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IN THE

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FEDERAL REPORTER, VOLUME 125.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CRANE CO. v. BAKER.*

(Circuit Court of Appeals, Seventh Circuit. April 14, 1903.)

No. 940.

1. PATENTS—INVENTION—CAR-HEATER.

The Baker patent, No. 472,689, for a car-heating apparatus, was not anticipated, and shows patentable invention, taking into account the history of the device since the patent issued, which shows its superiority in operation over the old devices and its displacement of them; also *held* infringed as to claim 1.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Paul Synnestredt and F. W. H. Clay, for appellant.
Clifford E. Dunn, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The claim and so much of the specification as relates thereto are as follows:

"In car-heating apparatus it has heretofore been usual to provide an expansion-vessel above the body of the car, into which the pipes from the heating apparatus ascend, so that the water circulates through the expansion-vessel in heating the car. There is more or less leakage in the apparatus, involving a loss of water that has to be made up from time to time by filling water into such expansion-vessel to keep the same at the proper height; and a supply-cock has been used with a funnel connected by a screw-coupling, but when the supply-funnel is left in its position for use it is liable to become charged with cinders and dust. In my present improvements the supply-funnel and the screw connecting it to the cock are constructed in such a manner that when the funnel is turned up into position for use the screw is tightened. The cock is screw-threaded at one end and screwed into the

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* Rehearing denied October 6, 1903.

expansion vessel at or near the water-line, and at the outer end of the cock is a screw-socket, receiving the screw-threaded end of the funnel, and the parts are constructed in such a manner that when the collar is screwed up firmly against the end of the socket the funnel will be vertical and in position for the reception of water for the expansion-vessel, and when the water has been filled in through this funnel the attendant simply gives the funnel a half rotation, partially unscrewing it, and the funnel hangs downward, and is not liable to become detached and cannot become obstructed by cinders or dust. * * * I claim as my invention: (1) The combination, with the expansion-vessel and the cock having a horizontal screw-threaded socket, of the funnel having a bend and a horizontal screw-threaded connection to the cock, whereby the funnel is allowed to hang down when partially unscrewed and held firmly by the friction when turned up for use, substantially as specified."

The combination of an expansion-vessel, a cock, and a funnel with bent neck attached to the cock by a screw-threaded connection, was old. For many years preceding 1892 the parties to this suit had been using such a combination in filling car-heaters. From the first it was known that the funnel, if left upright, would become choked with cinders and the cock injured, and consequently the construction was such that the funnel could be turned down when not in use. This was its usual position, as it was only in use a few minutes at a time at long intervals. In the old filling apparatus the connection between the funnel and cock was made by means of a union nut or swivel joint, the sleeve, interiorly threaded, being set loosely upon the shouldered neck of the funnel, and drawing the beveled end of the funnel into the correspondingly ground opening in the cock by engagement with external threads on the outer end of the cock. It is evident that the funnel could be set at any position and held firmly by tightening the union nut; that when the nut is tight the funnel could probably not be turned without danger of breaking unless the nut were loosened; and that when the nut is loose the mere turning up of the funnel from its down position could have no effect in tightening the joint or holding the funnel firmly in an upright position. The testimony of witnesses who had used the old-style apparatus for years shows that the brine used in filling the heating pipes corroded the threads of the union nuts; that the use of a wrench was necessary to loosen them when that could be done at all; and that very frequently in the attempt the nuts or cocks or funnels were broken.

In the new apparatus the patentee joined the funnel to the cock by threading the funnel exteriorly and the cock interiorly, and by putting a shoulder upon the funnel at such a point that when the funnel was turned from a downward to an upright position the shoulder abutted against the end of the cock, making a tight joint and frictionally holding the funnel in place. It is evident that by this construction a tight joint can be made and the funnel held in position by friction only when the funnel is upright; that when not in use the funnel hangs loosely in the threads; and that, when the attendant comes to use the apparatus, he finds the funnel loose, and makes a tight joint, and fastens the funnel in place for use by the act simply of turning the funnel to an upright position. The testimony of witnesses who have used the new-style device shows that there is not so much corrosion;

that the corrosion does not interfere with the successful operation of the new device as with the old; that a wrench is unnecessary; and that the disadvantages besetting the old device have been overcome.

In the patents relied upon as anticipatory, No. 288,708, November 20, 1883, to Johnson and Buerkel, and No. 461,280, October 13, 1891, to Searle, there is no disclosure of the means by which the funnel is connected with the cock, much less that the connection would permit the funnel to hang down loosely in the cock, and cause a tight joint, and hold the funnel in place for use merely by moving the funnel to an upright position. If there is anticipation, it is in the old device hereinabove described. And in considering that question it is necessary to bear in mind also that in the art of fitting steam or water pipes a direct screw-threaded connection and a union nut were used as equivalents, the selection depending upon the particular workman's idea of convenience or suitability at the place; that in making a direct screw-threaded connection the fitters were accustomed to use the elbow, if present, as a means of turning up the pipe, instead of taking a wrench; and that, if desired, the limit of turning one part upon another could be determined by ending the threads at the proper point. If the patentee in this case has only substituted a well-known equivalent for one of the elements in an old combination, performing the same function, the claim cannot stand. Construed as a claim for a combination of an expension-vessel, a cock, and a funnel with bent neck attached to the cock by a screw-threaded connection, it is bad because it includes the old device. But the claim, limited by the "whereby" clause and the specification, we think is for a combination of the expansion-vessel, the cock having a screw-threaded socket, and the bent-necked funnel having such a screw-threaded connection with the cock that the funnel is allowed to hang down loosely when not in use, and the mere act of turning it up for use necessarily or automatically makes a sufficiently tight joint between the shoulder of the funnel and the end of the cock, and frictionally holds the funnel in place. We think that the described screw-threaded connection in this combination is not the mere equivalent of a union nut; that in effect another element, the shoulder, has been introduced, making a different combination; and that the new combination produces a result wanting in the old, namely, the automatic action of the shoulder of the funnel upon the end of the cock in making a sufficiently tight joint, and frictionally holding the funnel at the right point and at no other.

It has not been without doubt and hesitation that we have found invention in this improvement, considering the case irrespective of the history of the device since the patent issued. But, adding to the view that history, which shows a successful overcoming of difficulties and disadvantages that were known for many years to builders, repairers, and users of car-heaters, an almost universal replacement of the old devices, as they wear out, by the new, and the tribute of imitation, we have felt that the doubt should be resolved in favor of upholding the patent.

The claim being valid, infringement is undoubted, as appellant uses the very structure.

Appellant urges that there was such delay on the part of appellee and her assignor that a court of equity should not entertain this suit. We have carefully read the entire record, and find nothing in it to indicate that any owner of the patent has dedicated the device to the use of the public or estopped himself from claiming the benefit of the grant. We think the court below gave appellant the full benefit of the delay by limiting the reference as to profits and damages to the time since January 4, 1901, when appellee notified appellant to cease infringing. A question is mooted by appellee whether at the accounting she may go back of the date named, but we think it unnecessary to express any opinion thereon at this time.

We find no error in the court's permitting the hearing to be reopened and a stipulation and certain letters to be introduced by appellee and made a part of the record. This was within the court's discretion.

The decree is affirmed.

STANDARD SCALES & SUPPLY CO., Limited, v. E. & T. FAIRBANKS & CO.

(Circuit Court of Appeals, Third Circuit. September 8, 1903.)

No. 30.

1. PATENTS—INVENTION—SCALE.
The Scharle & Himmes patent, No. 359,636, for a railway track scale, claim 1, discloses invention, and is valid. Also *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. L. Pierce, for appellant.
James Whittemore, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. The complainants below and appellees here filed their bill of complaint alleging that they held by assignment certain letters patent of the United States issued to Nicholas Scharle and Jacob Himmes, and known as letters patent of the United States No. 359,636, and charging the defendants with infringement thereof, which said bill concluded with the usual prayers. The defendants, by their answer, denied the validity of the patent and the utility of the patented device, and alleged prior letters patent and publications and noninfringement. It appears from the record that testimony was taken as to all of these defenses, and that they were considered by the learned judge below. By the decree entered in said cause, the first claim of the patent was adjudged valid, and infringed by the defendants' device. From this decree an appeal was taken to

this court, and several errors alleged to have been made by the learned judge. But at the hearing in this court the appellants abandoned the defense of noninfringement, as well as that of anticipation, and relied solely upon the defense of noninvention, insisting that the prior state of the art was such that in its light any skilled mechanic was capable of constructing complainants' device. In support of this contention the appellants insist that the five-section scale of the patent in suit is but the natural evolution of the four-section scale long before then known to the art. The argument is if, having a four-section scale, by taking away one section you obtain a three-section scale, then, by adding one section to a four-section scale, you must obtain a five-section scale. This is true as an abstract proposition, but the means necessarily employed for shortening the four-section scale and making a three-section scale of it do not suggest the method employed in the patent for lengthening the scale and converting it into the five-section scale of the patent in suit. Nor will a scale lengthened on the same principle that it is shortened be an operative one. This appears clearly from the testimony of the witness Sargent, when read as a whole, upon a part of which appellants chiefly, if not entirely, rely.

It appears from the record that prior to the granting of the patent in suit there had been manufactured by the complainants what was known as the four-section track scale, which might be varied in length from 24 to 22 feet; that there was a large and growing demand for a longer scale; and, while the complainants had one upon the market, it was not satisfactory, though, with the aid of experts and skilled mechanics, they had been endeavoring to make it so. Under these circumstances we are unable to conclude that the result so long and unsuccessfully sought for was apparent, and did not need more than mechanical skill to construct.

We concur in the conclusion of the learned judge below that claim 1 of the complainants' patent in suit is valid. The decree must be affirmed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. ROBERTS et al.

(Circuit Court, E. D. Pennsylvania. September 10, 1903.)

No. 47.

1. PATENTS—SUIT FOR INFRINGEMENT—EVIDENCE.
A patentee is not entitled to use a decision of the patent office in interference proceedings in his favor, nor the evidence on which it was based, as evidence in a subsequent suit for infringement of his patent, against a defendant who had no relation to such interference proceedings.

2. SAME—PRIORITY OF INVENTION—DISCLOSURE.
Where an inventor communicates his ideas to one who is thoroughly competent to understand and perpetuate them in case of his death, having effectively given his invention to the world in this way, he is entitled to bring forward the disclosure to maintain the asserted priority of his invention.

3. SAME—PRIORITY—BURDEN OF PROOF.
While the burden of showing priority is no doubt upon the inventor, and the courts are called upon to scrutinize the evidence closely, they are not required to go out of the way to discredit it, coming from a reliable source.

4. SAME—DATE OF INVENTION—INFRINGEMENT—ELECTRICAL MOTORS.
The invention embodied in the Tesla patents, Nos. 511,559 and 511,560, issued December 26, 1893, on applications filed December 8, 1888, the former covering a certain method, and the latter certain means of operating electric motors by a divided and dephased alternating current, derived from a single source, being an adaptation of what is known as the "split phase system," *held*, under the evidence, to have been made prior to April 22, 1888, the date of the publication in an Italian electrical journal published at Milan of a report of a lecture by Prof. Galileo Ferraris describing the same system, and therefore not anticipated by such publication. Said patents were not anticipated, and are valid, and entitled to a liberal application of the doctrine of equivalents. Claims 1 and 2 of each patent also *held* infringed.

5. SAME—INFRINGEMENT.
A patent for an electrical motor may be infringed by an electrical meter where it is the same in mechanical construction and principle of operation, being no more than an adapted motor with meter attachment.

In Equity. Suit for infringement of letters patent Nos. 511,559 and 511,560, for electrical transmission of power and an electrical motor, granted to Nikola Tesla, December 26, 1893. On final hearing.

Kerr, Page & Cooper, for complainant.

Fred. J. Knaus, Seward Davis, and Charles A. Brown, for respondents.

ARCHBALD, District Judge.* The patents in suit and those on which they are based, or which are kindred to them, have been so fully considered in previous cases, which until recently have also been uniformly in their favor, that little that is new is left to be brought forward with regard to them. In an admirable opinion by Townsend, J., in Westinghouse Electric & Mfg. Company v. New England Granite Company (C. C.) 103 Fed. 951, the fundamental patents were reviewed and expounded, and the right of the patentee to stand as an inventor of great merit in the use of alternating electric currents for the trans-

* Specially assigned.

mission of power was fully established. The alleged disclosures of Siemens (1878), Baily (1879), Deprez (1880–84), and Bradley (1887) were discussed, and the claims advanced for them as anticipations held to be unfounded—conclusions which were affirmed on appeal. 110 Fed. 753, 49 C. C. A. 151. The essence of the invention was declared by Judge Townsend to be "the production of a continuously rotating or whirling field of magnetic forces for power purposes by generating two or more displaced or differing phases of the alternating current, transmitting such phases, with their independence preserved, to the motor, and utilizing the displaced phases as such" therein.

The same patents came up before Brown, J., in Westinghouse Electric & Mfg. Company v. The Royal Weaving Company (C. C.) 115 Fed. 733, and a similar result was reached. The Dumesnil (1884) and the Cabanellas (1885), two French patents, which had not been brought forward before, were particularly relied on as anticipations, but were distinguished from those in suit in a carefully expressed and convincing opinion. These French patents, however, according to Judge Brown, established that Tesla was not the first to employ alternating currents out of phase with each other for power purposes, so that the expressions in previous cases which attributed this to him would have, as he thought, to be qualified, if not recalled. But it was at the same time pointed out that in neither the Dumesnil nor the Cabanellas was there a resultant magnetic force, the distinctive feature of the Tesla invention, each of the others named providing for the independent action of separate alternating currents operating on different ends of the motor armature, without any play of the magnetic and electric forces in between. As it stands, the Cabanellas patent is unintelligible to me; but taking it as it is explained by the defendants' experts and illustrated by the exhibit in evidence, of the correctness of which, however, I have much doubt, there is nothing more, at the best, than a mechanical combination of the two operative devices, like the opposite cranks on the same axle of a locomotive driving wheel. There is no conjoint operation, as in a Tesla motor, of the two energizing circuits by means of a combined magnetic influence to produce a common result. It is important, however, to observe that, while in no sense anticipations, the Dumesnil and the Cabanellas serve to limit the invention of Tesla—if not, indeed, so limited in his patents themselves—to a device in which a magnetic resultant of dephased alternating currents exists; the mere use of alternating currents out of phase with each other, made otherwise effective, being something aside and different.

The derivative patents in suit—Nos. 511,559 and 511,560—were first considered in the Dayton Fan & Motor Case (C. C.) 106 Fed. 724, affirmed in 118 Fed. 562, 55 C. C. A. 390, and a decision rendered in substantial accord with those which had preceded it. One defense there, as here, attempted to be made was that it involved no inventive skill, when once the practicable use of alternating currents of different phase was established, to substitute a dephased split current, which was a well-recognized equivalent. But it was not so held, nor can it be here. This question was practically put at rest in this court by the decision of Judge McPherson in the Tesla Electric Co.

v. Scott & Janney (C. C.) 97 Fed. 588, where two of the earliest Tesla split phase patents were sustained. But aside from that, and upon an entirely independent consideration of it, the same conclusion must be reached.

A serious doubt as to the economic value of the polyphase Tesla motor was that it required independently generated currents, and, as so limited, lacked commercial adaptability, the alternating current in ordinary use, such as that on electric light wires, being single. According to Mr. Brown, who was asked to become interested, he raised this question at once; and it was the criticism made of it by Swinburne in the Electrician of July 20, 1888, and by Richard in La Lumière Electrique, of January 19, 1889. Tesla, if he is to be believed, immediately addressed himself to this problem, and it is successfully solved in the patents in suit and others applied for about the same time. It does not detract from the inventive skill involved that he appropriated the experiments of Oberbeck with regard to the splitting and dephasing of alternating currents derived from a single source, nor yet that others took up the subject independently and worked out similar ideas. All who are thus brought forward—Ferraris, Shallenberger, Borel, Professors Anthony and Jackson—were electricians of the highest professional training, and the fact that with study they attained the same result by no means proves that the adaptation and successful substitution of a split phase alternating current in place of two or more independently generated was obvious to a person of ordinary skill. It is always difficult to decide where inventive genius ends, and this is particularly the case in an art at best but little understood. As is well said by Judge Severens in the case last cited, 118 Fed. 562, 55 C. C. A. 390:

"The subject is one of the most abstruse and subtle of all the practical sciences, and its pursuit involves the exercise of the keenest intelligence and most patient research that gifted men can bestow. We ought, therefore, to be cautious, when a distinct and practical improvement is made in so useful an art, in denying to the author the reward which the law gives to meritorious inventors."

The patents in suit were also before Judge Lacombe in Westinghouse Electric & Mfg. Co. v. The Catskill Illuminating & Power Co. (C. C.) 110 Fed. 377. In addition to the attack made upon them in other cases, it was further urged that, in a paper read by Professor Ferraris before the Royal Academy of Sciences of Turin, Italy, March 18, 1888, a portion of which was published on April 22d following, at Milan, in L'Elettricita, a journal devoted to electrical subjects, not only was there a full disclosure of the transmission of electric power by means of alternating currents of different phase, but also the use for the same purpose of a dephased split current derived from a single source, the same as in the patents in suit. Upon a due consideration of the opposing proofs, the invention of Tesla was held to be carried back of this publication; but, on appeal, the decision was reversed, the evidence brought forward by the complainants not being considered sufficient for that purpose—(C. C. A.) 121 Fed. 831—a conclusion which was followed by Judge Colt in a case by the same plaintiffs against the Stanley Instrument Co. in the First Circuit, 129 Fed. 140.

This, and the matter of infringement, are the overshadowing questions in the present case.

Before proceeding to a discussion of the proofs, it is necessary to determine what portions, if any, to which objections have been made, are to be excluded. The complainants have brought in from the patent office the record of interference proceedings between Tesla and Ferraris with regard to the first of the two patents in suit, in which the right of the former to priority was sustained. The good faith of this contest is questioned, but, whether adversely conducted or not, it is evident, upon the most cursory consideration, that, as against the defendants, the complainants are entitled neither to the result nor the evidence by which it was obtained. The controversy was between parties with whom the defendants are in no privity, and they cannot, therefore, be affected thereby. Edward Barr Co. v. Sprinkler Co. (C. C.) 32 Fed. 79; Western Electric Co. v. Williams-Abbott Electric Co. (C. C.) 83 Fed. 842.

The defendants have also moved to strike out—or, as we should say, suppress—certain depositions taken by the complainants subsequent to the argument on final hearing. The defendants at that argument asked to have the case reopened for the purpose of taking the deposition of Frederick Darlington, which was granted, leave being given to the complainants at the same time to take evidence in reply. The testimony of Darlington was directed to his relations with Tesla in the summer and fall of 1888, when the latter was experimenting in the Westinghouse laboratory at Pittsburgh, with regard to polyphase motors, the purpose being to show that up to that time Tesla had not evolved his split phase method. In answer to this the complainants introduced the testimony of several witnesses, including Tesla himself, a considerable portion of which, it is claimed, was not confined to a strict reply. So far as a reply to Darlington is concerned this may be true, but it is not of a reply generally. It all, directly or indirectly, bears on the issue raised by the introduction of the Ferraris publication, on which the life of the patent depends, and is too important to be lightly set aside. So far as Tesla was called to contradict Darlington, no exception can be taken. But in going further, and examining him with regard to the date of his invention, the complainants have appropriately supplied a gap in the proofs, which was the subject of serious criticism by the opposing counsel at the argument, and the lack of which in the Catskill Case, according to the opinion of the court, contributed not a little to the adverse result there reached. It is to be regretted that Tesla was not cross-examined, but after consulting the record made by the examiner, and hearing what counsel have to say upon the subject, I am not persuaded that a fair opportunity for it was not given. The motion to strike out, the disposition of which was reserved until this time, must therefore be refused.

The Ferraris publication, as we have seen, was April 22, 1888, and the patents in suit were not applied for until December 8th following. To relieve from this apparent priority, the invention has therefore to be carried back of the earlier date by competent and convincing evidence. Of necessity a high character of proof is required in such cases, and that which was before the court in the Catskill Case was not

upon appeal considered up to the standard. It is more ample here, however, warranting a re-examination of the question. That Tesla, early in May, 1888, had a complete grasp of the split phase idea is established by his application of May 15th for patents, numbers 511,915 and 555,190, which embody it, the same that were before Judge McPherson in the Scott & Janney Case (C. C.) 97 Fed. 588, already alluded to. This is important evidence, which cannot be contradicted, and I therefore start with it. Not only is the invention beyond question carried back by it to the date named, which is within 23 days of the Ferraris publication, but from the known order of events—a patent not being able to be worked out in a day—ground is thus persuasively laid for an earlier date, if there is any fair evidence to warrant it. In the face of it, I hardly see how we can doubt the accuracy of Mr. Page's statement that Tesla disclosed to him the principles of the invention somewhere in the 1st part of April of that year. His testimony on this point is specific and convincing. In the fall of 1887 and spring of 1888, as he says, he was engaged in developing in the patent office a number of Tesla's inventions, and among them the polyphase motors and transformers, which were patented May 1, 1888. These were prosecuted to an allowance in the early part of April, the final fees, as shown by the books of the firm of which he was a member, having been forwarded to Washington on April 6th. After having secured the allowance of this group, and made arrangements for similar applications in a number of foreign countries for patents to issue simultaneously therewith, Tesla gave him the material for an application, one feature of which was the inducing of one current from another in the operation or construction of a motor, and in this connection disclosed to him his plan for operating his polyphase motors by means of a single split phase circuit. Startled by this revelation, and questioning whether the claims which he had drawn in the pending cases would protect this new improvement, he had a long conference with Tesla, getting from him all that he could as to the different ways he proposed to operate this two-wire system. He also discussed with his partners, Gen. Duncan, now dead, and Mr. L. E. Curtis, of Denver, whether the applications on which patents were about to issue had not better be stopped and amended, and soon afterwards went to Washington to consult with Major Bailey, who had charge of them there. The disclosure of Tesla, which brought about this action, is fixed by Mr. Page as very shortly after the fees in the polyphase motor patents were paid, which, as we have seen, was April 6th. The visit to Washington, according to charges made for it in the books of the firm, was April 27th. Between these dates, on April 18th, is a charge for the application for the invention, in connection with which, as he testifies, Tesla told him of the improvement; and following this, on May 7th, is a charge for the drawings to be used in connection with the application for the first of the split phase patents, filed May 15th, the application itself being charged for May 10th. Mr. Page says that the work on the application was complete when this latter charge was made, and that he must have been engaged on it at least three weeks, which carries it back of the Ferraris date. On what basis this testimony can be passed over or explained away I

do not see. While the interval which has elapsed is considerable, the transactions in their nature were such as were likely to impress themselves on his trained professional mind, and his memory has been kept fresh by being called upon to testify on several occasions, beginning with the interference proceedings, which were soon afterwards. The dates are also substantiated by reference to the billbook of the firm, to which no objection was made. It seems to me, therefore, convincingly established that prior to April 22d, the date of the Ferraris publication, Tesla had disclosed to Mr. Page, his solicitor, the principle of his split phase adaptation. We may not be able to assign the exact date, but it must evidently have been somewhere, as Mr. Page says, between the 8th and the 18th of April, the reason why these dates are selected appearing in what has already been said. The only question, then, is as to the extent of the disclosure, and whether it embraced the patents in suit. Mr. Page is sufficiently cautious upon this, not to the point of doubt, but of conviction. "I cannot state now from my recollection," he says, "how many of the specific ways of operating these motors Tesla told me of at that time, but my recollection is entirely clear as to the point that at the conference which I had with him in the early part of April, 1888, and as the result of my closely questioning him, he described to me so that I fully understood the general plan of construction and mode of operation of the three forms of motor to which I have referred. That is to say, the two-wire induction motor, as we then called it, in which the currents in one energizing circuit are induced by the currents which pass through the other energizing circuit; secondly, the derivation motor, in which the two circuits have different electrical character—that is to say, one circuit has a higher self-induction than the other circuit; and, thirdly, the long and short core motor, in which the difference of phase in the magnetic effect of the energizing current is obtained by making one set of cores longer or of greater mass than the other set of cores." The two-wire induction motor—that is, the one covered by the application of May 15th—was considered at the time, as he says, of more importance than the other—a circumstance which explains why it was first put into shape; and the other two forms, which he describes, are those of the patent in suit. Communicating his ideas in this way, as he did, to one who was thoroughly competent to understand and perpetuate them in case of his death, the inventor effectively gave his invention to the world, and by all the authorities he is entitled to bring forward this disclosure now to maintain the priority which he asserts. Walker on Patents, § 70. The burden is, no doubt, upon him, and the courts are called upon to scrutinize the evidence closely, but they are not required to go out of their way to discredit it coming from a reliable source. Where an inventor has gone on and developed his invention and secured a patent, there is in fact a certain equity which ought to operate in his favor. It seems to me that the testimony of Mr. Page, uncontradicted and unshaken as it is, and materially corroborated at points, is sufficient in itself to sustain the priority claimed. It is said, however, that if Tesla had perfected this invention in the fall of 1887, as he testifies, it is impossible to believe that he would have kept it back from Page until the next April, as he con-

fessedly did, having already revealed it in the meantime, as it is claimed, to Mr. Brown. But the idiosyncrasies of inventors, which do not seem to lessen with their genius, are not to be so reckoned with. Mr. Page says the only explanation he could ever get from Tesla why he did so was that he was afraid if he (Page) knew that the polyphase motors could be run on a single circuit he would not believe the invention amounted to anything, and might not in consequence draw as good claims. This may seem a peculiar, if not an unsatisfactory, reason, but what we are concerned with is that an explanation was demanded and given, and it hardly discredits Mr. Page because it may not be altogether up to the mark.

But the testimony of Mr. Page is by no means all there is upon this subject. Mr. A. S. Brown, who has already been alluded to, an electrical engineer of experience, formerly connected with the Western Union Telegraph Company, became interested in the summer or fall of 1887 in bringing out the original Tesla motor; and he testifies that at once, when it was first brought to his notice, it occurred to him as a great objection that it required two separate currents, not long after which Tesla showed him how it could be operated on a single main line from the generator. The means proposed, as he says, was to put an injunction resistance in one of the circuits derived from the main line, thereby causing a retardation, and producing a difference of phase; another way being to have alternate pole pieces differently wound, one with a finer wire than the other. He further identifies an old experimental motor which he saw operated by Tesla, with derived circuits, one of which was retarded in the way suggested; and he recognizes a photograph of another similarly run, the original of which, it is said, was destroyed in 1895, when the Tesla laboratory was burned. If matters not whether these motors, in and of themselves, have a split phase construction, although I am convinced that one at least has; it was a sufficient disclosure of the system if they were run by that method, as he affirms. The only question as to this witness is one of time. He fixes the occurrence at one place in the summer of 1887, and at another in the summer or fall, and as Tesla, as it is claimed, did not make the discovery until September, doubt is supposed to be thrown on his testimony, and the idea advanced that the information could not have been given him until the next year. But that is not what he says, and whatever be the uncertainty as to the season of the disclosure it cannot consistently be put over a whole year. He unquestionably became interested in the summer or fall of 1887, and, for reasons which he gives, soon after this, in order to remove an important objection, Tesla disclosed to him how it could be overcome. This is the significant point in his testimony, rather than whether it was summer or fall. The probability is that it was the latter, as he says it may have been, and, if so, it was still earlier than the disclosure to Page, and anticipates by months the Ferraris publication of the next spring.

It is urged, however, that the testimony of these witnesses cannot be reconciled with that of Prof. Anthony and Mr. Darlington without assigning to the invention a later date than they give. It seems that early in 1888 the Tesla motor inventions were submitted to Prof. An-

thony as expert adviser of the Mather Electric Company, to whom they had been offered, and as nothing, as it is said, was disclosed by Tesla in that connection about a split phase method of operating his motors, the conclusion is that it had not then been devised. This might be true if the two were brought together under such circumstances that Tesla would be expected to communicate all his ideas on the subject, and did not do so, but neither assertion is sustained by the proofs. The only patents pending at that time were those of May 1, 1888, covering the original polyphase invention, and there is nothing to show—to say nothing of the probabilities—that the negotiations with the Mather Electric Company, which soon fell off, extended to anything else. It is true that Mr. Brown says he presumes it was intended to have that company fully informed with regard to all the Tesla patents and inventions, but this, without more, can hardly be accepted as a fact. Even more conclusive of the matter, however, is it that there is nothing in the record to show that Tesla did not disclose to Prof. Anthony all that could be expected or asked. What Prof. Anthony says is that he never suggested any other mode of operation than such as involved a magnetic resultant, shifting in position as the phases of the alternating currents changed. This is an entirely different matter, bearing on another branch of the case, and is of no significance here. I am aware that he testified otherwise in the Catskill Case, but whether he has had occasion to reconsider and recast his statements, we must take them as they now appear, and they leave the defendants nothing on which to build.

Neither do I see that the testimony of Mr. Darlington is of any material aid. He states that from some time in May to the last of October, 1888, he was intimately associated with Mr. Tesla in the Westinghouse laboratory at Pittsburgh, where the latter was conducting experiments for the purpose of perfecting his alternating current motors and adapting them to commercial use, and that during this period several split phase devices were tried and failed, the argument sought to be drawn being that up to this time Tesla had not advanced with them beyond the experimental stage. This is absolutely refuted by the uncontrovertible fact that as early as May 15th Tesla applied for the first of his split phase patents; but, passing this by, there is nothing of serious consequence in what he has to say. Only two experiments are mentioned, one of which was successful, and developed into patent No. 390,820. The other, as he says, was an attempt to use a single phase current dephased by means of a greatly elongated pair of coils and extra amount of iron in the transformer core, and did not succeed. Tesla denies the close intimacy asserted, and states that Darlington did not understand the nature of the experiment, and that from the size and character of the test device it was impossible for it to have been used for the purpose which he supposed. Be that, however, as it may, it merely proves, if true, that the one experiment failed; but it at the same time substantiates that Tesla was fully alive at the time, whenever it was, to the possible adaptation of the split phase system to the operation of his motor, and for all that Darlington knew he might have already worked out all the devices that are now claimed. That he said nothing about them is entirely without conse-

quence. He was not called upon to do so, and that is all that needs to be said. Inventors are notoriously reticent about their inventions, as they have to be to protect them, and it affords no occasion for comment that Tesla was not more communicative than he seems to have been.

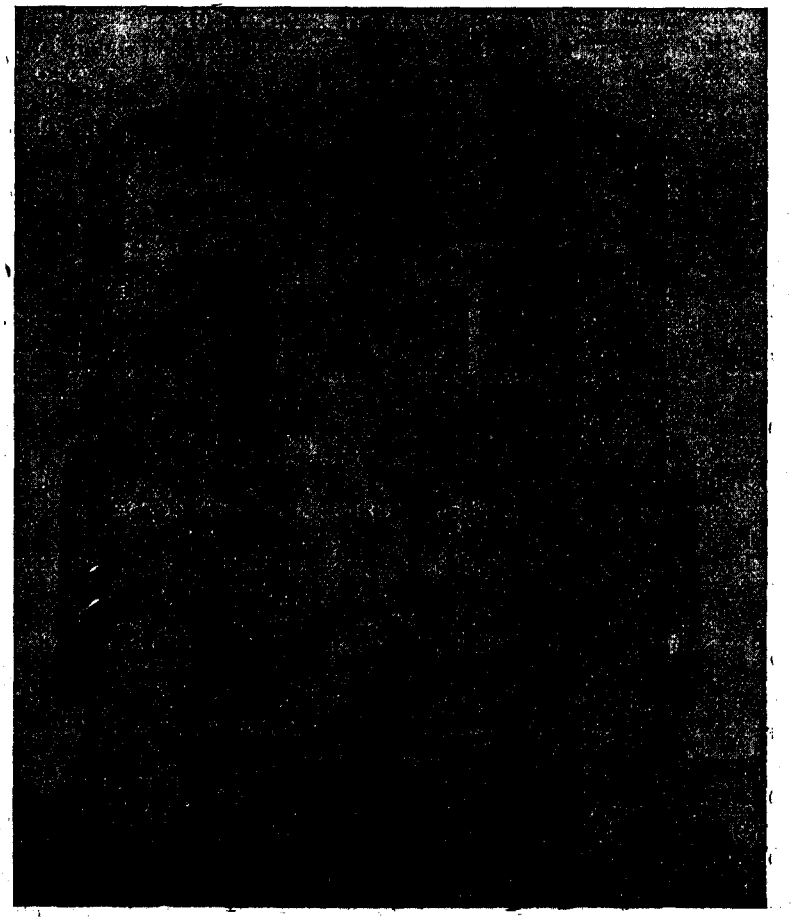
So far I have considered only the proofs, about which no question can be raised, and, basing my decision solely upon them, I am satisfied that the patents should be sustained. The testimony of Tesla outside of this, to which objection is made, goes mainly to the date of his invention, which he fixes as some time in the summer or early fall of 1887, and his disclosures to Mr. Brown soon after that, whose statements he entirely confirms. By calling him, the complainants have no doubt strengthened their case as already pointed out, although they do not have to depend on it; but in the combined evidence thus secured there can be no reasonable doubt as to the clear priority over the Ferraris publication for which they contend. There is other testimony which might profitably be alluded to in this connection, such as that of V. S. Beam, with regard to the inherent split phase character of the old experimental motor (pictured at page 273 of complainants' record), of which I am convinced. But the length to which this opinion has already extended precludes it, and that to which I have referred must suffice.

The question of infringement still remains. At the time suit was brought the defendant Roberts was engaged at Philadelphia in the sale of Gutmann recording watt meters, as agent for the Sangamo Electric Company, of Springfield, Ill., by whom they were made. There was some controversy at the outstart as to whether sufficient evidence of an infringing sale by him had been produced; but the complainants, by permission, having taken supplementary proofs upon this point, it was abandoned, and the Sangamo Electric Company, at their own request, have now been made parties defendant, with all the responsibility which that entails.

It is contended that a meter is not a motor, and that on this ground, of itself, no infringement can be charged. But, as pointed out by Judge Lacombe in the Catskill Case (C. C.) 110 Fed. 377, while the Tesla patents contemplate the production of power, they are silent as to the amount of it; and as a meter armature rotates against the action of a permanent magnet, and turns a spindle which operates the registering devices, the production of some power is necessarily involved. It is somewhat aside from the question, but still it is a circumstance that Gutmann himself, in accordance with whose patents the meters in question are constructed, recognizes and claims therein that his device may be used for power purposes also. No doubt the strict object of a meter of this class is to measure and record the element which passes through or actuates it, gas, water, the electric current, or whatever it may be; but where, as here, it is, in mechanical construction, nothing more than an adapted motor with meter attachments, it cannot escape infringement on that plea. There is nothing in conflict with this, when rightly considered, in what is said in the National Meter Co. v. The Neptune Meter Co. (C. C.) 122 Fed. 75. The attempt there made was to defeat a special safety appliance of a

water meter by references drawn from the general motor art, and it was in that connection that it was held that the two were not the same.

The meter manufactured by the defendant company is portrayed in the accompanying figure, and is described as follows: AA are two coils of fine wire, wound upon laminated iron cores, whose poles are presented to the lower part of an aluminum armature, D, and embrace the rear half of it, the magnetic circuit between the poles being continued by a crescent shaped laminated core within the cylinder. BB are coils of coarse wire on opposite sides of the upper part of the armature, above and in a plane parallel with the poles of the cores, CC. The armature, D, is cylindrical, and is mounted on a vertical shaft, capable of rotation, to which a registering device, R, is attached. By diagonal slots sawed in its surface and slanting upwards to the left at considerable of an angle, the exterior of the cylinder is divided up into predetermined circuits. To the bottom of the cylinder is attached a disk or ring, E, which rotates with the armature, and is located be-



tween the poles of a permanent magnet, M, thereby furnishing a load for the meter which varies with the speed of the rotations of the armature, causing such rotations to be proportionate to the energy passed through it, and furnishing a basis for measuring the same thereby. The two sets of coils, it will be noted, are differently constructed, BB being composed of a relatively small number of turns of coarse wire without a core, the recognized construction where a relatively low self-induction, which will not dephase the alternating current, is desired; while the coils, AA, on the other hand, are made up of a large number of turns of fine wire wound about an iron core, a well-known way for bringing about a large self-induction, with the effect of greatly delaying or dephasing the current. The current which severally energizes the two circuits proceeds from a single source, but is divided before it reaches them, one part passing through the coarse coils, BB, and thence through the lamps to be measured, and so back into circuit, while the other flows through the coils, AA, to the same point. The former is spoken of as being in series, and the latter as in shunt, the connection with the shunt windings being preferably taken off from the circuit first, and that of the series coils afterwards, or on the load side, by which arrangement everything is measured except the inconsiderable current passing through the shunt coils. The construction so described is, in effect, a motor in which the armature is operated upon by two independent energizing circuits, produced by passing through them a divided and dephased alternating current derived from a single source, thus apparently realizing the patents in suit.

Before definitely reaching this conclusion, however, some further observation of them is required. The two claims of No. 511,559 are as follows:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits, and retarding the phases of the current in one circuit to a greater or less extent than in the other. (2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth."

The following are the first two claims of No. 511,560, which also are relied on:

"(1) The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits. (2) The combination with a source of alternating currents and a circuit from the same of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit, the motor or energizing circuits being of different electrical character, whereby the alternating currents therein will have a difference of phase, as set forth."

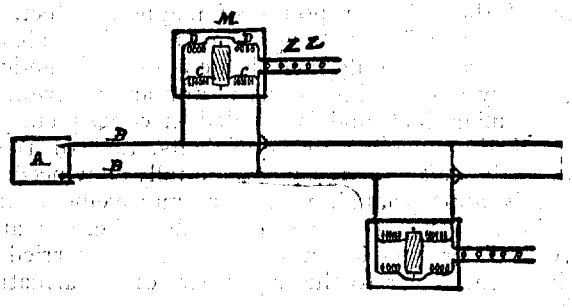
By the first of these the method or system was patented, and by the last certain special forms devised for carrying it out. Both adopt as a necessary foundation the "Tesla effect," exemplified in his original invention, to which they are merely an adaptation of the split phase

idea. To realize either there must, therefore, exist, in any infringing device, a resultant action of the two energizing circuits. This, as held by Judge Brown in the Royal Weaving Case (C. C.) 115 Fed. 733, before referred to, is the limitation imposed by the Dumesnil and Cabanellas patents, and is in fact all that is claimed by Tesla in describing his invention in this and other patents. But it is conceded, or, if not conceded, satisfactorily proved, that the eddy currents formed in the armature under the field poles, AA, at one end, are deflected by the slots in the cylinder so as to come under the influence of the field poles, BB, of differing phase at the other, and that it is the resultant magnetic effect of the two that causes the rotation of the armature. That it is this resultant effect that is sought and obtained is manifest, else why the deflecting slots, the only function of which is to extend the eddy currents from one to the other? Cut this off, or dispense with one set of poles, and you have no rotation, or only a most feeble one, explainable on other principles. Or if the slots are made parallel to the axis of rotation, or, if with their angularity retained, the two sets of poles are set at an angle exactly opposite thereto, there is the same lack of result. The angularity of the poles when in the same horizontal plane must be retained when they are in independent planes, or it must be made up by an equivalent angularity of the slots, so that each set of poles shall always operate on the same armature bars. Reversing the angle of the slots reverses the relative position and action of the poles, causing the armature to turn in the opposite direction. The action which is thus secured is theoretically produced in each instance by the rotary progression of an ideal pole, the resultant of the two sets of poles acting independently. That this is dependent on the intermediate eddy currents being deflected along the armature, from one set of poles to the other, does not affect the character of the action or the result; or, in other words, it is no less a resultant because one set of poles acts in one plane and the other in another. The supposed mechanical resultant of a parallelogram of forces is a convenient diagrammatic fiction to illustrate a physical effect, and may exist whether the co-operating forces act in the same plane or in planes that are parallel, and there is nothing to impose any stricter limit on that which is relied upon here. The action of the two energizing circuits has been spoken of graphically as a whirling field of force, and compared to that of a magnet rotated about the armature, which no doubt conceives of the resultant as moving in a single plane at right angles to the axis. But the inventor himself simply speaks of it as a rotary progression of the poles or points of magnetic effect, and this, as already stated, is satisfied, although the energizing poles act in independent planes, provided only there is a conjoint magnetic influence to produce a rotary effect. The Tesla motor as an invention was first in its own peculiar field, and is entitled in consequence to a liberal application of the doctrine of equivalents, and of the substantial equivalency of the defendants' device I am fully convinced. The fundamental idea is appropriated, whatever improvement or adaptation there may be besides. Nor can I see that there is any difference whether we consider the eddy currents, which are carried by means of the slots from the lower to the upper part of the armature, as there

attracted or repelled; that is to say, as drawn tangentially or pushed tangentially by the field poles under whose influence they are so brought. The significant thing in each is the conjoint or resultant action of the two opposite sets of poles, the magnetic influence, whether of attraction or repulsion, waxing and waning, and shifting progressively about the armature, of the existence of which there can be little doubt.

It is persuasive of the equivalency of operation which is so contended for, although by no means conclusive of it, that Tesla, in a patent applied for May 20, and granted December 3, 1889, suggests that where the two main or primary sets of energizing poles there employed are at right angles, and a single armature core is used, it is to be wound in closed circuit from end to end, but that if the poles are in line—that is, in vertical plane with each other, as in the present meter—there should be an angular displacement of the armature coils. This equivalency is assumed without explanation, as being within the terms of the invention. So, in another patent applied for March 26, 1890, and granted August 5th following, the two sets of field poles there found are located at either end of the armature, out of line with each other, forming practically two fields of force, as it is said, alternately disposed, with the poles of one set or field opposite the spaces of the other. Much in the same way Gutmann, in the patent under which the meters in controversy are constructed, shows an armature with straight slots and poles out of line, interchangeably with slanting slots and poles in line. Other confirmations of the equivalency of the two arrangements with that of a Tesla motor, as well as with each other, could be drawn from this record, but these must suffice. They establish to my satisfaction the general infringing character of the defendants' meter as is charged.

A special defense of noninfringement is made, however, as to the second claim of patent No. 511,560, on the ground that the energizing circuits in these meters are not in derivation or multiple arc with the circuit from the source of supply; and the decision of Judge Lacombe in the Catskill Case is relied upon, where it was held that the Scheefer meter did not infringe, both energizing circuits not being connected in multiple arc with the main circuit. This decision is said to be the result of a mistake as to the exact character of the circuit connection, but of that I shall not undertake to speak. In the case before me, which is illustrated by the accompanying diagram, the circuit from



the generator is divided, one branch being taken off to go to one set of poles and the other to the other, both uniting again after the latter has passed through the lamps to be measured. This would seem to make each of the branches which constitute the energizing circuits to be in derivation or multiple arc with that from the source of supply, realizing the terms of the patent. While the so-called series coils, DD, may be in series with the lamps, LL, the lamps are certainly in multiple with the circuit from the generator, and so of necessity also are the coils. The distinction attempted by Prof. Jackson, and particularly the suggestion that the insertion in one of the branch circuits of a set of incandescent lamps destroys the derivative relation, is too refined, as it seems to me, to stand.

Finding, therefore, that the patents in suit are valid and have been infringed, a decree is directed in favor of the complainants in the usual form, with costs.

PARRAMORE et al. v. STEIN et al.

(Circuit Court, N. D. Illinois, N. D. July 15, 1903.)

No. 25,373.

1. PATENTS—ANTICIPATION—STOCKING SUPPORTERS.
The Parramore patent, No. 629,391, claims 1, 2, and 3, for a stocking supporter, consisting of duplicate suspension tapes and a single hanger adapted to be detachably fastened to the front of the corset, are void for anticipation in the prior art, and especially by the Banfield patent, No. 197,587, and the Andrews patent, No. 550,551.

In Equity. Suit for infringement of letters patent No. 629,391 for a stocking supporter, granted to Reddin W. Parramore, July 25, 1899. On final hearing.

Louis C. Raegener and Wm. O. Belt, for complainants.
Pierce & Fisher, for defendants.

KOHLSAAT, District Judge. The bill in this case was filed November 17, 1899, to restrain infringement of claims 1, 2, and 3 of patent No. 629,391, issued July 25, 1899. Claim 1 is for a stocking supporter having a single hanger which is provided with an eye or loop, adapted to be detachably engaged with the stud of a corset clasp, together with duplicate suspension tapes which are connected at the upper end with the hanger. Claim 2 is substantially the same as claim 1, except that it is not limited to an engagement with a corset clasp, but does provide that such engagement shall be at the point where the sections of the corset meet. Claim 3 provides that the means for connecting the tapes to the corset shall consist of a fabric body and a metallic hanger piece united to said body, and having a central loop prolonged beyond the fabric body, which engages with the stud of the corset. The patent was involved in Parramore v. Taylor (C. C. A., 2d Circuit) 114 Fed. 97, 52 C. C. A. 45, and sustained. In a later suit by Parramore v. Cohn (C. C.) 116 Fed. 1022, in the Southern District of New York, an injunction was obtained, but the suit was

settled before final hearing. Ordinarily these decrees would be deemed very persuasive by this court in this case, since infringement is not seriously denied. Practically the only feature of the patent in suit not employed in defendants' device is the metallic hanger piece, the latter having only an eye and a slot used in connecting the fabric body therewith.

Defendants insist, first, that the finding of the Second Circuit Court was not fairly sustained by the evidence; secondly, that the case was not well presented to the court; thirdly, that new evidence found in the prior art and elsewhere, now presented, places the matter in a different light. The patent is for a hose supporter, and nothing more. The requirement that it shall be adapted to be detachably engaged with the corset stud, or with the corset at the point where the corset sections meet, is merely descriptive. Evidently, from the claims, a supporter, described as adapted to be detachably engaged with any part of the corset, if a duplicate of complainant's device, would be just as much of an infringement as is now claimed. Therefore we must, for the purpose of this inquiry, entirely disassociate the question of the place of use or application of the supporter of complainant from the article iself. A change in location or use cannot be patented. Walker on Patents, § 38.

The case of Parramore v. Cohn was decided upon the authority of Parramore v. Taylor. Certain additional alleged anticipating patents were cited, but were, it is claimed, not fully considered. Among those then before the court was the Andrews patent, No. 550,551 (1895), for an underwaist. The specifications and drawings disclosed a supporter detachably fitted upon a stud placed upon the side of a corset. The eye at the place of contact with the stud is practically identical with that of defendants' device, and adapted to be attached to a corset or any other stud. It has duplicate "stocking engaged members," and means for uniting these at their upper ends, and a fabric body, which is not like complainant's fabric body in shape. As in defendants' device, there is nothing, except perhaps the eye, corresponding to complainant's metallic hanger. In the Cohn Case there was no proof of actual use of supporters of the Andrews type at the front of the corset, whereas in this case several witnesses have testified that they have worn supporters like those shown in Andrews' patent attached to the front studs of their corsets, and have found them satisfactory.

There was also before the court in the Cohn Case the Banfield patent No. 197,587 (1877), for a stocking supporter consisting of duplicate suspension tapes and a hanger piece in the shape of a loop for permanently uniting the two tapes at their upper end, and having an eye or ring adapted to engage in hook or button on any part of the waist. Complainants' expert (X-Q. 25) says that if the fabric body were omitted from complainants' supporter, and if the tapes were in a single piece, and merely run through the slot at the bottom of the metal eye, there still remaining duplicate stocking supporters, he should regard such construction as falling within claims 1 and 2 of the patent. It is difficult to see in what manner the supporter described in X-Q. 25, above, differs from that of the Andrews & Banfield patents. If it

does not differ, of course claims 1 and 2 have been anticipated in the prior art. To divide the supporters from their upper to their lower ends is not new, but is shown in Harvey patent No. 463,050 (1891) and Sythes patent No. 512,670 (1894). These were not before the court in the Taylor suit.

The George patent, No. 208,387, for a stocking supporter, was also not cited to the Second Circuit Courts. This device shows triangular fabric pieces, from which the tape or strap supporters hang. It is not, however, adapted to be detachably fixed to a corset stud. The Gray patent, No. 224,899 (1880), for a shoulder and back brace, discloses a supporter which evidently is adapted to be detachably connected with a corset stud. The tapes are not, however, divided so near the upper end as to make them available for a single hanger front device for use on both stockings. The metal eye and its connection with the hanger are similar to defendants'. The Arthur & Gray patent, No. 369,678 (1887), includes a similar device for an eye and hanger and their means of attachment to each other. The Harvey patent, No. 463,050 (1892), covers a supporter the tapes of which are divided at a point near their upper end. This would permit of free leg action, but does not appear to be detachable from the waist piece. The Lennon patent, No. 606,064 (1898), for a combined retainer and stocking supporter, was considered by the Second Circuit Court in the cases above cited. It discloses a pair of supporters, depending from stud and loop clasps upon the front of the corset, thereby, as the inventor says, holding in the abdomen while supporting the hose. There is no single hanger, nor are the straps, though jointed by a crosspiece at the top, equivalent to a single hanger, as the bearing is from two points on the corset. The E. F. Young patent, No. 638,540 (1899), was before the Court of Appeals in the Taylor Case. It discloses an abdominal pad for suppressing the stomach from which the supporters depend.

From the foregoing citations, and other patents in evidence in the prior art, I find several material facts to be established: (1) That a stocking supporter adapted to be detachably connected with a stud on the corset is not new; (2) that such a supporter, with a single hanger, and adapted to such detachable use upon a fastened stud upon the corset, is not new; (3) that a supporter adapted to be detachably connected with the stud on any part of a corset is also adapted to be detachably connected with the fastener or stud of a corset at the place where the two sections of a corset meet; (4) that any hanger attached to the front of a corset will serve the purpose of depressing the abdomen; (5) that the hangers of the Gray, Andrews, Banfield, Shelby, No. 267,943 (1882), Arthur & Gray, Washburn, No. 561,460 (1896), are adapted to be so detachably connected with the corset; (6) that stocking engaged members of supporters with a hanger uniting same at their upper ends are not new; (7) that defendants' eye and slot connection with the hanger is old in the art; (8) that duplicate suspension tapes are also old in the art; (9) that, if complainants' device has patentable novelty, it must be found in their fabric body and metallic hanger piece and eye.

Complainants' design, as shown by the drawings, calls for a fabric body and hanger in which the upper ends of the tapes are separated

from each other, while having a common bearing. Patentee, however, reserves the right to change the proportion, size, etc., leaving him at liberty to duplicate the fabric hanger of the Andrews & Banfield patents. The metallic hanger piece or yoke of complainants' patent serves to hold the tapes apart. No advantage is claimed in the specifications for this feature. If, as claimed by complainants' expert in answer to X-Q. 25, the fabric body of complainants' patent is not essential to their claim, and if the duplicate supporting tapes might be found in a single piece and brought close together at the slot below the eye and still be within the patent, then, in my judgment, the Banfield & Andrews patents are clear anticipations. And such I am constrained to hold they are.

In the case of Parramore v. Taylor (C. C.) 105 Fed. 965, Judge Townsend found that the defendant's device did not infringe. On appeal to the Court of Appeals this finding was reversed. 114 Fed 97, 52 C. C. A. 45. The court, having before it a record far less complete than that now presented, says:

"The patented device was 'the first to design a complete detachable device, which sustained both stockings from a single existing point of support on the corset,' and, notwithstanding the apparent simplicity of the improvement, the record discloses the labor and experiments required to produce a patentable supporter fastened to the front of the corset by a single point of support on the corset, and the inventive character of the device is made apparent despite first impressions as to triviality. Its novelty and utility 'in its limited fields' are manifest."

As the record now stands, I cannot agree with this statement of the case. The court seems to decide the case upon the use to which the supporter was put rather than upon the device itself. That a supporter was never before used to support both stockings from the front of the corset does not, in my judgment, enter into this case. As shown above, there were prior patents which were and are capable of being detachably connected with a stud upon the front of the corset, and which complainants by their expert insist come within the terms of their patent in suit.

The bill must be dismissed for want of equity, and it is so ordered.

NATIONAL TUBE CO. v. SPANG et al.

(Circuit Court, W. D. Pennsylvania. September 21, 1903.)

No. 25.

1. PATENTS—INVENTION—MANUFACTURE OF TUBING.

The Patterson patent, No. 581,251, for the manufacture of tubing, covering the method of making butt-weld pipe by charging the plates into the furnace from the rear, and withdrawing them from the front by means of tongs or other suitable device, which also draws them through the welding bell, is void for lack of patentable invention. The advantages of back charging in the manufacture of such pipe, as was practiced in making lap-weld pipe, were previously known, and it was practiced by at least one method. It was merely a part of the steady evolution and development of the art in mechanical means, not involving invention.

In Equity. Suit for infringement of letters patent No. 581,251 for the manufacture of tubing, granted to Peter Patterson, April 20, 1897. On final hearing.

Kay & Totten, for complainant.
Wm. L. Pierce and Bakewell & Byrnes, for defendants.

BUFFINGTON, District Judge. This is a bill filed against Spang, Chalfant & Co. by the National Tube Company, assignee of patent No. 581,251, granted April 20, 1897, to Peter Patterson, for manufacturing tubing. Infringement of all claims is charged. The defenses are invalidity of the patent and noninfringement. The patent concerns pipe-making. In that art long strips of wrought iron or steel of suitable width are brought to a proper welding heat. In one method the strips are drawn through a flared or bell-mouthed ring, which gradually rounds the strip into diminishing circular form, as it passes through its lessening diameter, and the bell at its outer and smallest opening forces the edges to abut and weld. This method is called butt-welding; its product, butt-weld pipe. In the other method the sides of the strip are first skived or beveled, and then passed over a mandrel, and through rolls, whereby the edges are made to overlap and weld. This is called lap-welding, and the product lap-weld pipe. Butt-weld pipes were successfully made prior to the patent in suit, which was for an improvement in one step of the process, and did not, it will be observed, create a new article of manufacture. The product of the patented, as well as the former process, continues to be styled butt-weld pipe. In the art antedating the patent the high heat required to bring the strips to a butt-welding point was secured by the use of reversible reverberatory furnaces which ran to approximately 3,000°. Under such high heat the strips required rapid handling, since if not withdrawn at the melting point the iron was burned. As these strips were fed in at the front of the furnace, and the ends first subjected to heat were last withdrawn, it was manifest that when a welding heat was reached at the end last introduced the other end might by the time it was withdrawn be burned. This danger was lessened by furnace construction, by which through graduated valves the heat was in a measure, if not indeed wholly, controlled; for, as Mr. Converse, complainant's president, said: "My own impression is that the different exposures—that the difference of time of exposure of front charging—was compensated by heat distribution in the furnace." It was also known that to successfully weld a strip its center should not reach as high heat as the edges, for a stiff center maintained the form or contour of the pipe under the strain of welding the abutting edges. In securing this result it was recognized that it was preferable to allow the strips to remain in the position in which they were originally charged, and withdraw them from that point, rather than to shift them to the common withdrawing one. The advantage of this stationary or quiescent position of charging is due to the fact that when the cold strip is introduced it speedily absorbs heat from beneath, and as this absorbed heat is added to by the heat from the furnace arch or body above it the strip soon becomes superheated, and returns its heat

to the strip of the furnace floor beneath it. This absorption of heat from the strip by the floor tends to keep the central line of the strip relatively cooler, and give it that stiff body which aids in welding the abutting edges. If, however, the strip were moved from its original position to one which was and had been subjected to the heat radiating from the furnace arch, the strip instead of losing heat to the floor at this point of the process would absorb more from it. The advantage of quiescent heating was known and appreciated, and its advantages sought for through the agency of a shifting or movable working bench. An example of this is seen in the table of Patterson himself, shown in patent No. 416,374, whereby he sought to "overcome the necessity of handling the plates after they are placed in the furnace, and so provide for the more regular and even heating of the plates," through the agency of a movable work bench. Another practice in the prior art which deserves careful consideration in forming a just estimate of the patent in suit was the means used to draw the strips from the furnace and through the welding bell. The prior practice, until a short time before the patent in suit, was by means of a draw bench and a "tang" or drawing rod, and is described by Patterson in his patent No. 416,374, above referred to, as follows:

"The most approved method of making this butt-weld tubing heretofore practiced has been to weld a rod to the end of the plate from which the tube is to be formed, and bringing this plate to a welding heat in a suitable furnace, and draw the plate by means of said rod through a bell-shaped die, generally termed a 'bell,' the sides of the plate being turned over so as to bring it to tubular form, and the edges of the plate being butted and compressed together within the die and so welded. In welding tubing in this manner, a long draw bench has heretofore been employed, the draw bench being mounted stationary before the mouth of the welding furnace, and the draw bench having at its forward end a holder to support the welding die or bell, and a chain traveling in said draw bench, and a buggy running on a track on the draw bench, and acting to draw the blank through the die by first engaging with the 'tang' or drawing rod secured to the tube blank, and then engaging with the traveling chain, and so drawing the blank through the welding die or bell."

Moreover, prior to the patent in suit the general principles and advantages of charging metal at the rear of a furnace were known and appreciated. It was seen that it prevented congestion at the furnace front, and that the general benefits naturally incident to a continuous, straightaway process followed. Front charging of billets and slabs was the common practice, but about 1870, when the use of Siemens regenerative furnaces in pipe making eliminated coal smoke from such furnaces, rear-charging was and has since been followed in heating skelp for lap-welding. With the exception, however, of the crane practice referred to later, no step toward rear charging was taken in butt-weld furnaces. The reason for this seems apparent in the limitations imposed by the use of "tangs," since it was impracticable, if not, indeed, impossible, to charge a strip from the rear of a furnace with a "tang" welded to its nose. In the first place, the "tang" end could not be slid along the furnace floor, and, even if it could have been, it would have been so hot it could not be handled to shift the strip or to pass it through the welding bell and attach it to the draw buggy. Not only was the "tang" an impediment to back-

charging, but it was an expensive factor, in that it required a preliminary heating and the labor of welding it on and shearing it off. The desirability of using tongs instead of "tangs" was appreciated, but the conditions under which tongs had to be used were such that it was a difficult thing to devise them. In the first place, they had to operate at long range; second, their size must be such that the gripping end could pass through the welding bell; and, third, their grip must be such that they could stand the jerk or strain of instantaneous engagement to a chain moving at the rate of several hundred feet a minute, and at that rate grip and start a strip of iron 25 feet long, and draw it at a rapid rate through the welding bell. From these conditions and difficulties it will be apparent that the use of "tangs" and the lack of tongs would completely prevent any attempt at back-charging. This is clearly and forcibly shown in the affidavit of Saunders, filed in the Patent Office, in the application for the present patent, and the testimony of Simpson in the present case. Saunders' affidavit was:

"Up until within a short time of the invention made by Mr. Patterson, the almost universal custom in making butt-weld tubing or drawn tubing was to employ what were termed 'drawing tags,' which were secured to the front end of flat plates, the plates being pushed into the furnace from the same end as that from which they were withdrawn. * * * It would have been impracticable to introduce them from the other end for two or three good reasons, the principal one being that the tag would have become heated in passing through the furnace so that the welder could not grasp the tag end and so manipulate the plate in the furnace, and, furthermore, that the tag would be liable to catch on the bottom of the furnace and tear up the bottom, or direct the plate out of its proper course. I have never known it to be attempted. * * * The use of tongs for drawing the plate from the furnace was practically only experimental up until within a short time of Mr. Patterson's making the invention, as it was difficult to provide tongs which would hold sufficiently well to the plate and yet pass through the welding bell."

The testimony of Simpson was:

"Q. 12. How long did you continue to use the bell and the tag-welded plate as a means of handling the plate and drawing it through the bell as the principal way of making your pipe? A. Up to about 1893; that is, up to the time I left in 1893. Q. 13. Up to that time had you known of any better way in practical use of making butt-weld pipe than by welding the tag on to it, as you have described. A. No."

The difficulty in devising such tongs is stated by Doyle:

"The difficulty in devising such tongs lies in the fact that they must be slender enough to allow their passage through the bell, and at the same time have sufficient strength for the required drawing of the plate through the bell."

A careful examination of the proofs in this case—and in that aspect we may say they are practically unquestioned—satisfies us that the absence of such tongs was a prohibitive step to the use of back-charging methods, and, in our judgment, the conclusions drawn by Dr. Sellers, an expert, and Henderson, a practical superintendent, are justified by the proofs in this case. The former says:

"A. The chief, and I might almost say the only, impediment in the way of back-charging was the noninvention of any means of drawing the plate out of and through the bell, except by means of a tag welded to the bar ready for the operation of passing this tag and the pipe through the bell, and is now

done by the ingenuous tongs that have been gradually evolved to take the place of the welded or otherwise attached tag, the use of which necessitated the front-charging method."

The latter says:

"A. The reason for not charging skelp into the rear end of butt-welding furnaces was the absence of a suitable device with which to withdraw the flat sheet from the front end of the furnace; in other words, we were unable to secure a pair of tongs over which we could slip the welding bell, and which would be at the same time slender enough and having sufficient tenacity when gripping the sheet of iron to pull the same through the welding bell without slipping off and allowing the sheet to remain in the furnace, thus causing what we would term a cobble. The whole question of back-charging hinged on the question of a suitable appliance for withdrawing the sheet from the front end of the furnace, and until this was accomplished we used what is commonly known as the 'tang' method of making butt-weld pipe."

Indeed, the fact that no tong has yet been devised for handling small-sized pipe, say an eighth to a quarter inch, and that they continue to be made by the front-charge method, is illustrative of what for a time restricted the larger sized pipes to front-charge furnaces. And that the tongs were the lacking factor is shown by the practice in lap-weld furnaces. There tongs had been devised by which the skelp could be satisfactorily gripped, and back-charging was therefore practiced. But the tongs that were suited to that practice and to the relatively moderate cherry red heat there employed would not meet the requirement of grasping strips raised to the melting point required in butt-welding. The difference is set forth by the witness Henderson, who says:

"A. The condition of the flat sheet or strip of metal when drawn through the skelping box from the front end of the skelping furnace was what was commonly known as cherry red heat. The skelping tongs which grasped this plate had an entirely different work to perform, as compared with a pair of tongs suitable for grasping a flat sheet or strip of metal heated to a high welding heat, which were to be drawn through a small welding bell. In the first instance the tongs were quite short, and were mounted on a buggy. Sufficient pressure could be put on these tongs by the use of a pulley hook, which would make them grasp the plates tenaciously enough to allow them to be drawn through the skelping die, while in the welding tongs, which of necessity had to be long and slender, great trouble was experienced in securing tongs which would retain its hold on the plate when pulled through the welding bell."

But, in spite of this drawback, the art was not without its development in back-charging of strips for butt-welding. What is known as the Crane method was in use previous to the patent, and is still used as a successful method of butt-welding by back-charging. In this practice the furnace was open at the front, the welder and front slider worked from that point, and together moved the plates from the second position forward to the final working point. At one side it had a stationary work bench provided with bell, buggy, and movable chain, and the strips were charged by a stationary mechanical charger placed at the diagonal corner from the work bench. Instead of a reversible furnace, one in which the heat was generated on one side and the exit flue on the other was used. A picker man or rear slider was stationed at the rear opening, who moved the plate from its first to its second position, from which point they were moved to the third

and fourth position by the front slider, and to the fifth or final position by the welder. This device showed the application of the general principle of back-charging to the butt-weld art. As an incident to that method it showed the uniformity of heating obtained by opening the rear end, and thus avoiding the heat nonuniformity, which necessarily came from a closed rear furnace section; it also incidentally showed equality of time of heat subjection. Not only was the end of the strip first introduced first withdrawn, but the whole strip, as it was shifting toward the hotter working side, was uniformly subjected to the higher heat zones horizontally.

In this state of the art the idea occurred to Patterson, the patentee, to dispense with tangs, charge the strips at the back of a butt-weld furnace, allow them to remain in such initial position, grip them with tongs, and withdraw them therefrom at the front of the furnace by means of his shifting draw bench. This constitutes his process. It was embodied in a furnace built at McKeesport in October, 1894. That furnace differs from the Crane method in this: that the plates are initially charged in the position from which they are finally drawn. In that respect Patterson himself says:

"My understanding of the Crane apparatus is that a flat plate or strip of metal is charged in between a plate and the bridge wall, and when so charged into the furnace they are moved laterally to the place of withdrawal. With this exception, the Crane apparatus is practically the same as the apparatus at McKeesport."

Subsequently, to wit, on March 18, 1896, the National Tube Works Company, as assignee of Patterson, made application for the patent in suit, which was granted April 20, 1897. Did this device involve patentable novelty? In considering that question we naturally inquire of the steps or means through which an invention is reached. A long series of futile experimental efforts, resulting in a solution in some unthought of way, sometimes serves to aid in showing inventive character. The present case is singularly free from any effort of that kind. The plan of rear-charging simply occurred to Patterson several years before he reduced it to practice. It seems to have come to him and been suggested by the use of his movable draw bench as a means of increasing production. He says:

"A. On December 3, 1889, I was granted a patent No. 416,374, for an apparatus for welding. This invention covers the movable draw bench, and it was when we put this draw bench in operation, and were experimenting with it to increase our production in butt-weld tubing, that the thought of charging the plates into the rear of the furnace occurred to me. It was not more than a thought at the time, and as time went on it would return to my mind, especially when we were struggling with the difficulties of getting uniform heat on the plates for the making of butt-weld tubing. I have a distinct recollection of telling Mr. Pierce in 1893, who was the manager of the pipe mills of our company at that time, of my idea of making pipe by charging the plates from the rear of the furnace; but Mr. Pierce did not give me very much encouragement, and time went on, and it was not until the fall of 1894 that I was permitted to have a furnace built in which to carry out my idea of back charging."

Referring to his talk with Mr. Pierce, he says:

"A. My conception was to charge the plates into the furnace on certain lines, and I disclosed it to Mr. Pierce. I also stated that if allowed to build

a furnace of that kind that I would use my movable draw bench, so as not to move the plates in the furnace, as was the custom in front charging."

The conception, whatever its character, was then complete. There were reasons why it remained unused so long. The tang method prevented its use, and Mr. Converse objected to the heavy expenditure involved in furnace reconstruction and in the adoption of a process which involved dividing the responsibility for furnace control between the charger and the welder. This latter objection proved unfounded, and when permission was received to construct a back-charging furnace complete plans were drawn, the furnace constructed according to them, and at once put in operation without any experimental work. Mr. Converse says:

"I remember ordering the charge of this furnace and seeing the work done, and afterwards hearing from Patterson other ideas he had which included this back-charging. I do not recall any other objections than our heavy expenditure which would be incurred by such a radical change, other than the taking away from the old welder to a great extent the control of charging his furnace. I refer more particularly not to means of charging, but to the quantities and time."

In view of these facts and statements, it seems to us that the idea of back-charging simply and naturally occurred to Patterson as a means of using his patented movable draw bench, and thereby increasing production. This is strengthened by Mr. Converse's estimate of the invention. He says:

"My own impression is that * * * the great advantage derived from the back-charging methods as against front-charging methods were far better facilities for charging without interrupting the welder or interfering with his work—continuity of presentation—and, as I have before stated, the enormous increase in production for heat and labor unit."

As confirmatory of the view that the improvement in method here involved was mechanical and commercial, and did not call into exercise inventive genius, it will be noted that near this same time other persons had thought of back-charging for butt-welding, and that they were seeking to devise tongs as a means of securing it. The difficulty was not in the lack of conception of back-charging, but in the lack of tongs to make its adoption possible. These facts are to be regarded not as anticipations or prior conceptions to Patterson, but simply as evidencing the fact that the back-charging of a butt-weld furnace was a mechanical conception, which naturally occurred to other persons near the same time and without knowledge of the others' actions. Thus Doyle, the manager of the respondent's works, says:

"When I went to Spang, Chalfant & Co. the condition of their butt-weld plate making was so very far behind the method used in other mills, we started in at once to make improvements in the method of manufacture. I reduced the number of heatings required to make a complete tube from 7 to 5; again from 5 to 3, still making the tube by the old common tag-welding process; it being still unsatisfactory, in 1894, we put in a bell-welding furnace. It being found unsatisfactory, on account of the expense of making and welding on the tangs, I began work on devising suitable tongs to take the place of the tang, knowing that when we were able to get satisfactory tongs we would then have to charge from the rear of the furnace, as that would be a more convenient way of working. Along in 1895 I succeeded in devising satis-

factory tongs, showed the tongs in operation to Mr. George A. Chalfant, general manager of the works, and explained the advantages of the tongs in charging from the rear over the tang method then in use."

George A. Chalfant, one of the respondents, testified as follows:

"Q. 22. In April, 1896, when you began to charge your butt-weld furnace at the rear, had you ever heard of the Patterson patent in suit, or of its introduction at the complainant's works at McKeesport or elsewhere? A. I most certainly did not. * * * Q. 7. When did you first hear of charging butt-weld furnaces at the rear and drawing them at the front? A. It was in the fall of 1888. Mr. Doyle said to me we ought to make pipe by charging the skelp or plates in at the back of the furnace and drawing them out welded pipe at the front of the furnace. The only thing that would be necessary would be suitable tongs to draw out the hot skelp. * * * Mr. Doyle came to the office one day in the fall of 1895, and asked me to come up to the mill, that he had something he wanted to show me. I went up to the mill. He showed me a pair of tongs that he had made for drawing skelp out of the front of the furnace. He had made an opening in the back of the welding furnace, and charged some plates in the back of the furnace for making inch and a quarter pipe. When they were heated to a welding heat he drew them through the bell at the front of the furnace with these tongs that he had shown me, and made inch and a quarter pipe. I said, 'You have succeeded; get ready to make pipe by back-charging.'"

The significance of facts of like general character was referred to in Haslem v. Pittsburg Plate-Glass Co. (C. C.) 68 Fed. 481, where it was said, citing Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438:

"As confirmatory of the view that this improvement did not call into exercise inventive genius, reference may be made to the fact that, even if priority of conception could be accorded to Haslem, at or about the same time three skillful mechanics—namely, Haslem, Sleeper and Edward Ford—acting independently of each other, suggested the duplication of the orbicular beam in the Belgian machine at the Jeffersonville Works, and the application of the reverse crank movement to the beam. This circumstance furnishes persuasive evidence that the change was obvious to the skillful mechanic."

A vast amount of testimony has been taken to show the value of the back-charging practice and its advantages over former methods. We so regard it. It is a natural, continuous, straightaway method, and, like all such improved methods of continuous handling, it avoids congestion of workmen; allows steady, as compared with intermittent, work; it utilizes the same heat and labor to produce a larger product. We are also satisfied that by a quiescent charging better heat results are obtained and less scrap made. We are also satisfied that further use of the practice has developed advantages additional to the two which alone the patentee had in mind and referred to in the application, viz., even longitudinal heating and separation of the working force. But, conceding such difference and progress, the fact still remains that the step here made was one of gradual, and to be expected, progress which marks every great, and therefore progressive, industry. In that advance the tongs and movable draw bench afforded scope for inventive genius, and presumably have secured protection to those who devised them. The principle of back-charging was not Patterson's invention. Now, why should the general principle and practice of back-charging which tongs have made available for butt-weld heating be monopolized to prevent their use for that purpose?

Nor was the principle of quiescent charging his. He simply utilized these principles by employing them in the only way they could be used by means of improved tongs and shifting draw bench, and in a way the draw bench naturally suggested. That this use disclosed new and unexpected advantages may be conceded, but it is not everything that is novel and useful that is patentable. Many processes and methods have proved exceedingly valuable in manufacturing that have not been patentable. To use, with some changes, the language of another (Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438), we may say that the development of this as of every great industry develops a constant demand for new methods, which the ordinary skill of those versed in such branch has generally been adequate to devise, and which devising is the natural outgrowth of such development. Each forward step prepares the way for another, and to burden a great industry with a monopoly to each improver for every step thus made, except where marked by an advance greater than mere progressive skill, is unjust in principle and hostile to progress. In reaching the conclusion of the invalidity of this patent we are not unmindful of the prima facies to which its issue entitles it. But the prima facies is necessarily affected by the fact that the record discloses neither in the specification of the patent nor in the action of the examiner any reference to the Crane practice. Indeed, the proofs show it was not known to Patterson. His specification contains no reference to it. Indeed, it is conceded that if literally construed, and not restricted to the specific method disclosed, Crane's method would infringe at least one claim.

In conclusion, we remark that while the testimony of the experts in this case shows the thermal and operative advantages of back-charging, a conclusion to which we agree, and while the process is simple, effective, and economic, we are nevertheless satisfied it involved no invention. In our judgment, it was but the steady evolution and development of advance incident to an industry where competition pushes progress to constant change. In this advance the movable bench and the successful tongs were material factors. Back-charging was the natural step in advance when these factors were provided.

So holding, we are of opinion the patent is invalid, and the bill must be dismissed.

VICTOR TALKING MACH. CO. v. AMERICAN GRAPHOPHONE CO.

(Circuit Court, D. Connecticut. July 13, 1903.)

No. 1,093.

1. PATENTS—INFRINGEMENT—TALKING MACHINES.
The Johnson patent, No. 679,896, for an improvement in sound-boxes for talking machines, the essential feature of which is a spring-mounting for the stylus-bar, comprising a thin piece of tempered steel having its ends twisted in opposite directions, construed, and *held* not infringed.

In Equity. On final hearing.

Horace Petit, for complainant.
Philip Mauro, for defendant.

PLATT, District Judge. This is a bill in equity seeking to restrain defendant from an alleged infringement of letters patent No. 679,896, issued August 6, 1901, to Eldridge R. Johnson, and subsequently assigned to the plaintiff, for an "improvement in sound-boxes for talking machines." The claims sued upon are as follows:

"(1) In a sound-box, a spring-mounting for the stylus-bar, comprising a thin piece of tempered steel having its ends twisted in opposite directions, and secured to the sound-box casing, and its intermediate portion secured to the stylus-bar.

"(2) In a sound-box, a spring-mounting for the stylus-bar, comprising a strip of tempered steel having screw holes provided in each end, and the said ends twisted or sprung in opposite directions, so as to render the intermediate portion extremely sensitive, the said intermediate portion being rigidly secured to the stylus-bar and the end portions to the sound-box casing, thereby rendering the stylus-bar sensitive, for the purpose described.

"(3) The combination with the sound-box casing, a diaphragm mounted therein, a stylus-bar mounted in an opening formed in the lower wall of the casing, a tempered steel spring secured to the said stylus-bar, having its ends twisted in opposite directions, and secured to the sound-box casing on each side of the stylus-bar.

* * * * * * * * * *

"(5) In a sound-box for talking machines, a spring-mounting for the stylus-bar, comprising small tempered steel fingers extending from each side of the stylus-bar transversely thereto, each of said fingers being twisted or sprung in opposite directions and having their free ends rigidly secured to the sound-box casing.

"(6) In a sound-box for talking machines, an annular casing having a radially-disposed aperture provided in its wall, a stylus-holder adapted to pass through said aperture, small tempered steel fingers extending from the said stylus-bar on each side thereof, each of said fingers being bent or sprung in opposite directions, and having their free ends secured to the sound-box casing, for the purpose described.

"(7) The combination with the sound-box casing, a diaphragm mounted therein, a stylus-bar mounted in an opening formed in the lower wall of the casing, a wire connection rigid in the direction of its length secured to the diaphragm and to the stylus-bar, a tempered steel spring secured to the said stylus-bar having its ends twisted in opposite directions, and secured to the sound-box casing on each side of the stylus-bar.

"(8) The combination with the sound-box casing, a diaphragm mounted therein, a stylus-bar mounted in the casing, a wire connection rigid in the direction of its length secured at one end to the stylus-bar, a head formed on the other end of said wire adapted to an opening in the diaphragm, means for securing said head to the diaphragm, and a tempered steel spring secured to the stylus-bar having twisted ends, the said twisted ends being secured to the sound-box casing on each side of the said stylus-bar.

"(9) The combination with the sound-box casing, a diaphragm mounted therein, a stylus-bar mounted in the casing, a wire connection rigid in the direction of its length secured at one end to the stylus-bar, a head formed on the other end of said wire adapted to an opening in the diaphragm, means for securing said head to the diaphragm, a film or seal of wax applied over the said connection and a tempered steel spring secured to the stylus-bar having twisted ends, the said twisted ends being secured to the sound-box casing on each side of the said stylus-bar.

"(10) The combination with the sound-box casing, a diaphragm mounted therein, a stylus-bar mounted in the casing, a wire connection rigid in the direction of its length secured at one end to the stylus-bar, a head formed on the other end of said wire adapted to an opening in the diaphragm, a flange formed on the outer end of said head, a washer secured on said head

adapted to bear against the opposite face of the diaphragm, a film or seal of wax applied over the said connection for preventing the same from rattling, and a tempered-steel spring secured to the stylus-bar having twisted ends, the said twisted ends being secured to the sound-box casing on each side of the said stylus-bar.

"(11) The combination with the sound-box casing, a diaphragm mounted therein so as to be free to move throughout its entire area, a stylus-bar loosely mounted within the casing, a wire connection rigid in the direction of its length secured to the stylus-bar, a head formed on the opposite end of said wire, means for positively connecting this head to the diaphragm, a seal of wax applied over said connection, and a thin twisted spring secured at its middle portion to the stylus-bar and having its twisted ends secured to the sound-box casing on each side of said stylus-bar, for the purpose described."

* * * * * * * * * *

"(16) A sound-box for talking machines comprising a casing made in two sections adapted to fit one within the other, the said two sections being driven or shrunk together, a diaphragm confined at its periphery between the two sections, yielding gaskets provided on each side of the said diaphragm; the said parts being adjusted so as to prevent the said diaphragm from rattling, yet leaving it free to vibrate throughout its entire area; a stylus-bar mounted within the casing; a tempered-steel spring having twisted ends, which are secured to the casing on each side of the diaphragm, and having its intermediate part secured to the stylus-bar; a wire connection permanently secured to the stylus-bar at one end and to the diaphragm at its other, and a wax seal applied over the connection to the diaphragm, substantially as described."

The defense is noninfringement.

It is well at the outset to make a few general observations. A serious contention is on foot between these parties and in the court for this district as to their respective rights in and to a certain type of talking machine which makes use of the disk record and a so-called "zig-zag movement." It cannot be expected that at the present juncture I will invade the darkened recesses for light upon that controversy. Consequently, it is not persuasive to charge the defendant with producing a "Chinese copy" of the plaintiff's construction. It is a somewhat peculiar method of attaining a coveted position to attack the defendant with a contention which, if successful, could only result in lopping off an unimportant branch, while the ax is withheld from performing its function in a process which might result in severing the very trunk of the tree itself.

In the case at bar the contention of the parties, as I gather it from the oral and written arguments, is chiefly confined to the question as to whether in fact the defendant uses a spring-mounting for a stylus-bar, which embodies in its construction "a thin piece of tempered steel having its ends twisted in opposite directions." The quotation is taken from claim 1. All manner of changes are rung upon the language in the later claims, but through them all the main idea which these words express can be traced. To find out what the inventor meant, we must go to his specifications. In one place he says that the piece shall be of "finely tempered steel," and that he finds it necessary to provide an "extremely sensitive mounting for the stylus-bar." High tension and extreme sensitiveness is the burden of his song. In the patent in suit, as in all like patents, the inventor is searching for a perfect reproduction of the human voice. The effort would seem to be hopeless, but every approach toward

the desired haven is laudable and worthy of protection. The point to be discussed is whether the attempted approach actually approaches. In the case at bar the patentee's line of thought is this: I will first take a spring of finely tempered steel. I will then put a reverse torsional twist in it, so that one end will twist in one direction, and the other in the opposite direction. I will then fasten down the two ends by riveting the eyes at the two ends down flat. The opposing twists, furnishing power in opposite directions, and with practically equal force, will so act upon the spring as to produce at or near the center a state of rest, a suspension of motion, a normal point at which motion ceases, but which can, however, be stirred by an almost infinitesimal vibration. To obtain the acme of responsiveness, it was indispensable that the spring should be of exceedingly fine temper. The higher the tension, the finer the result. This was the thought, as I conceive it; and now to haggle about low-grade tool steel, sheet tin, or any other substance which could only bring a minimum of tension, as being within the patent, is to degrade the high purpose, the lofty ambition, which must have quickened the pulse of the inventor when the possibility which the thought carried with it expanded upon his mental horizon.

Under this construction it is certain that no infringement has been shown by the evidence. In truth, a very much narrower construction might be evolved, and again the facts would not sustain the plaintiff's contention. In a business carried on under the circumstances and in the way testified to by the defendant's witnesses, a single infringing spring device out of a mass would even then be an accident, if not a miracle.

It is unnecessary to say more in explanation of my order, but I cannot refrain from touching lightly upon the diaphragm and the gaskets. In claim 16 an additional element in the combination appears. The pressure of the rubber gaskets on the edge of the diaphragm is to be such "as to prevent the said diaphragm from rattling, yet leaving it free to vibrate throughout its entire area." It had long been the practice to hold the diaphragm tightly between the gaskets so as to make it solid at the edges, and in patents lately prior to the one in suit Mr. Johnson had suggested that it was better to hold the diaphragm loosely, so that the vibrations might reach the very edge. Now he says, let the gaskets neither overdo nor underdo their appointed task. Let them hold just tight enough so that there will be no clamping, and yet loosely enough so that vibrations may reach the extreme periphery. The thought that lay back of this was of the very essence of dream life. It came from the ineffable, the uncertain, and is too impractical to be granted a monopoly.

Let the bill be dismissed, with costs.

BROWN v. CRANE CO.

(Circuit Court, N. D. Illinois, N. D. October 13, 1903.)

No. 26,236.

1. PATENTS—ANTICIPATION IN ANALOGOUS ART—CORE-MAKING MACHINES.
The Grant patent, No. 513,998, for a machine for making cores, is void for anticipation by machines for making tiles; tile making and core making being so closely analogous that the mere adaptation of a machine for one purpose to the other, by the enlarging or diminishing of some of the parts, does not constitute patentable invention.

In Equity. Suit for infringement of letters patent No. 513,998 for a machine for making cores, granted to Edward Grant February 6, 1894. On final hearing.

Walter H. Chamberlin, for complainant.
Banning & Banning, for defendant.

KOHLSAAT, District Judge. The bill herein was filed to enjoin the infringement of claim 3 of patent No. 513,998, which reads as follows:

"A core-making machine, consisting of a hopper, F, located adjacent to, and supplying material to, a tube, D, having within it a worm, E, for forcing material out through tube, D, an aperture, H, within said worm, and a wire, A, held in a fixed position, passing through said aperture, H, and terminating beyond the end of said worm, E, for the purpose of forming a hole in the body of the core for the escape of the gas."

There is no attempt on the part of defendant to deny the infringement. The defense rests wholly upon the invalidity of the complainant's patent by reason of the state of the prior art. Several earlier patents are shown in the record which deal with devices of an analogous character, such as tile making. These have the hopper, a tube with a worm or screw in it for advancing the material, a wire, or its equivalent, for the purpose of forming a hole in the tile or article manufactured. For some reason or other, cores for molding purposes have, prior to complainant's device, been made in two sections, and then fastened together by hand—a tedious and uncertain method. It appears that cores should be constructed with a longitudinal lengthwise opening through them, in order that gases and vapor may escape therefrom. The Sault patent (1862), No. 37,112, is for a device for covering wire with gutta-percha and other substances, and for manufacturing other articles therefrom. The coating substance is forced upon the wire by means of a screw. The tube in which the screw works is tapered off at the coating end. Rubber tubing, it is claimed, can be formed by this device. Defendant insists that the converging of the feeding tube makes this device ineffective in the manufacture of cores. Whether such is the case or not is a disputed fact. The Woodcock patent (1867), No. 62,914, is a tile machine. It, too, has the hopper and the cylinder, in which a screw revolves, forcing the material into a die, as required. The patentee claims as new a revolving core shaft. Here, too, the die forming the tile is smaller than the cylinder or tube in which the screw works. The McKenzie patent

(1869), No. 89,878, covers a device for making tile. It has a hopper, a cylinder in which a screw forces the material forward into a die, and a mandrel or bore-forming projection upon the screw, the cylinder and screw tapering towards the die. The same is substantially true of the Hotchkiss patent (1870), No. 105,335, for making tubes, etc.; also, the McKenzie patent (1880), No. 233,535, for a brick and tile machine; also, the Clark patent (1881), No. 242,884, for covering wire, etc.; also, Harris patent (1884), No. 298,850, for making tile. The Tiffany patent (1859), No. 25,687, for a tile machine, has a hopper, a tube in which a screw or worm which fills the tube, and forces the material upon a die, an extension of the screw shaft for the purpose of forming a bore, and an unrestricted discharge. The die is of equal diameter with the tube and screw.

It is thus evident that the only feature of complainant's device, if any, which can be urged as new must be its adaptation to the manufacture of cores. The materials from which these are made are sand, flour, and perhaps some kind of oil or lubricator. The fact that cores were never made by machinery before is very persuasive as to the novelty of the device, but it cannot be deemed conclusive. If the device be old, its use is unimportant. It seems fair to say that the only difference between the tile machine of Tiffany and the Grant machine is the difference in size of the article manufactured, and the lengthwise aperture through the same. Can it be said that title making and core making are different arts in the sense in which the courts deal with the term "arts"? Is it patentable novelty to reduce the size of the tile, as well as the relative size of the bore therethrough, so as to produce a smaller article with a relatively smaller bore? This involves simply a reducing of the die and the mandrel. Indeed, the die may or may not be reduced in size. Certainly, the difference in material used for tile making and that used for core making is not important for the purposes of this hearing.

In my judgment tile making and core making are so closely analogous that any one having in mind the making of cores by machinery would at once, and without thought of invention, adapt the old art devices to the article required. It involves simply the enlarging or decreasing of some of the parts. No new princple is involved, and complainant's patent must therefore be held to be anticipated in the prior art, and invalid.

The bill is dismissed for want of equity.

In re KNIGHT.

(District Court, W. D. Kentucky. September 15, 1903.)

No. 830.

1. BANKRUPTCY—JURISDICTION OF COURTS OF BANKRUPTCY.

When a general assignment for the benefit of creditors is made by a debtor, the same being an act of bankruptcy, the right immediately arises in his creditors to have his estate administered under the bankruptcy law; and, where the enforcement of this right is demanded by a proper proceeding within four months after its inception, no action by any court

in any suit brought after the commission of the act of bankruptcy can defeat it, without the consent of the bankruptcy court, whose jurisdiction is exclusive, and, on the making of the adjudication, relates back to the act of bankruptcy.

2. SAME—PRIORITY OF JURISDICTION OF STATE COURT—APPOINTMENT OF RECEIVER.
Under Bankr. Act July 1, 1898, c. 541, § 3a, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, which makes the appointment of a receiver because of insolvency an act of bankruptcy, a state court cannot, by the appointment of a receiver on such ground, obtain priority of jurisdiction to administer the property of a debtor, to the exclusion of a court of bankruptcy.

3. SAME—PROCEEDING BY TRUSTEE TO RECOVER PROPERTY.
Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 800, a court of bankruptcy has jurisdiction of a proceeding by a trustee to recover property from an assignee to whom it was conveyed by the bankrupt, for the benefit of creditors, within four months prior to the bankruptcy.

4. SAME—PRIORITY OF JURISDICTION OF STATE COURT—SUIT COMMENCED WITHIN FOUR MONTHS.
In general, an adjudication of bankruptcy vests the bankruptcy court with exclusive jurisdiction to administer the property of the bankrupt, as against any state court which may have obtained possession of such property through proceedings instituted within four months prior to the adjudication, and it is immaterial that the proceedings in the state court were for the enforcement of valid liens not affected by the bankruptcy act.

5. SAME—SALE OF PROPERTY BY ASSIGNMENT.
A sale of property by an assignee for the benefit of creditors vests the purchaser with no title as against the trustee in bankruptcy of the assignor subsequently appointed on an adjudication based on the assignment, where such purchaser has made no payment for the property.

In Bankruptcy. On rule to require the surrender of property to the trustee.

Wheeler & Hughes and W. M. Smith, for petitioning creditors and trustee.

Robbins & Thomas and Thos. W. Bullitt, for R. M. Chowning, receiver.

EVANS, District Judge. Upon hearing the testimony and considering the record so far as applicable to the pending rule, the court finds the facts to be as follows: On March 21, 1903, Henry Knight, of Fulton, Ky., owning property probably worth $45,000, made a general assignment for the benefit of his creditors to R. M. Chowning, who then was and now is the cashier of the First National Bank of Fulton. That on the same day, in writing at the foot of the deed of assignment, Chowning accepted the trust, though he did not qualify as assignee in the county court of Fulton county, as required by section 76 of the Kentucky Statutes of 1899, until March 26, 1903, when, at an early hour in the morning, with W. W. Morris, then vice president of said bank, and J. E. Robbins and Gus Thomas, its attorneys, as sureties thereon, he did so by executing the bond required by law. That the assignee was thenceforward subject to the orders of the county court under section 82 of the Kentucky Statutes of 1899. That while, under section 96, this would not prevent an action for a

settlement of the trust, yet otherwise the trust was to be executed and the assets administered pursuant to the provisions of what constitutes a portion of the insolvency laws of the state, embraced in chapter 7 of the Kentucky Statutes of 1899, and covering sections 74 to 96, inclusive, though it is not understood that this qualification of the assignee would prevent the appointment of a receiver in the bank's action, if otherwise admissible. That on the same day, to wit, on March 26, 1903, the First National Bank of Fulton, by its attorneys, J. E. Robbins and Gus Thomas, brought a suit in equity in the Fulton circuit court against Henry Knight and others upon certain promissory notes for large sums, and which had more than four months before March 21, 1903, been secured by a mortgage upon certain real estate—principally a large hotel belonging to the bankrupt—the relief sought being a personal judgment upon the indebtedness, and a foreclosure of the mortgage given to secure its payment. That certain other persons, who also had liens upon the same property, mostly if not altogether prior to that of the bank, were made defendants to the action, and required to set up their claims. That subsequently they did this by cross-petitions filed in the action. That on May 14, 1903, upon the claim in the petition and otherwise that Knight was insolvent (which fact at the hearing of the rule was admitted to have been true at the time), and upon the further claim that the mortgaged property was probably insufficient to pay the mortgage debts, the Fulton circuit court, in the action referred to, appointed the same R. M. Chowning as its receiver therein, with directions to take possession of the mortgaged premises, rent the same, etc., and to do certain other things in the way of operating the hotel, which constituted the major part of the mortgaged premises. That said Chowning at once gave bond as receiver, and entered upon the discharge of his duties as such. That no suit was ever brought in the circuit court for a settlement of the assignee's trust, under section 96 of the statutes, nor did the county court make any orders in the premises under section 82, nor was any order taken in either court concerning the duties of the assignee in the premises. That on June 9, 1903, Chowning sold certain personal property of the bankrupt, to wit, a building on leased premises, used as a restaurant, and certain appurtenances thereto, to one J. A. Milner. That the consideration therefor was the full amount of the debt due by Knight to Chowning, and which Milner assumed and agreed to pay, but no part of which has yet been paid. That Chowning claimed to have a mortgage on this last-named property for a debt due to himself for $2,700, and made the sale as assignee without orders from any court. That before this sale, namely, on June 1, 1903, three or more creditors of Knight, whose claims aggregated $500 in amount, filed a petition in this court, wherein they showed that on May 21, 1903, Knight had made a general assignment for the benefit of his creditors, and upon that ground prayed that he might be adjudged a bankrupt, within the meaning of the law. That pending that proceeding, and when it was about ready for determination, the said Knight, on June 22, 1903, filed his own voluntary petition in this court, praying for the same relief. That the two proceedings were consolidated by the orders of this court, and on June 23,

1903, the said Knight was accordingly adjudged a bankrupt. That on the 8th day of August, 1903, H. F. Oliver was duly appointed trustee of the bankrupt, and shortly thereafter entered upon the discharge of his duties as such, and that on September 5th he filed herein his affidavit, wherein he stated, in substance, that the said Chowning had possession of the property of the bankrupt, and refused, upon demand, to surrender it to the trustee, and prayed for a rule against said Chowning to show cause why he should not be required to surrender the assets of the bankrupt to the trustee. The court further finds as a fact established by the testimony that the mortgaged property exceeds in value the amount of the liens upon it, including the several mortgages and the vendor's lien. Another point was raised, and upon it the court, under the rule established in Mueller v. Nugent, 184 U. S. 15, 22 Sup. Ct. 269, 46 L. Ed. 405, heard evidence, to wit, the question whether the receiver's possession of the property, under the facts found, was adverse to the trustee. The court concluded that such possession of the receiver was not adverse, but, as that may be a question involving considerations both of law and of fact, it may be better disposed of by what may be hereafter said. At the close of the testimony the court, without disposing of the questions arising upon the rule, was clearly of opinion that there ought to be at least a temporary stay of proceedings in the case pending in the state court; and under section 11 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), and upon the admission in open court that, at the time of the appointment of the receiver, Henry Knight was insolvent, an order was entered accordingly.

In the response of Chowning, and by the argument of counsel, four contentions are made. The first is that the property of the bankrupt having been taken into the custody of the state court, through its receivership, before the adjudication in bankruptcy, and in an action of which the state court had jurisdiction, the case is one to be decided upon the well-known principle that that one of two courts of co-ordinate jurisdiction which first gets its grasp upon property is entitled to hold it for subjection to its judgment; and the case of Peck v. Jenness, 7 How. 612, 12 L. Ed. 841, is principally relied upon to support this contention. The second contention is that the respondent, as receiver, holds the assets adversely to the trustee in bankruptcy, and that a summary proceeding for its recovery is not admissible. The third is that the mortgage and vendor's liens sought to be enforced in the state court were all created more than four months before the making of the general assignment, and this circumstance is supposed, per se, to be sufficient to defeat the jurisdiction of this court, although the suit for the enforcement of those liens was commenced after the commission of the act of bankruptcy, and within four months before the adjudication. And the fourth contention is that Chowning having sold the restaurant before the adjudication to Milner, to whom possession was delivered, that portion of the estate is also held adversely to the trustee. We need not discuss these propositions separately, though it may be admitted that, if the bankruptcy court has only co-ordinate jurisdiction with the courts of the state in bankruptcy matters, the rule should be discharged. Knott v. Evening

Post Co., 124 Fed. 342. On the contrary, a different result must follow if the bankruptcy court, within the powers bestowed upon it for bankruptcy purposes, is one of exclusive jurisdiction. Doubtless, that court, while it may, under section 11 of the statute, stay proceedings in actions in a state court in certain cases, can decline to exercise its jurisdiction and power in that respect. But this depends entirely upon its own discretion—a discretion which cannot be controlled otherwise than by appellate proceedings in a higher court. This discretion has been exercised by this court in several instances —among them, in the Case of Holloway, 93 Fed. 639, and in the Case of Porter, 109 Fed. 111. Doing this did not depend upon any want of power in such cases, but because it was discreet not to exercise the power, inasmuch as no benefit could come to the general creditors by staying a suit in the state court, the entire avails of which must go to the plaintiff in the action there pending. Here, however, the evidence shows that the property exceeds in value the amount of the liens upon it; and the court's discretion will move in the other direction, if, indeed, it be a matter of discretion at all. It must be a matter of discretion if the law gives the bankruptcy court superior or exclusive power in such cases, but the application of the trustee must be denied if the rights of the state court in the premises are superior to those of this court. We must endeavor, therefore, to ascertain what the law is.

By the decisions in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, Leidigh Carriage Co. v. Stengel, 95 Fed. 645, 37 C. C. A. 210, and other cases, it is the established doctrine in bankruptcy that an assignee, under a deed of general assignment, and the execution of which deed is the act of bankruptcy upon which the adjudication is made, although he has qualified in the county court and is acting under its orders, does not hold the estate of the bankrupt adversely to the trustee in bankruptcy. It thence logically and necessarily follows that the assignee holds the property subject to the right of the requisite number of creditors having debts amounting in the aggregate to the sum of $500 to avail themselves of the act of bankruptcy and secure an adjudication, and that when this is done the rights of the creditors relate back to the act of bankruptcy, and override all intermediate or intervening attempts by the assignee to overreach or defeat the results of the act of bankruptcy, or the rights of creditors arising out of it. The general principle which underlies the subject, and which cannot be ignored, must be this: When a general assignment for the benefit of creditors is made by a debtor, eo instanti there is generated by the statute a right in his creditors to have his affairs wound up and his estate administered in the bankruptcy court pursuant to the bankrupt law, which has suspended the operation of all state insolvency laws; and, if the enforcement of this right is demanded by a proper proceeding within four months after its inception, no action in any court in any suit brought after the commission of the act of bankruptcy can defeat it without the consent of the bankrupt court. Quoad hoc, the jurisdiction of the bankruptcy court is necessarily exclusive and supreme. In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. ——; Mueller v. Nugent, 184 U. S. 1, 22 Sup.

Ct. 269, 46 L. Ed. 405; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Lengert Wagon Co. (D. C.) 110 Fed. 927; Leidigh Carriage Co. v. Stengel, 95 Fed. 645, 37 C. C. A. 210. In other words, the rights of creditors, inchoate from the making of the assignment, ripen into maturity when the adjudication is made. If it were otherwise the bankruptcy law could be evaded with the utmost facility. When Henry Knight, in this instance, committed an act of bankruptcy by making the deed of general assignment to Chowning, the First National Bank of Fulton, of which Chowning was cashier, and of the litigation of which he was an active manager, must be regarded as having had full notice of the act of bankruptcy, and of the consequences likely to follow, especially as the vice president of the bank and its attorneys were the sureties of Chowning on his bond as assignee, executed early in the morning of the same day on which the bank's suit was brought. With this knowledge, and under these circumstances—or, indeed, under any circumstances—can the rights of the creditors to have the bankrupt's estate administered in the bankruptcy court and under the bankruptcy law be defeated by the expedient of thereafter hurriedly bringing a suit in the state court, in which, upon an allegation of insolvency, a receiver is appointed and put in charge of the debtor's property—things which, of themselves, under the amendment of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797), constitute a further act of bankruptcy, upon which alone an adjudication could have been secured? And just at this point we may well inquire whether, if an adjudication in bankruptcy had been made upon a creditor's petition alleging, in the language of the amendment of February 5, 1903, that because of insolvency a receiver had been put in charge of Knight's property by the state court, that court, under the doctrine and rule of comity, and the supposed teachings of the case of Peck v. Jenness, would be still entitled to administer the assets, notwithstanding the bankruptcy law? This inquiry would seem to reach the kernel of the matter, for if a state court could thus do the very thing which constitutes an act of bankruptcy, and at the same time defeat it on the doctrine of comity and priority of jurisdiction, the new ground of bankruptcy is a manifest delusion. These suggestions seem to me to show that the expedient resorted to in this case, under the facts and circumstances surrounding it, cannot defeat the rights of the general creditors, which related back to the doing of the thing upon which the adjudication in bankruptcy was made. Section 70 of the bankrupt law (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), it is true, provides that the title of the trustee shall relate back to the adjudication, but it is obvious that cases like Bryan v. Bernheimer and Leidigh Carriage Co. v. Stengel proceed upon the view that that provision in no way affects the point decided. Besides, it is important to remember that, whether so in fact or not, a deed of general assignment is constructively fraudulent, and, in legal contemplation, its purpose is to hinder and delay creditors, within the meaning of section 67e of the statute of 1898 (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), and consequently that under that section the assigned property, if the deed was made within four months before the filing of the petition in bankruptcy, belongs to the trustee, and by

the express terms of the section it is made his duty to recover and reclaim it. Brandenburg on Bankruptcy, §§ 1100, 1097, and cases cited. This duty and this right, we hold, cannot be defeated by any proceeding brought within the four months in any other court. And such recovery may be enforced by proceedings in the bankruptcy court, under the express provisions of section 67, cl. "e," as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 800, wholly independently of section 23 of the act of July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], which is thereby limited to suits in controversies of a different nature.

It seems to me to admit of no doubt, under the provisions of section 3, cl. "b," 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], that the period of four months is clearly and definitely fixed in the present bankruptcy law (though possibly not so in the act in force when Peck v. Jenness was tried) as limiting the time within which creditors shall have an opportunity to obtain knowledge of the commission of acts of bankruptcy, and to consider and determine whether to avail themselves of the rights afforded by the bankruptcy law for their benefit, as the consequence of those acts of their debtor. The rights of the general creditors should not be easily defeated by the acts of secured creditors whose debts are much more certain of payment. The acts of others within the four-months period referred to cannot defeat the rights given to the general creditors by the law. If an act of bankruptcy is made the basis of an adjudication, such adjudication, when made, dissolves and avoids every intermediate step respecting the bankrupt's estate taken anywhere outside of the bankruptcy court, subject, possibly, to certain equitable considerations, such as may arise out of innocent acts, but the existence and effect of which considerations must be adjudged by the bankruptcy court alone. Examples of the considerations referred to are those which relate to expenses incurred, the fees, etc., of assignees, and the doing of certain innocent things after the act of bankruptcy, but before the adjudication. So, again, it seems to me to admit of no doubt that the receiver of the state court, in this instance, having been appointed after the commission of the act of bankruptcy upon which the adjudication was made, and long within the period of four months referred to, is precisely in the position of the assignee in Bryan v. Bernheimer, and holds subject to the rights of the general creditors, which relate back to the deed of assignment, and for whose use and benefit the assignee held the assets, precisely as a receiver would have done in case a debtor's property had been put in his charge because of the insolvency of the debtor under the amendment of 1903, if that act of bankruptcy had been the basis of the adjudication. There can be no difference in principle between the two cases, and when they are coupled their force is irresistible. And if this result does not follow, then the commission of the act of bankruptcy would defeat the object of the law in making it such, which it would be absurd to suppose was intended by Congress. Ex necessitate rei this must be so, for, if the property in the hands of the receiver or assignee must still remain there, the adjudication in either case would be a mere barren abstraction, and utterly useless to the petitioning creditors. These observations may be emphasized in this case by the

facts, first, that the receiver does not claim to hold otherwise than in a representative or official capacity for the benefit of the secured creditors, and makes no pretense of personal and individual ownership of the property (Mueller v. Nugent, 184 U. S. 16–17, 22 Sup. Ct. 269, 46 L. Ed. 405); second, that his appointment, and the delivery of the possession of the property to him as receiver, were by a process and upon grounds which per se constituted an act of bankruptcy; third, that his constituents at the time had full notice of the original act of bankruptcy, to wit, the general assignment to Chowning, the present receiver, upon which act the adjudication in bankruptcy was made; and, fourth, because, holding the property as assignee, and under liabilities fixed by the decision in Bryan v. Bernheimer, Chowning could not change or evade those liabilities by silently abdicating his trust as assignee, and assuming those of a receivership which he had promoted, and in a suit to which the general creditors were not parties, and the judgment in which was not binding upon them. In other words, when the assignment was made, and when Chowning qualified as assignee, at that moment, under the ruling in Bryan v. Bernheimer, he came under a certain obligation to the creditors, namely, the obligation to hold the assets for the trustee if the bankruptcy law should be invoked by a proper proceeding; and that obligation, once arising, cannot be destroyed by the action of the state court, taken most probably at his instance in a proceeding commenced after the obligation arose, and to which the petitioning creditors were not parties.

These propositions take the case entirely out of the doctrine of Peck v. Jenness, and of judicial comity generally, and bring it within those cases which show that upon transactions which are acts of bankruptcy, and which may be made the basis of adjudications as such in the bankruptcy courts, the latter courts have the exclusive power, under the supreme law of the land, and that as to acts done within four months of the commencement of bankruptcy proceedings there are no courts with powers co-ordinate with the bankruptcy courts. In re Watts & Sachs. If these were not sustainable propositions, the bankruptcy law would be a vain thing. If, by going into a state court after one act of bankruptcy had been committed, and committing another act of bankruptcy there, by putting the property of an insolvent person into the hands of a receiver, the rights of creditors under the general bankruptcy law could be defeated, proceedings under that law would be made ridiculous. Such results cannot be possible, especially since the amendment of 1903. If, within four months after its commission, creditors avail themselves of the provisions of the law respecting an act of bankruptcy, the bankruptcy proceeding must draw to itself the whole power, and override everything done in the meantime, though as to things done in other courts in actions brought more than four months before the act of bankruptcy was committed the doctrine of comity, and of cases like Peck v. Jenness, and Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, will apply. In short, under the statute, as construed by the courts, the line of demarcation is plain, and the established rule is this: Whenever, in a suit in a state court, the property of a debtor has come into the custody

of that court, its right to control and administer it for the purposes of that suit is superior to that of the bankruptcy court, provided such suit was commenced and the seizure made before the beginning of the four-months period referred to; but, if the suit was begun and the seizure made within that period, the right of the bankruptcy court over the property is not only superior, but after the adjudication is exclusive, regardless of what has been done in the state court, whose jurisdiction in such cases is divested by the bankruptcy proceedings. By this rule we must test the case now before us, and the result is obvious.

My attention has not been called to any decision of the Supreme Court nor of any Circuit Court of Appeals in any case precisely like the one before me. In Metcalf v. Barker and in Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, and in Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, and in many other cases, the suits in the state courts had been instituted more than four months before the commission of the acts of bankruptcy, and consequently the state courts were not deprived of jurisdiction over the property. But it will be observed that in all of them the courts are careful to put their decisions upon that very ground. In Pickens v. Roy, 187 U. S. 180, 23 Sup. Ct. 79, 47 L. Ed. 128, the court, in referring to the rules governing cases of priority of jurisdiction, imputes to Judge Goff the following language, which is approved:

"The bankruptcy act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

Though there is error in the citation, as Judge Goff did not sit in Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, the language is found in Pickens v. Dent, 106 Fed. 657, 45 C. C. A. 522, the decision in which was under review in Pickens v. Roy, and there affirmed. The Frazier Case, however, does very strongly state the rule that the bankrupt court can only maintain its jurisdiction where the suit in the state court was brought within four months before the adjudication, and because the suit there was brought in the state court more than four months before the adjudication the application of the trustee to have the property delivered to him by the state court receiver was denied. I have preferred to use the words "commission of the act of bankruptcy," rather than the word "adjudication," as being more accurate, inasmuch as from many causes, especially where there are vigorous contests, the adjudication may be delayed; and it seems to me that the entire reason of the thing points to the date of the commission of the act of bankruptcy as the starting point for estimating the four months, except in cases where the plain language of the statute otherwise requires. But whether one or the other is most accurate is not material in this case. The essential matter is that the authorities, though in cases the converse of the one before us, plainly establish the proposition that this court's jurisdiction over the bankrupt's assets is exclusive, except as to such portions thereof as may have been seized in some suit in a state court more

than four months before the adjudication in bankruptcy. This rule can in no way injure or impair the rights of secured creditors, whose liens are fully preserved by section 67, cl. "d," and will be perfectly protected in the bankruptcy proceedings. In plain terms, that clause provides that such "liens" as those appear to be which are asserted in the cause pending in the Fulton circuit court "shall not be affected by this act." It will be observed that it is the "lien" which shall not be affected, and not the suit brought for its enforcement. By other provisions—especially section 67, cls. "e," "f," 30 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3450]—certain clearly designated liens created within four months are made null and void; and it is to those liens and not to such as are preserved by clause "d" of the section, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], that the four-months period applies. As it is not now a question of "liens," but only a question as to what court shall enforce one which is assumed to be valid, it seems manifest that the provisions referred to in no way support the contention of counsel that, in all cases where a lien is created more than four months before the commission of the act of bankruptcy, that mere fact entitles the state courts in all such cases to enforce it, regardless of whether the bankruptcy proceedings were instituted before or after the suit was brought in the state court, and whether or not the latter suit was begun within the four months next preceding the bankruptcy.

It seems to the court to admit of no doubt, under many provisions, and particularly section 3, cl. "b," of the bankruptcy law, when construed with reference to its principal object, to wit, the marshaling and distributing of a debtor's assets among his creditors upon just and uniform principles, that it was the intention of Congress to bring the whole matter, including both secured and unsecured claims, into the bankruptcy court, except in cases where the suit in the state court was brought more than four months before the commission of the act of bankruptcy. In cases of the class just mentioned, as we have seen, the jurisdiction of the bankruptcy court must yield to that of the state court, upon the principle stated in Peck v. Jenness, while, on the other hand, if the four-months period had not elapsed when the suit was brought, the state court should yield jurisdiction to the bankruptcy court. In re Watts & Sachs. Congress, which has, under the Constitution, full power, has decided to fix this as the limitation. Being the supreme law, it is equally binding upon all courts, state and national. So we see that the question does not affect the lien, which is fully preserved, and which, if valid, may be the basis of proof of a secured debt, and promptly enforced in the bankruptcy proceeding, to which all creditors are parties, but does affect the question of which tribunal shall enforce the lien under the circumstance. And indeed, subject to the limitation referred to, it is most important that this should be the rule, if a uniform system of bankruptcy is desirable at all, for otherwise much discord might ensue, and greatly contribute to defeat the purposes of the bankruptcy statute, which, we repeat, is to have all the debtor's affairs, as far as practicable, adjusted and settled in one harmonious proceeding, wherein the rights of all claimants can be viewed comprehensively by one court.

Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, has been cited by counsel for the respondent. There, much more than four months before the act of bankruptcy was committed, the debtor had been required to give and did give bail in two civil suits pending in a Massachusetts state court. In order to induce one Silsby to become his surety, the debtor at the time placed in his possession $421 in money for his indemnity. Afterwards the debtor was adjudicated a bankrupt, and the trustee instituted in the federal court a proceeding to recover the money. But the court held, under section 23 of the bankruptcy law, as construed in Bardes v. Hawarden Bank, 178 U. S., 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, that the federal court had no jurisdiction, because Silsby, who had the money in his possession as indemnity against his liability as surety, was an adverse claimant thereof,—a proposition not affecting the question now before me. While it is not necessary to express any decided opinion upon the question, it may well be doubted whether a mortgagee of real estate in Kentucky is, as between himself and the trustee in bankruptcy, an adverse holder of the property. He does not have possession, and can hardly be said to hold it at all. He is, at last, only a creditor—a person to whom a debt is due—though one who has a better position than have those creditors whose debts are not secured. But this advantage does not arise out of possession given simultaneously as a security against a liability which otherwise would not have been incurred, as in the Jaquith Case, but is a mere equity, which can only be made effective by a judicial proceeding.

Touching the sale to Milner, it need only be remarked that it obviously comes within the ruling in Bryan v. Bernheimer, and the proposition is, if possible, emphasized by the facts not only that Milner appears not to have paid any part of the consideration, but also that Chowning, who made the sale, was not only assignee and vendor but also creditor. Indeed, the multitude of parts played by Chowning cannot escape attention.

We have, upon a careful consideration of the whole case, concluded that none of the contentions of the respondents can be maintained, and, although we hold that the receiver's refusal to surrender the assets to the trustee does not create an adverse claim, in the legal sense, yet in what has been said I have carefully abstained from any expression of opinion as to the right of the trustee to enforce his claims by a summary proceeding. It is hoped that, whether such right exists or not, it will not be necessary to exercise it. It seems so clear, from the bankruptcy law, as construed by the highest courts, that the rights of the receiver, acquired under the circumstances shown by the testimony, are subordinate to those of the trustee and to those of the bankruptcy court, that it is not doubted that the Fulton circuit court will acquiesce in that view, and, upon proper application made to it, will order the receiver to turn over to the trustee the property in his hands. To the end that an application for that purpose may be made, further proceedings upon the rule will for the present be held in abeyance. It would not only be unseemly, but altogether disagreeable to this court, to pursue any course which would be wanting in the utmost respect and courtesy to the state tribunal, and orders will be

made directing the trustee to apply to that court for leave to enter a special appearance in the case there pending, styled "First National Bank of Fulton v. Henry Knight and others," for the purpose of filing a copy of this opinion, the orders made in pursuance thereof, a copy of the adjudication in bankruptcy, and an accompanying application for an order of that court directing its receiver to turn over to the trustee in bankruptcy the property of the bankrupt held by the receiver. For the purpose of giving ample opportunity for doing this, the rule will be respited until the 12th day of October, 1903, at which time the trustee will report what has been done in the premises.

NOTE. The state court took the same view of the law, and on October 1st ordered its receiver to turn over to the trustee in bankruptcy all the property in his hands.

McCARTY v. HERYFORD.

(Circuit Court, D. Oregon. August 18, 1903.)

No. 2,732.

1. BREACH OF MARRIAGE PROMISE—DAMAGES—EXCESSIVE VERDICT.
A verdict for $22,500 damages for breach of a promise of marriage, against a man shown to own property of the value of $70,000, incumbered by mortgage for $20,000, is so excessive as to indicate passion or prejudice on the part of the jury, where the offer of marriage was renewed by defendant in good faith after commencement of the action, and when the marriage would have been equally as advantageous to plaintiff, and where the claim of seduction, which was the only matter of aggravation set up by plaintiff, was not made until after such renewal offer, was denied by defendant, and not sustained by a preponderance of the evidence.

2. SAME—EVIDENCE IN MITIGATION OF DAMAGES—RENEWAL OF OFFER.
An offer of marriage by a defendant in an action for breach of promise after the commencement of the suit is admissible in evidence in mitigation of damages, if made in good faith, the jury, however, being entitled to consider any change in the character, habits, or condition of defendant between the time of the breach of the contract and the renewal of the offer which would be to plaintiff's disadvantage, or justify her in rejecting the offer.

At Law. On motion to set aside the verdict and for a new trial.

O'Day & Tarpley and Robertson, Miller & Rosenhaupt, for plaintiff.

Dolph, Mallory, Simon & Gearin, for defendant.

BELLINGER, District Judge. About December 25, 1900, the defendant made a proposal of marriage to the plaintiff, which was accepted four or five days later. It was agreed that the marriage should take place on December 25th of the following year, at the plaintiff's home in Wayne, Mich. This engagement was made in Lake county, Or., where defendant's home was, and where plaintiff was temporarily residing. About the 1st of May, 1901, plaintiff went to Ashland, where her sister resided, and thereafter returned to her home

¶ 2. See Breach of Marriage Promise, vol. 8, Cent. Dig. §§ 13, 44.

in Michigan. The parties corresponded regularly until the 10th of October of that year, when the defendant wrote to the plaintiff that he had changed his mind, and was not coming back to marry her. Further correspondence took place between the parties, the last letter being one from the defendant dated December 28th, in which he adheres to his decision not to marry the plaintiff. The plaintiff in the meantime offered to release the defendant from his promise to come to Michigan to be married, and to meet him at Reno for that purpose. On the 8th of September, 1902, this action was begun for breach of promise, for damages in the sum of $70,000. In her complaint plaintiff alleges that, "confiding in defendant's promise, she has always since remained and continued, and still is, sole and unmarried, and has been for and during the time aforesaid, and now is, ready and willing to marry the said defendant." When service of the summons and complaint was made upon the defendant he wrote to the plaintiff offering to marry her, and requesting her to meet him at Reno for that purpose. He inclosed in his letter a draft on New York for $200 to pay her expenses to Reno, and requested her to wire him the probable date of her arrival there, so that he could meet her. To this letter and offer no response was made. Plaintiff cashed the draft, and deposited the money in a local bank, taking a certificate of deposit therefor in her own name, which she has since retained. On February 24, 1903, an amended complaint was filed, from which the allegation of plaintiff's readiness and willingness to marry the defendant was omitted, and in which it was alleged that plaintiff, as the result of defendant's breach, was greatly humiliated and suffered great anguish of body and mind, to her damage in the sum of $68,100. Special damages were alleged for loss of earnings, amounting to $1,200, as school-teacher, and for expenditures in preparing for her marriage in the sum of $700, making the total amount claimed $70,000, the amount claimed in the original complaint. The plaintiff testifies that the claim of $700 was a mistake of her attorney. The amount claimed on this account is stated in her last amended complaint at $200.

On the morning of the day of trial application was made in plaintiff's behalf for leave to file a second amended complaint, for the purpose of alleging seduction in aggravation of damages, and upon the representation of plaintiff's attorney, made in explanation of the lateness of the application, that the fact of seduction had only come to the knowledge of plaintiff's attorneys within a few days preceding, leave was granted as requested, and the second amended complaint was filed. In this complaint it is alleged that defendant, under promise of marriage, seduced the plaintiff, and it is alleged, for the first time, that plaintiff has been greatly injured in health, both of body and mind, by reason of defendant's conduct. Special damages in the sum of $1,200 are alleged on account of loss of employment as school-teacher, and for expenditures in preparing for marriage, $200. The prayer is for a judgment in the sum of $60,000, and the further sum of $1,400 for costs and disbursements in the action, in all $61,400. The jury found for the plaintiff, and assessed her damages in the sum of $22,500.

Defendant moves for a new trial because of errors which he claims were committed by the court during the trial, and upon the ground

that the damages assessed are excessive, and appear to have been given under the influence of passion or prejudice.

Plaintiff was at the time of her engagement to the defendant 30 years of age, and a school-teacher by occupation. She seems to have taught school frequently not far from the neighborhood where she lived, and during one summer in the state of Indiana, and at different periods of her life she had worked in, or had charge of, three or four different post offices. The defendant was 46 years of age, and was reputed to be worth $200,000. He was a widower with children, one of whom was an invalid. It was shown by the testimony of an attorney who had special opportunities for knowledge on the subject that the defendant was worth about $70,000, consisting of an interest in certain stock ranches in southeastern Oregon, and that he was indebted in the sum of $20,000, secured by mortgage.

A verdict in so large a sum in such a case is unusual, and I believe it to be unprecedented. Among the cases cited in plaintiff's brief on this motion, there is but one where the verdict was as large as this. That is the case of Campbell v. Arbuckle, where the verdict was for $45,000. (Sup.) 4 N. Y. Supp. 30. In this case the court, in passing upon the question as to whether the verdict was excessive, says: "The verdict was only four and one-half per cent. for one year of defendant's estate, as he admitted it to be. This cannot be deemed excessive, and affords some evidence that the jury was not influenced by any desire to punish the defendant for his failure to carry out his contract." In another case (one not cited) there was a verdict for $25,000, which was allowed to stand. The verdict was for about one-sixth of the defendant's fortune. In both of these cases unlawful relations were proposed by the defendants, but, so far as appears, they were not entered into.

The next highest verdicts to be found were for $16,000 and $12,500, respectively. Both were aggravated by seduction. In one case the defendant was worth between $50,000 and $75,000, and in the other at least $75,000. In all the cases that I have been able to find none appear that approach in the amounts awarded by the jury the cases last mentioned.

In this case the defendant's estate, as already shown, is of the value of about $70,000, subject to a mortgage of $20,000. If to this mortgage is added the amount of this verdict, with costs and disbursements, and the defendant's necessary expenses in the case, the amount will probably be more than enough to wipe out his entire estate at a forced sale, as may be inferred from the character of the property, the manner in which it is held, and the usual experience where property is sold under legal process. If a jury may thus divest a man of such an estate, and award it for general damages, its power ought to be exercised with great caution, and the facts should not be doubtful nor the injuries redressed altogether speculative in character.

The alleged seduction of the plaintiff was the thing mainly relied upon to increase her damages. It is alleged to have taken place some five weeks subsequent to the promise of marriage, and was therefore not the consideration for the promise, although the relations established by the promise may have been an inducement for an unlawful

relation between the parties. The defendant denies that he seduced the plaintiff, or that he ever had any improper relations with her. The affidavit of the landlady of the hotel at Bly, where the parties stayed one night, contradicts the plaintiff as to the defendant's conduct in engaging a room at that hotel. If this affidavit is true, the plaintiff has attempted to place the defendant in a false light in order to corroborate her statement as to their relations at that place. If she has done this in one part of her testimony as to the alleged seduction, the whole comes under suspicion. There is no explanation of the fact that the claim of seduction was not made by plaintiff, and was not known to her attorneys, until a few days before the trial of the cause. There is nothing in the letters that passed between the parties that hints of such a thing; and while on the trial it was sought to get such a meaning out of the expressions on her part that "in the sight of heaven they were married," yet these expressions do not necessarily imply improper relations between the parties, and were not so understood by her attorneys, who probably examined this correspondence beforehand, and who were not advised, as already stated, of this feature of the case until the eve of the trial. In her letter written after the defendant had informed her that he could not keep his promise to her, she recounts the wrongs done her by his faithlessness, but there is nothing said that is inconsistent with a perfectly lawful relation between them. It would seem that then, if ever, the wronged woman would have spoken; that, if in her list of grievances anything was omitted, it would not have been that grievance which is the greatest a woman can suffer at a man's hands. A letter by the plaintiff to the defendant, written on May 29th, a few days before the trial, was offered in evidence, but was not admitted. It was stated in open court, when this offer was made, that the plaintiff in that letter advised the defendant of her claim of seduction. The significance of the omission from her letters written at the time of the breach of any reference to such a charge is increased by this letter of May 29th, and by the fact that copies of these letters were kept by plaintiff, probably with a view to the use that is now made of them. Her explanation of these copies is that they were originals which, owing to her state of mind, were so written that she feared the defendant could not read them; that she therefore copied them, and sent the copies. But these originals show for themselves; they are well and plainly written. A few unimportant words are crossed out of them, the inference being that, in making the second draft, these words were omitted, and that thereafter the two drafts were carefully compared, and the words omitted in the second crossed out in the first, so that the retained original should be an exact copy of the letter sent. There is no copy of any antecedent letter. Moreover, these letters were registered, and the registry receipts are attached. She explains this by saying that theretofore in their correspondence something had been said to the effect that he did not get all of her letters; but she wrote at least two letters after this, and it seems not to have occurred to her to register these. The suspicion in which her uncorroborated testimony is involved as to this feature of the case is increased by the fact, of more or less significance, that while the alleged improper relations are said to have been main-

tained for some weeks in a room over one occupied by a man and his wife, with an eight-foot ceiling, in an unplastered house, where, according to her own testimony, the noise could be easily heard by the occupants of the room below, not a breath of scandal or suspicion was created as to the relations of the parties, although the other occupants of the house testify that the occurrences narrated by the plaintiff could not have taken place without some knowledge on their part to excite suspicion of what was going on.

It is the province of the jury to decide whether the plaintiff has told the truth. The inquiry which the court makes is not to ascertain whether they have erred or not in that behalf, but whether there has been error so flagrant as to imply that they have acted under the influence of passion or prejudice. A verdict not exceptional in character, upon doubtful facts, should not be disturbed; but an exceptional verdict, against the weight of the evidence, cannot be allowed to stand. The judgment rendered upon a verdict is the judgment of the court, and the respect which is due to the verdict does not require the court in any case to enter an unjust judgment.

The law is that an offer of marriage by a defendant in a case of this kind, made after the action is begun, if made in good faith, may be considered by the jury in mitigation of damages. Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275. The cases are not in accord as to this. One case, Bennett v. Bean, 42 Mich. 346, 4 N. W. 13, holds that such an offer is not admissible in mitigation of damages. The reasoning of the court is that the principle which would permit such evidence in any case would admit it in a case where a man respectable, virtuous, of wealth, etc., should subsequent to his breach enter on a life of debauchery, and then when sued offer marriage, when any woman of respectability would shrink from his polluted touch. The criticism to be made upon this reasoning is that it assumes that the jury must give the same consideration to the subsequent offer in all cases. It is a question for the jury in the particular case as to what allowance, if any, should be made because of the offer. In all cases the effect of the offer depends upon the advantages offered. If the subsequent offer is in all respects as advantageous as the first offer, there is no reason why the plaintiff should reject it for its equivalent in money. Public policy is better served with the compromise of marriage than with sensational litigation, that spreads before the public, eager to listen, the secrets of a courtship and the unsavory details of a seduction; and when it is manifest that the jury has refused to give consideration to an offer in such a case the verdict should, in the interest of private justice and public morals, be set aside. The weight of authority and the better reasoning support the rule stated. When the defendant received a copy of the original complaint in this case, containing the allegation that the plaintiff was still ready and willing to marry the defendant, the latter wrote her the following letter:

"Lakeview, Oregon, Sept. 15, 1902.

"Miss Birdie McCarty, Dear Birdie:—I was surprised when an officer to-day served me with a copy of your complaint for breach of promise of marriage; I did not believe that you would sue me for money because you so often said

you loved me for myself and I believed you, and still believe that you sued me not through your own desire but by the advice of others. You know that I have liked you for your interest and sympathy in me and admired you for your education and ability. You know too, had it not been for my great trouble caused by the sickness of my son Archie who required my constant attention during the last twelve months and as a cause of such sickness he is now totally blind in both eyes and still unable to help himself in any way. Had it not been for all this I should have gone to you and kept my promise, but surely you would not wish me to be so selfish, cruel and unfatherly as to leave my own child dying on a sick bed and go East in order to get married. You, womanlike, can understand my feelings in this matter better than I can explain them.

"I wish you to feel that I am quite willing to marry you. Could I leave my son now, I should go and tell you this in person rather than by letter, but as you promised to meet me in Reno to be married their (there) I now request that you do so as soon as convenient and notify me by wire the probable day that you will be in Reno and I shall meet you their (there) and we will be married. I enclose a draft on New York for two hundred dollars to pay for your expenses to Reno and after we are married we shall purchase such things as you think necessary to furnish our house.

"Hoping that you will come quickly to Reno so that we can be married at once and I shall try hard by kindness and affection to atone for any injury or neglect of the past. J. D. Heryford."

This letter offered the plaintiff all the advantages and inducements of the original promise for which money damages are sought in this action. It is not claimed that the defendant has less wealth, or is less virtuous and respectable, than he was at the time of the breach. All the advantages that the marriage then promised her she could have had by accepting the offer of September, 1902. The reparation for her seduction, if there was seduction, would have been as complete then as if the first promise had been kept, and would have been infinitely more complete than any reparation that can be made in money. There is nothing to impeach the defendant's good faith in the subsequent offer, unless the breach of his promise has that effect, and this is plaintiff's contention. The defendant's breach is urged as evidence that his subsequent offer was not in good faith. But if the breach has that effect, then, of course, the offer of marriage made after suit cannot in any case be considered in mitigation of damages, and the rule would be abrogated by the conditions which give rise to it. Furthermore, the plaintiff was willing to come to Reno and marry the defendant in December—two months after he had notified her that he could not keep his promise to her. She was willing to trust him then, and she would have been willing to marry him at the time he made his offer after the suit was begun, so she testified, if he had come to her home for that purpose; and she would have married him, so she stated in her testimony, at the time she came to Portland to attend this trial, if he would have secured her financially.

The letters in which the defendant stated that he had changed his mind, and that he had ceased to love the plaintiff, show that a very great affliction had overtaken him in the blindness of his boy. In the first of these letters he says that "Archie is sick again," and has been so for two weeks. In the following letter he says that "Archie is blind, hasn't seen anything for two weeks, and the doctor says he may be that way always." In the meantime the blind boy was being cared for by his grandmother and the defendant. The plaintiff was

conscious of the fact that the defendant's change of feeling towards her had been influenced, if not caused, by the calamity that had overtaken his boy. In her answer to the letter which stated that he had changed his mind, she says, "I know Archie's sickness causes you to worry," and she offers to help take care of the invalid. In his letter to her of December 28, 1901, in answer to a letter of hers of the 13th of that month, he reminds her that she had said she "never could live here at Lakeview only a little while at a time," and he gives this as a reason for thinking that the marriage had better not take place. In this letter he again refers to the sick boy, who "can't see yet and cannot help himself very much."

It is not at all surprising that the feelings of this man, then 47 years old, with his hopelessly blind boy requiring constant care, should change in respect to marriage, and that he should conclude not to marry a woman who could not be content to live where he was compelled to maintain his home "only a little while at a time." There was no hope for him in such a marriage of the companionship that belongs to the married state, and it seems doubtful, from her statements to the defendant and from her testimony, whether there was expectation or desire for it on her part. These conditions do not justify his breach, but they relieve his conduct of the imputation of bad faith. The letter containing his subsequent offer is creditable to both parties. It shows a high regard for plaintiff, and a determination on defendant's part to be a good husband to her. There is no redress that a court of law can give to a woman in her situation that equals what was here offered. It seems incredible that she should have preferred to make merchandise of her good name, hitherto unsullied, by proclaiming her unchastity, in order to increase the sum of money she expected at the hands of a jury.

My conclusion is that this verdict is so grossly excessive as to imply that the jury acted under the influence of passion or prejudice, and that it should be set aside. The motion to set aside the verdict and for a new trial is allowed.

UNITED STATES v. THREE PACKAGES OF DISTILLED SPIRITS.

(District Court, E. D. Missouri, E. D. September 18, 1903.)

1. INTERNAL REVENUE—CHANGING CONTENTS OF PACKAGE—ADDITION OF COLORING MATTER TO DISTILLED SPIRITS.

The provision of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], which subjects to forfeiture every barrel, with its contents, which has been stamped or marked to show that the contents have been duly inspected or the internal revenue tax thereon has been paid, if such barrel contains "anything else" than the contents which were therein when said barrel was so stamped or marked, is plain and unambiguous, and must be literally construed. While the government would be estopped to claim a forfeiture of distilled spirits because of the addition of water thereto after the barrels or casks containing the same had been stamped, where the reduction was made in accordance with the regulation of the department permitting the same, such estoppel is not broader than the regulation, and the addition of a coloring matter to such spirits, such as caromel, is a violation of the statute, which subjects the liquor to forfeiture.

On Motion for New Trial.

David P. Dyer and Horace L. Dyer, United States Attys.
Warwick W. Hough, for claimants.

AMIDON, District Judge. This is an information filed by the United States seeking the forfeiture of three packages of distilled spirits for an alleged violation of section 3455 of the Revised Statutes [U. S. Comp. St. 1901, p. 2279]. The evidence shows that the distilled spirits in question were produced in the state of Kentucky. When they were withdrawn from the receiving cisterns at the distillery the casks in which they were stored were stamped in accordance with section 3287 [U. S. Comp. St. 1901, p. 2130], and at the time they were withdrawn from the warehouse the casks were further stamped in accordance with section 3294 [U. S. Comp. St. 1901, p. 2135]. The liquors were, therefore, what are known as two-stamp liquors. Thereafter, under the regulation of the commissioner of internal revenue permitting such reduction, a quantity of water was added to the distilled spirits, whereby their proof was reduced from about 100 to 90. This was done on the premises of a duly qualified wholesale liquor dealer, in the presence of a government gauger, who affixed to the cask the stamp required by said regulation. It is charged by the government that after this was done a quantity of burnt sugar or caromel was surreptitiously added to the liquors, whereby the color was restored to what it was before the proof had been reduced, and thereafter the packages, with their contents, were sold. It is this addition of burnt sugar or caromel, and the subsequent sale, which the government claims constitutes a violation of section 3455. A demurrer was interposed to the information, and overruled. At the close of all the evidence the claimant moved the court to direct the jury to return a verdict in its favor, which motion was denied, and thereafter a verdict was returned in favor of the government. On the present motion for a new trial it is not contended by counsel for claimants that the evidence was not sufficient to require the submission of the case to the jury, but the position now taken is the same as that urged upon the demurrer and the motion for a directed verdict, namely, conceding that the charge of the government is proved, still the facts constitute no violation of law.

So far as I know, this is the first time that the precise question now raised has been presented to a court for determination. A large number of cases have arisen under section 3289 of the Revised Statutes [U. S. Comp. St. 1901, p. 2132], and it is urged that those cases are decisive of the one at bar. I do not so regard them. Section 3289 reads: "All distilled spirits found in any cask or package containing five gallons or more without having thereon each mark and stamp required therefor by law shall be forfeited to the United States." Among the cases which have arisen under this section are Three Packages of Distilled Spirits (D. C.) 14 Fed. 569; United States v. Fourteen Packages of Whiskey (D. C.) 66 Fed. 984, 14 C. C. A. 220; United States v. One Package of Distilled Spirits (D. C.) 88 Fed. 856. An examination of these cases will show that the only point decided by

them was this: The only marks or stamps "required by law" are those specified in sections 3287 and 3295 [U. S. Comp. St. 1901, pp. 2130, 2135]. In each of the cases referred to those stamps were found upon the casks. It was claimed by the government that because the liquors at the time they were seized did not correspond as to proof with the stamps that they were therefore subject to forfeiture. The courts held that this was not the true construction of section 3289, but that the stamps mentioned were to speak as of the time they were affixed to the casks. At that time they spoke the truth. If the contents of the casks were thereafter changed either by natural causes or by artificial means, this change could not bring the liquors within the scope of section 3289. In the case of United States v. One Package of Distilled Spirits (D. C.) 88 Fed. 856, the same contention was made with respect to the regulations prescribed by the President and the heads of departments under section 3287; but the court there properly held that, while these departmental regulations could be made for the purpose of carrying existing laws into effect, a violation of such regulations could not be made by the regulations themselves a ground of forfeiture. The opinion in this last case contains the following statement: "In quite a line of decisions the courts of the United States have held that the addition of water or sugar to a package of distilled spirits on which the tax has been previously paid is no violation of law, and does not work a forfeiture of the spirits." This remark is purely obiter, and finds no support whatever so far as the addition of sugar is concerned in the authorities cited.

The only case in which section 3455 [U. S. Comp. St. 1901, p. 2279] has been brought under direct judicial consideration is United States v. Nine Casks of Distilled Spirits (D. C.) 51 Fed. 191. This case arose on a demurrer to an information which charged that the packages in question at the time they were sold contained "something else than the contents that were in the packages when they were stamped, to wit, other distilled spirits of a different and lower proof and quality." It was there held that this information charged an offense under section 3455. That was the only question decided, but the court further states, "to avoid any misconception," that the addition of water would not constitute a violation of this section. This remark is purely obiter, and the opinion contains no statement of the reasons for the holding. It is, however, susceptible of entire justification. I think it exceedingly doubtful whether the addition of water would not constitute a violation of section 3455 for reasons which I will explain later. But I do not think the government, after having promulgated a regulation authorizing the reduction of proof by the addition of water, could claim a forfeiture upon that ground.

The provisions of section 3455 which are pertinent to the present case read as follows:

"Whenever any person sells any barrels stamped, branded or marked in any way so as to show that the contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal revenue law has been complied with, said barrel being empty or containing anything else than the contents which were therein when said liquor had been so lawfully stamped, branded or marked by an officer of the revenue, he shall be liable," etc.

This clause of the law deals with two kinds of vessels: First, those that are empty, and it is made unlawful to sell any such vessel while it bears the government stamps or brands. That is the first feature. The second makes it unlawful to sell any vessel thus branded if it contains "anything else" than the contents which were therein when said liquors were lawfully stamped and branded. I should think that language too plain for construction, if the internal revenue department had not seen fit to promulgate the regulation above referred to. "Anything else" would include water or sugar or wine or whisky or coloring matter. It is as comprehensive as language can be made. But the internal revenue department, under the section giving it power to make rules and regulations, has seen fit to make a rule or regulation on this subject which permits the reduction of the proof of liquors by the addition of water after the stamps have been affixed. It was explained upon the argument of the present case that this rule was promulgated for the purpose of placing distillers in the United States and dealers in liquors distilled in the United States on an equality with persons handling the same kind of distilled spirits which were imported from foreign countries. Such imported liquors were not subject to the regulations of the internal revenue law. The importer or dealer in them was at liberty to treat them in whatever manner he saw fit. This led to serious complaints by American distillers and those handling liquors produced in this country. To meet that difficulty the regulation was made. The careful language in which it is framed, however, shows that the officers of the internal revenue appreciated the danger of its abuse, and threw about the permission granted every protection possible. The rule requires that such reduction of proof shall be made in the presence of a government gauger, either at a distillery or a government warehouse, or upon the premises of a duly qualified wholesale liquor dealer. Written application is required for permission to make the reduction, and the government gauger is directed to stencil upon the vessel his name and title, and between the name and title words and letters showing unmistakably the change that has been made.

I think it may be seriously doubted whether this regulation is valid. Of course, it is not if it is in conflict with section 3455. United States v. Two Hundred Barrels of Whiskey, 95 U. S. 571, 24 L. Ed. 491, and United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. But the government, having, through its officers in charge of the internal revenue, promulgated the regulation permitting the reduction, would be estopped to claim a forfeiture of liquors for an act done in conformity therewith. This was probably the ground of the remark of the court in 51 Fed. 191, "that the addition of water would not subject the liquors to forfeiture." The estoppel of the regulation, however, is not broader than the regulation itself. It does not permit the addition of anything except water, and cannot, therefore, be put forward as a justification for the addition of caromel or burnt sugar or other coloring matter.

It is said in many of the decisions to which reference has already been made that the primary object of the internal revenue law is to prevent frauds upon the revenue. That is no doubt true, but what

will best accomplish that purpose is a matter for legislative, not judicial, discretion. In the judgment of Congress there were many classes of acts which ought to be prohibited because of the possibility of their being done for the purpose of defrauding the revenue. These provisions of the statute were made not for the reason that none of the prohibited acts could be done without defrauding the revenue, but because some acts falling within the class would be done for that unlawful purpose. Now, in the trial of any given case, it would be no defense that no fraud upon the revenue was in fact intended or accomplished by a forbidden act. The courts are bound to enforce the law as it is written, and not to pare down its specific mandates by a consideration of the general purpose for which the law was adopted. The primary purpose of many of these regulations is to save the government from being brought to a trial of the question whether the intent was to defraud the revenue or whether any such result has been attained; for in the trial of such an issue all the knowledge and all the evidence is in the possession of the defendant, and whether his act in fact defrauded the revenue would be exceedingly difficult for the government to establish in court. The evidence in this case is persuasive on that subject. The record shows that chemists of national reputation were in direct conflict as to whether any sugar or caromel had in fact been added to the packages complained of. Now, if in addition to proving the fact that "something else" had been added to the package, the government was put to the proof of intent, and to the further proof that by the act complained of the revenue had been defrauded, an issue would be raised in which the government could rarely make out its case. The whole scheme of the internal revenue law contemplates that at every change that takes place in distilled spirits, except such as arise by natural causes, a government officer shall be present, and shall register upon the vessel containing the distilled spirits the change that is made, so that, as Judge Thayer well remarks, "the government can readily trace the origin and history of each cask, and thus prevent frauds upon the revenue." If changes could be made in the absence of the officer, and the owner of the distilled spirits could escape liability by proof of an honest intent, and that his act had in no way defrauded the revenue, it would be well-nigh impossible for the government ever to establish a case. Its only proof would be such as could be derived from a chemical analysis of the contents of the package, while the defendant would not only be permitted to resort to the same evidence, but could further add the direct and positive testimony of himself and his employés. It needs but a moment's consideration to see that an act coming within the terms of the statute could not be justified, though done with an honest intent and without any actual loss to the government. Take the very statute we are considering. If the owner of a vessel which had been used for distilled spirits, and which bore the stamps required by law, the same being empty, should sell it for the purpose of storing vinegar, the intent would be honest, and no fraud would be perpetrated upon the revenue, but no one would contend that the act would not constitute a violation of the first clause of this section. Learned counsel for claimants urges that the "anything else" referred to in the statute

must possess these qualities: (1) It must be something put in to be sold under the stamps; (2) the contents must be a different thing in its entirety; (3) it must be something subject to tax. Assume that the officers of the internal revenue have discovered a vessel containing distilled spirits which have been tampered with after the official stamps were affixed, and that in order to make out a case under section 3455 of the Revised Statutes the government will have to establish by a preponderance of the evidence that the substance which has been added to the distilled spirits possesses these attributes, or that the case of the government would be defeated by a claimant who could prove that the substance added did not possess all these elements, and it will be manifest at once that the statute would be rendered of no practical force or effect. As was said by the court in Michel v. Nunn (C. C.) 101 Fed. 423:

"If we begin to determine what sort of materials are meant, if we say that water and sugar, and blackberry juice, and orange juice, and lemon juice, are not materials within the sense of the act, the trouble is to find a stopping place, and show what will be a material within the meaning of the act."

If the government finds that the liquors have been altered by the addition of something else than was in the vessel at the time it was stamped and branded, how is it to prove that that something else is an article subject to the payment of an internal revenue tax? If we say that anything which is not subject to such tax may be introduced, then not only coloring matter, but any chemical compound which would affect either the taste or the appearance of the liquid, could be added, and in any given case it would be quite impossible to show whether that which was added was other distilled spirits or some chemical substitute. It is because of the difficulty of proving what has been put into the liquors, and because all the direct evidence in relation to the fraud, if a fraud is committed, would be in the control of the party who would profit by it, that Congress has wisely seen fit to forbid in unqualified terms the addition of anything, and it is impossible to find any practical criterion less absolute than the statute itself.

It is suggested by counsel for claimants that the internal revenue officers virtually repudiated the holding of the court in Michel v. Nunn (C. C.) 101 Fed. 423, because, after that case was decided, they permitted, by a regulation, the addition of burnt sugar to fruit brandy. This regulation, however, was made under the authority expressly conferred for that purpose by section 3255 of the Revised Statutes as amended by the act approved June 3, 1896, c. 309, 29 Stat. 195 [U. S. Comp. St. 1901, p. 2111].

The motion for new trial is therefore denied.

THE NORTHLAND.

(District Court, W. D. New York. September 15, 1903.)

No. 105.

1. COLLISION—VESSEL LANDING AT DOCK—DUTY TO KEEP LOOKOUT.
It is the imperative duty of a steamship, when making a landing at a dock in a river where other vessels are constantly passing, to maintain an efficient lookout, and the absence of such lookout cannot be excused on the ground that all the crew were otherwise engaged.

2. SAME.
A large lake steamship was making her berth in Buffalo river where it was about 250 feet wide. A steam canal boat, with two other boats in tow on a line, passing down the river, meeting a tug when about opposite, after giving the proper signals, went to starboard, and passed within a few feet of the steamship, which was apparently stationary at her berth. The steamship had no lookout, and no watch astern, and paid no attention to the passing vessels or their signals. When one of the tows was opposite the stern of the steamship, the latter started one of her propellers at high speed, creating a suction which drew the canal boat from her course and caused a collision, resulting in the sinking of the canal boat soon after, from injury inflicted by the ship's propeller. Had a proper watch been maintained, and attention given to the passing tows, the injury might readily have been avoided. *Held*, that the ship was in fault, and that the canal boat was not in fault or negligent, having the right to assume that the ship would perform her duty, and avoid subjecting the passing boats to danger of collision by operating her propellers.

In Admiralty. Suit for loss of cargo through collision.

George Clinton, for libelant.
Joseph G. Dudley and Harvey L. Brown, for the Northland.
John W. Ingram and Frederick G. Mitchell, for Lena Beadle.

HAZEL, District Judge. This is a proceeding in rem against the steamship Northland, and in personam against the owners of the canal boats Campania and Columbia, to recover certain damages to the Campania's cargo, resulting from the negligent manner in which the aforesaid vessels were navigated, whereby the Campania was sunk. Upon the abandonment of the cargo by the cargo owners, libelant paid to them their loss, and thereby became subrogated to their legal rights and remedies.

The facts established by the proofs are these: On June 18, 1900, at about 5 o'clock in the afternoon, weather clear, the large passenger steamship Northland, returning from a trial trip on Lake Erie to the port of Buffalo, N. Y., proceeded unaided under her own motive power up Buffalo river to the dock at the foot of Main street, her regular landing. As the steamship was getting into her berth, the steam canal boat Columbia, in charge of a licensed pilot, having the canal boats Campania and Chicora in tow, each heavily laden, one astern of the other in the order named, came north towards the river through Peck Slip, which enters Buffalo river from the south just above the point where the bow of the Northland ordinarily lies when secured to her dock. The canal boats were each approximately 98 feet in length over all, and 18 feet beam. The Northland has two engines port and

starboard, with corresponding screws, and is 386 feet over all, 40 feet beam, and of 5,000 tons burden. The Columbia's tow line from her stern to the Campania was about 20 feet long and the towline from the stern of the Campania to the Chicora about 35 feet. At the time the steamer was making her berth, with her stern near mid-stream, the Columbia and tow were then entering Peck Slip from Blackwell Canal, and gave the usual bend signal of one blast of her whistle. She repeated the signal very soon afterwards, upon leaving the slip to turn into the river. The Northland, having stopped her headway, was then alongside the opposite northerly bank, her bow resting approximately 30 feet distant from the Columbia, which had straightened into the river, and had sounded several short and rapid blasts of her whistle to an approaching steam tug on her port side. These signals were sounded in compliance with governing rules, usage, and custom. None of the signals were answered by the steamship, and no attention was paid by her to the Columbia and tow. Believing the Northland to be stationary in her berth, the Columbia proceeded in her course in a westerly direction down the north side of the river, and about 20 feet distant from the steamship on her starboard side. The Northland's port propeller was in motion to facilitate landing. It freely lashed the water, causing a suction which suddenly drew the Columbia's bow, without any warning, towards the propeller, but by a prompt maneuver she straightened into her course. The motion of the screw then stopped, but very soon afterwards, just as the stern of the Campania came opposite the steamer's fan tail, the Northland's starboard propeller, suddenly and without warning, began to rapidly revolve, producing a suction and commotion of the water which drew the passing Campania towards the revolving screw under the stern of the Northland, where the screw impinged upon her starboard quarter. The Campania, by reason of this injury, soon afterwards sunk in Watson Slip, which is near by, whither she was assisted by the steam tug Cascade. Her cargo was greatly damaged. At the point of collision the channel is approximately 250 feet wide, and steam tugs, vessels, canal boats, and tows are constantly passing. The Columbia and tow were not seen by the master of the Northland, and her signals were not heard, or, if heard, were not heeded. No lookout was stationed upon the steamer's deck, instructed to report signals or the approach in the river of other vessels. Neither had the Northland a lookout at her stern or on her starboard side, next to the river, who could have seen a passing vessel or tow, or a threatened danger, and, by giving timely warning, have stopped the engine until the tow had safely passed beyond the steamer's stern. The master of the Northland substantially testifies upon this point that, if he had known of the presence of the tow, he could have averted the injury to the Campania by stopping the revolving propeller within half a minute. According to the engineers of the Northland, all of whom were on duty at their post, the engines were stopped instantly upon hearing and feeling the jar of the collision, and before receiving the signal to stop from Capt. Brown. In explanation of the absence of a lookout, the master of the Northland further testifies that it is not usual or customary for landing steamers to have a lookout forward and

astern when the vessel is practically secure in her berth, or, indeed, while she is proceeding up the river to her dock. The claim of the steamship is that her propellers were alternately and continually working for quite a distance before reaching her place of landing. To get into her berth, she worked her bow slowly towards the dock, using her port propeller to go ahead, and at the time of the accident her starboard propeller was used to throw her stern, which was 15 feet out in the stream, towards the dock. There was a barge ahead, alongside the dock, and an excursion steamer immediately astern of the steamship's berth, requiring the landing to be made between them. While the Northland was in this situation, with her bow line around the timber head on the dock, and the heaving line at stern, ready to make fast, and almost ready to discharge her passengers, her master, who was upon the bridge on the port side, quite a distance from the accident, felt a slight jar, and almost instantly received a signal from aft to stop the steamship's propeller. This was done. The injury to the Campania, however, had then happened.

The argument of counsel for the Northland, explaining the absence of a lookout, is based upon the fallacious theory that the entire attention of the officers and entire crew was needed to make a safe and careful landing; that to report passing vessels to the master at such time would distract his attention, so that safe landing might be imperiled. This contention cannot be held to be in accord with that degree of care and vigilance which a steamer is bound to exercise in seeking her berth or in making a landing. It is unimportant whether a steamship is endeavoring to effect a landing or a departure. The duty to maintain a proper lookout is imperative, and where vessels are in close proximity the absence of such a lookout is not sufficiently excused by other engagements of the crew. Thorp v. Hammond, 79 U. S. 408, 20 L. Ed. 419. The degree of care required of a steamship depends upon the circumstances surrounding each particular case. The measure of care demanded by the particular situation may be extraordinary care and watchfulness or such reasonable care only as a prudent person would use to avoid doing injury. The Nevada, 106 U. S. 159, 1 Sup. Ct. 234, 27 L. Ed. 149; The City of New York, 54 Fed. 181, 4 C. C. A. 268. I am of opinion that the Northland is at fault for not having had a competent lookout, properly instructed to report to the master signals and approaching vessels, and also for lack of proper watch astern. Had such precautionary measures been taken, the accident could easily have been averted. Indeed, had the plain obligation to avoid harm to other vessels having equal rights in the river been heeded, the prospect of the injury complained of would have been exceedingly remote. Such injury could then have been received only through the negligence of the injured ship. It is a positive legal duty of a vessel, in making her berth or dock, to stop moving if in motion in a channel or narrow river, where other vessels are passing, whenever injury is threatened to another vessel on account of the commotion produced in the water by her screw. The Nevada, supra; The City of Macon (D. C.) 20 Fed. 159; The Colon, Fed. Cas. No. 3,025; Clapp v. Young, Fed. Cas. No. 2,786. No custom or usage can be established requiring a less reasonable precaution. The

City of New York, supra, cited by counsel for respondent, is not a precedent here. That case merely holds that no recovery could be had by a tug employed to assist the respondent vessel to her dock, because such tug had notice of the intermittent use of the libeled steamship's propellers, and therefore voluntarily assumed a position of danger. In the case at bar the Columbia three times gave notice by signaling of her presence and movements. Assuming that the Northland's propeller, while docking, was astir in the water, which the Columbia should have seen, she nevertheless had a right to presume that the revolutions of the propellers would momentarily cease, or at least would be operated with due regard to her proximity and safety. Irrespective of conflicting testimony as to whether the Northland was actually stationary in her berth, the Columbia was undoubtedly justified in believing that the steamship was so secured to her dock that no harm or danger to her, as a passing tow, need be apprehended. The failure of the Northland to answer the signals sounded by the Columbia when she turned into the river, and on account of her nearness to her place of landing, might well convince the Columbia that she could proceed safely in her course down the river alongside and in close proximity to the Northland.

The respondent steamship contends that the propellers of the Northland were intermittently in continual motion in the steamship's entire course up the river to her berth; that the commotion of the water produced by the propeller could have been observed for a distance of more than 100 feet, and therefore the approaching Columbia must be held in fault for directing her course through the water in close proximity to the screw. This contention lacks merit, for, as already remarked, the Columbia was entirely justified in assuming that the Northland would perform her duty in such a situation, and seasonably stop the propeller to prevent injury. Nor was the Columbia negligent in continuing in her course after she had succeeded in safely passing the steamship. I am satisfied from the evidence that the port propeller, which was in motion, stopped while the Columbia was passing. Under the circumstances, she could very properly assume that her passing with tow had been noted by the officers of the Northland, and no further danger or harm would be precipitated by the movement of any of her propellers. The evidence clearly preponderates that the sudden and unexpected starting of the starboard propeller as the Campania was passing, in and of itself, produced the accident, which, however, as we have seen, could have been avoided by the presence of a competent lookout. The absence of a lookout at such a time, stationed where danger to passing vessels in the river could be observed, and timely notice given to the officers in charge, is a fault for which the Northland is liable. In failing to comply with this reasonable precaution, the burden is upon the Northland to prove that the accident was owing to other causes, for which she is not chargeable. Clapp v. Young, supra; The Hansa, Fed. Cas. No. 6,037. The cases hold that "where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some pre-

sumption, at least, adverse to its claim with regard to the propriety of the conduct of such other vessel, and any reasonable doubt should be resolved in its favor." Such is the doctrine enunciated in The City of New York, 147 U. S. 85, 13 Sup. Ct. 211, 37 L. Ed. 84. See, also, The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Oregon, 158 U. S. 187, 15 Sup. Ct. 804, 39 L. Ed. 943.

I conclude, on the evidence as a whole, that the charges of fault set forth in the cross-libel are not well founded. The evidence abundantly shows that a wide turn of the bend of the river by the towing canal tug was made necessary to safely navigate the tow on account of the presence of a dredge and scow which were moored on the opposite bank, and which occupied approximately 50 feet of the river. It also appears that the steam tug Elk was passing up the river on the port side of the Columbia and tow. These conditions made it practically necessary that the Columbia and tow should pass down in a course close to the north bank of the river, and hence in close proximity to the Northland. The evidence of the respondent owners of the Columbia and of the Campania sustains the view that both canal boats were properly navigated and equipped. On all the evidence, therefore, no fault for the collision is attributable to them, or either of them. The cross-libel is dismissed.

A decree may be entered for libelant against the steamship Northland, and an order of reference to the clerk of this court to compute the damages.

MORRIS v. CHESAPEAKE & O. S. S. CO.

(District Court, S. D. New York. October 8, 1903.)

1. CONTRACTS—PERSON ENTITLED TO SUE FOR BREACH—UNDISCLOSED PRINCIPAL.
   The real principal for whose benefit a contract was made is entitled to avail himself of the contract, even though the other party had no knowledge that there was an undisclosed principal.
2. SAME—CONTRACT FOR CARRIAGE OF CATTLE—RIGHTS OF ASSIGNEE.
   A contract for the carriage of cattle on certain vessels is assignable by the shipper, and the assignment vests the assignee with the right to sue thereon in his own name, notwithstanding a provision therein that no part of the space contracted for shall be sublet without the consent of the shipowner.
3. SAME—CONSTRUCTION—VESSELS "ALL SAILING."
   A contract by a steamship company for the carriage of cattle on certain specified vessels, "all sailing" during certain months, imports a warranty that all the vessels named will sail during such months.
4. SAME—PAROL EVIDENCE TO VARY.
   Where such contract makes no distinction between the several vessels named, it cannot be changed by parol evidence to except one from such warranty.
5. SAME—RIGHTS OF UNDISCLOSED PRINCIPAL—EQUITIES EXISTING BETWEEN APPARENT PRINCIPALS.
   Where an undisclosed principal comes in and avails himself of the contract, he must do so subject to existing equities between the apparent principals; and a claim for demurrage existing in favor of a steamship

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¶ 1. See Principal and Agent, vol. 40, Cent. Dig. §§ 502, 503.

company against a shipper with whom a contract for further shipments is made may be set off against similar claims arising against the company under such contract, although the latter was in fact made by the shipper on behalf of another who made the shipments thereunder, and in whose favor the claims arose.

In Admiralty. Action to recover damages for breach of contract.

Opdyke, Willcox & Bristow, for libellant.
Convers & Kirlin, for respondent.

ADAMS, District Judge. This is an action which was brought by the libellant to recover from the respondent damages arising out of an alleged breach of contract made between the respondent and Schwarzschild & Sulzberger Company and J. Shamberg & Son and assigned to the libellant. The contract was in writing and is as follows:

"Chesapeake & Ohio Steamship Co., Ltd., Agents.

Special Live Stock Contract.

New York, Oct. 19th, 1899.

Messrs. Schwarzschild & Sulzberger Co. and J. Shemberg & Son—Dear Sirs: We offer, as Agents of Chesapeake & Ohio S. S. Co. Ltd. and owners, and not on our own behalf, to let you suitable space as undernoted, for the transportation of live cattle, that is to say: On the Steamers named in margin intended to be dispatched about Sailing dates as per margin from Newport News, Va., U. S. A. to the Ports named in margin, for 350 head of cattle excepting 'RAPIDAN' and 388 head for S. S. 'RAPIDAN', at the rate of Twenty-seven shillings and six pence Sterling per head. Freight to be paid as customary at destination.

It being stipulated that no responsibility is to attach to the vessel, her owners or her agents, for loss arising from delay in receiving or shipping, or from the Steamer not being ready to embark the animals, or for loss or damage when caused either directly or indirectly by the act of God, the Queen's enemies, strike, mobs, quarantine, insufficiency or defect in fittings, lighterage to or from the vessel, trans-shipment, explosion, heat, fire at sea or on shore, perils or accidents of the seas, rivers and navigation, or arising from boilers, steam, machinery, pumps or pipes of any kind (including consequence of defect therein or damage thereto), collision, stranding, heeling over, upsetting, submerging or sinking of ship in harbor, river, or at sea, however these or any of them may be brought about, or from admission of water into the vessel, whether this shall arise from any of the before mentioned causes, or from any act of omission, negligence, default or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in service of the shipowner's occurring previously to the vessel's sailing, or by unseaworthiness of the ship at or after the commencement of the voyage (provided all the reasonable means have been taken to provide against such unseaworthiness); the other conditions being as customary with us, and as expressed in our form of Live Stock Bill of Lading, a copy of which is hereupon endorsed, and which forms part of the Special Live Stock Contract. No other cattle to be carried.

You are not to sub-let any part of the space referred to in this Contract, without our previous consent, nor until the party to whom you propose to sub-let has signed and delivered to us an undertaking to be bound to all the terms and conditions herein specified, it being understood that you are responsible for the due observance of such undertaking. It is also provided that we shall not be required to give any notice when to ship, except to you, that you are not, under any circumstances, to be relieved from any part of your obligation under this Contract; and that neither ourselves nor the Owners of the Steamship assume any obligations whatever to the party to whom you may sub-let. Bills of lading to be issued at New York as soon as cattle are loaded.

It is distinctly understood and agreed that under no circumstances will cattle be carried free, through the process of crowding a few extra heads in the spaces required for a less number, the freight being payable per head.

Six days' notice to be given you of the date when the steamer will leave Newport News, and the cattle are to be in Newport News, ready for shipment by the time called for, otherwise usual demurrage to be paid the Steamer. And if the cattle are detained in Newport News, detention to be paid for at the rate of 50 cents per head per day.

In consideration of the Shippers engaging the spaces on the above named Steamers, Agents give Shippers the option to be declared on or before April 15th, 1900, of taking the cattle spaces, conditions as above, on their Steamers sailing from Newport News to Liverpool and London for the months of May, June and July, 1900, at 30/- Sterling per head. Should Shippers declare as their option that they will take the spaces for the additional period named above then a new contract shall be made containing an option to the Shippers for a further period of three months on the same terms, option to be declared on or before the fifteenth day of the last month covered by the contract. This arrangement to continue for all the months of the year 1900 in periods of three months each unless Shippers should at any time not avail themselves of their option when this agreement is to terminate.

Shippers have option to be declared upon receipt of the six days' notice of Steamers readiness to receive of declining to ship cattle in which case they shall pay the Steamship Company upon sailing of the Steamer from Newport News one-half of the freight on the cattle in full settlement of dead freight, in which case also no other cattle to be carried.

* * * accept the above offer, and hereby agree and bind * * * to ship the number of animals called for on the terms and conditions there stated. P. Pro Furness, Withy & Co., Ltd.,
Geo L Woolley, Agents."

(Written across the face)
"Accepted Each firm Shipping
one half &
signed severally
not jointly. J. Shamberg & Son.
Schwarzschild & Sulzberger Company.
P. Joseph,
Vice Prest."

(Written on left-hand margin)
"Nothing contained herein shall be construed to relieve any Manager, Agent, Master or owner from any liability which it is made unlawful to contract against by C. 105 of the Acts of the 52d Congress of the United States, approved February 13, 1893, but they shall have the benefits of all the exemption for liability conferred by the Act."

(Written on right hand margin)
"S. S. 'Rapidan.'
S. S. 'Shenandoah.'
S. S. 'Rappahannock.'
S. S. 'Greenbrier.'
S. S. 'Chickahominy.'
S. S. 'Appomattox.'
S. S. 'Kanawha.'" All sailing during the months of December, 1899, January, February, March, April, 1900, for London and Liverpool.

The libellant became the principal by the assignment and the said original parties became his agents in the fulfilment of the contract.

Numerous shipments of cattle were made under the contract for the benefit of the libellant whose acts tended to show a recognition by the respondent of the libellant as the principal in the transaction.

On or about April 5, 1900, the said agents notified the respondent that the option provided for in the contract to continue the contract during the months of May, June and July, 1900, would be exercised. The option for the months of August, September and October, 1900,

was also exercised by notification on or about July 10, 1900, and the option for November and December, 1900, was exercised by notification on or about October 5, 1900.

First Cause of Action.

On or about January 27, 1900, the respondent gave notice to the libellant that the steamer Chickahominy had been fixed to sail from Newport News on February 2, 1900, and the libellant procured and had in readiness for shipment on that vessel 351 head of cattle on the day appointed, but the steamer did not sail until February 6, by reason of which detention the libellant claims damages at the rate of 50c. per day per head, amounting to $702.

Second Cause of Action.

On or about February 20, 1900, the respondent gave notice to the libellant that the steamer Greenbrier had been fixed to sail from Newport News on February 26, 1900, and the libellant procured and had in readiness for shipment 351 head of cattle on the day appointed, but the steamer did not sail until February 28, by reason of which detention the libellant claims damages at the rate of 50c. per day per head, amounting to $351.

Third Cause of Action.

On or about February 24, 1900, the respondent gave notice to the libellant that the steamer Rappahannock had been fixed to sail from Newport News on March 3, 1900, and the libellant procured and had in readiness for shipment 359 head of cattle on the day appointed, but the steamer did not sail until March 5, by reason of which detention the libellant claims damages at the rate of 50c. per day, amounting to $359.

Fourth Cause of Action.

The libellant claims that the respondent at all times during December, 1899, and throughout the entire year 1900, failed to furnish cattle space or to carry any cattle upon the steamer Rapidan, although she made seven trips across, on each trip carrying live cattle and freight at rates greatly in excess of those fixed by the contract with the libellant; that during said period the libellant had in readiness for shipment cattle sufficient to fill the space on the steamer reserved under the contract, whereby libellant suffered damages to the extent of $40,000.

The respondent, answering the libel makes some formal denials and avers that the arrival of the Chickahominy was delayed by sea perils until February 1, 1900, and all reasonable diligence was used to dispatch the steamer as soon as practicable thereafter and no liability for demurrage on the cattle accrued.

The answer to the second cause of action, after denying the formal allegations, avers that the arrival of the Greenbrier was delayed by sea perils until February 25, and all reasonable diligence was used to dispatch her as soon as practicable thereafter and no liability for demurrage has accrued.

The answer to the third cause of action denies the allegations of the libel.

The answer to the fourth cause of action makes some formal denials and avers that there were no sailings of the Rapidan during December, 1899, or during 1900, and that it was not in contemplation of the parties that the contract should attach unless the vessel sailed in the respondent's service, which she did not, and that in October, 1899, Furness, Withy & Co. Ltd., as agents of the respondent, entered into a live stock contract with Schwarzschild & Sulzberger Co. and J. Shamberg & Son, with certain steamers mentioned in the margin, the Rapidan being one of them, but that it was understood and agreed between the parties prior to the execution of the contract that the Rapidan was not a vessel belonging to the respondent or regularly running in its line, but that she was temporarily chartered and would not be one of the vessels "sailing during the months" above stated unless her charter was continued and that if it was not and if the vessel did not run in respondent's service during the currency of the cattle contract, or any renewal of it, the contract should not be deemed to apply to or include her cattle spaces in any way. It is further averred that the vessel with the knowledge of Schwarzschild & Sulzberger Co. and J. Shamberg & Son was taken on time charter by the British Government prior to the signing of the contract and that her name was included in it only on the faith of the agreement and understanding that it would attach to her only in the event of her return to the respondent's service and that in fact the steamer never came back into the respondent's service during the currency of the cattle contract in question and never was a vessel to which the contract or any renewal of it attached.

The contentions advanced by the respondent are:

1st. That the libellant has not proved any privity with the respondent entitling him to maintain this action in his own name.

The evidence shows that the respondent knew with whom it was dealing. Certain correspondence took place between the libellant and his assignors of which the respondent was apprised and there was some direct dealing between the libellant and the respondent, in the shape of bills of lading for some of the shipments made. The libellant to the knowledge of the respondent, was operating in the name of the Morris Beef Company, Ltd., and many of the shipments were by that company and the respondent collected demurrage from the libellant upon at least one shipment. The inference that he knew of the relation of the parties to the contract is irresistible.

Moreover, the real principal was entitled to come in and avail himself of the contract made for his benefit, even though the respondent did not know there was an undisclosed principal. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 378, 380, 12 L. Ed. 465; Ford v. Williams, 21 How. 287, 16 L. Ed. 36; Baldwin v. Bank, 1 Wall. 234, 17 L. Ed. 534; Prichard v. Budd, 76 Fed. 710, 22 C. C. A. 504.

The situation is not changed by the provision in the contract that none of the space should be sub-let. The contention of the respondent is, that in view of such provision, the libellant could acquire

no rights in the contract, but the difference between sub-letting and assigning is material. In the one case, the lessee claims the whole or a part of the premises he is entitled to occupy. In the other, he transfers all his right in a contract and the assignee acquires all the rights and assumes all the liability of the assignor. Lynde v. Hough, 27 Barb. 415; Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Field v. Mills, 33 N. J. Law, 254.

2nd. The respondent is not liable for having offered cattle space on the Rapidan.

The respondent's contention is that the words "all sailing" during the months covered by the contract, should be read "all that may sail." In my opinion, the expression should be held to import a warranty that all would sail. Any other view seems to me to be inconsistent with the plain intention of the parties, as shown by the terms of the contract. There is nothing in the contract to distinguish the Rapidan from the other steamers, about which liability for, by the respondent, there is no dispute. The contract is unconditional and unambiguous and can not be destroyed by parol evidence. Bast v. Bark, 101 U. S. 93, 97, 25 L. Ed. 794; De Witt v. Berry, 134 U. S. 307, 315, 10 Sup. Ct. 536, 33 L. Ed. 896; Seitz v. Brewers' Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880; Corse v. Peck, 102 N. Y. 513, 7 N. E. 810; Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961.

3rd. The claims for demurrage due to the respondent from Schwarzschild & Sulzberger Co. and J. Shamberg & Son are admissible as set-offs in this suit.

The respondent's contention in this regard is entitled to more consideration. It is claimed that there is due to the respondent some £1500 for demurrage arising out of transactions between it and the assignors prior to this contract. The claims are before the court and can be dealt with conveniently in this action. The parties stand in the position they would have stood if the assignors had really been principals. Montagu v. Forwood, Law Repts. 2 Q. B. Div. 1893, p. 350; Taintor v. Prendergast, 3 Hill, 72, 38 Am. Dec. 618.

I do not find that the defences should be sustained except as to the demurrage last referred to.

Decree for the libellant, with an order of reference.

WESTERN UNION TEL. CO. v. PENNSYLVANIA CO.

(Circuit Court, W. D. Pennsylvania. October 6, 1903.)

No. 46.

1. TELEGRAPHS—CONTRACTS BETWEEN RAILROAD AND TELEGRAPH COMPANIES —CONSTRUCTION.

An executory contract between a telegraph company and a railroad company for the construction and operation of a telegraph line on the right of way of the railroad company, to be used for its benefit in the transaction of railroad business, and for the benefit of the telegraph company in the transmission of commercial messages, which provided that the poles and cross-arms for the original construction should be

furnished and placed by the railroad company, and expressly gave the telegraph company the right to string a second wire thereon, did not operate as a conveyance to the telegraph company of any estate or interest in the realty, in the absence of any words of grant therein, but created a relation of joint ownership and interest between the parties in the personalty used in constructing the line, subject to the terms of the agreement.

2. SAME—RIGHT OF TERMINATION.

A contract between a telegraph company and a railroad company for the joint construction and use of a telegraph line along the latter's road, which fixes no time for its expiration, is not perpetual in its operation, but is terminable at the option of either party on reasonable notice.

In Equity. On demurrer to bill.

Rush Taggart and A. M. Neeper, for complainant.
Dalzell, Scott & Gordon, for defendant.

BUFFINGTON, District Judge. This is a demurrer to a bill in equity filed by the Western Union Telegraph Company against the Pennsylvania Company, lessee of the Cleveland & Pittsburg Railroad Company. The bill is based upon an agreement entered into in October, 1856, between the Western Union Telegraph Company and the Cleveland & Pittsburg Railroad Company; and the rights of the complainant herein considered arise under that contract, and an alleged subsequent parol modification thereof. On June 2, 1902, the Pennsylvania Company, the successor of the Cleveland & Pittsburg Railroad Company, notified the telegraph company it would terminate such contract in one year thereafter, whereupon the latter filed this bill to compel specific performance, and to enjoin respondent from terminating the contract. The respondent has demurred, and the questions involved in such demurrer which are herein considered are, first, whether this agreement conveyed to complainant an easement or grant of real estate in perpetuity; and, secondly, whether the contract is terminable by the railroad on reasonable notice. In view of the case of The Western Union Telegraph Company v. The Pennsylvania Railroad Company (C. C.) 120 Fed. 362, and the affirmance thereof by the United States Circuit Court of Appeals (123 Fed. 33), it is not necessary to here consider any right claimed by the bill to vest in the complainant by virtue of the act of Congress of July 24, 1866 (14 Stat. 221, c. 230). The case turns on the agreement of 1856, and the meaning and construction of such contract are referable to its date of execution. If the writing then vested no interest in realty, the actions of the parties since have not enlarged its scope, for both have acted and are now acting under it, and their existing rights and status are derived therefrom. The property here involved is situate in Ohio and Pennsylvania, and in these states a grant of realty, by their statutes of fraud, must be in writing. The common-law requirement in a conveyance of real estate is that it shall contain apt words of conveyance, or manifest a clear intent by other terms. Examination shows that this writing contains no apt words of conveyance, nor evidences an intent to convey. Its form is not that of a conveyance. It styles itself not by the title given to a conveyance, viz., "lease," "indenture," or "deed," but by that of "agreement" or "contract"; and, while it is a

mere formal matter, it will be noted the grantor of the alleged realty is made the party of the second part, and the grantee, of the first part. Moreover, if this paper is to be regarded as a conveyance, and its effect is to create a perpetual servitude and easement on the property of the railroad, and to bind the telegraph company, in perpetuity, to operating and exercising such easement, then these broad powers and obligations are irrevocably granted and assumed in perpetuity by these respective corporations, without recital of any statutory authority thereto enabling them, or, if such powers are presumed, no corporate action authorizing their exercise by the executive officers is recited. The paper simply shows exercise of power by the executive officers, without reciting enabling statutory authority or corporate action. Presumably, this agreement was made between parties familiar with the forms and requirements of conveyance and due corporate action. It was between companies engaged in large affairs. They knew what each meant to grant and acquire. The omission, then, from this contract of all form, words, and terms incident to a conveyance of realty, and of reference to authority to exercise the broad powers now imputed to this writing, is most significant. If the parties intended to convey and grant, presumably they knew how to express such interest in fitting terms. But if the instrument was capable of such construction as to make it a conveyance, it must be conceded it would be a strained one, and therefore one to be resorted to only in case it is not susceptible of a single, natural construction. But this we think it is. The paper was executory. No present consideration passed. The purpose was to establish a relationship between the parties covering telegraph appliances and facilities thereafter to be constructed, to provide for their repair and extension, and to regulate their use in the transmission of railroad business for the benefit of the railroad, and of commercial business for the benefit of the telegraph company. Such agreements have been held to create joint enterprises and ownerships. St. Paul, etc., Co. v. Western Union Telegraph Company, 118 Fed. 511, 55 C. C. A. 263; Western Union Telegraph Company v. Burlington, etc., R. Co. (C. C.) 11 Fed. 1; Atlantic & Pacific Tel. Co. v. Union Pacific Railroad Co. (C. C.) 1 McCrary, 541, 1 Fed. 745. By it the railroad was to secure telegraphic services in conducting its business, and the telegraph company was to have the use of railroad property, and the facilities to carry on a general commercial telegraphic business. In the original installation the railroad was to furnish in place poles and cross-arms; the telegraph company to furnish wire, insulators, instruments, and patents, and string one wire. For stringing this wire the railroad was to pay $30 per mile. Certainly, by this original installation of poles, cross-arms, and wires thus made or paid for by the railroad company, and located on its own ground, it cannot be said that the telegraph company acquired any title to the land to which these fixtures were attached. For aught that appears in the contract, the telegraph company had no express right of entry to these poles or wires. The duty of keeping the line in order rested upon the railroad, and under the parol modification the telegraph company simply furnished material, while the railroad did the work. Under a working contract for such a joint undertaking, it is clear that

no easement or grant of any interest in realty was contemplated or required. It is true, the telegraph company had the right to string another wire for its own use; but this, it will be observed, was on the poles of the railroad, and such right, when exercised, was not incident to ownership created or vested, but because the contract expressly allowed it. Indeed, the express grant of such right by section 5 implies that, in the scrivener's view, such grant was essential to the exercise of that which would have been an incident of ownership, if the telegraph company, by the agreement as a whole, was vested with a line easement. The eighth clause provides that the railroad company was not to allow any other telegraph line or individual to build or operate a line of telegraph on or along the said railroad, or any part thereof. Such a provision was held, in the case of The Pacific Company v. Western Union Telegraph Company (C. C.) 50 Fed. 494, incompatible with the contention that the contract conveyed a right to the real estate, because it amounts to an assertion by the railroad company of a right to control the future use of the ground. That the material furnished by the telegraph company went into the construction of lines does not of itself make them or it realty. Much less does it draw to such personalty ownership of the particular ground on which they are placed. It must be borne in mind that they are so placed under the contract, and if the contention of the parties, evidenced by that contract, was that they were not to be considered realty, they will be treated as personalty. Whether fixtures such as poles, wires, and rails lose their character as personalty depends in a great measure upon whether the one who placed them on another's ground intended such a result. St. Paul, etc., Co. v. Western Union Telegraph Company, 118 Fed. 513, 55 C. C. A. 263; Wiggins Ferry Co. v. Ohio, etc., R. Co., 142 U. S. 409, 12 Sup. Ct. 188, 35 L. Ed. 1055; Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374; Wagner v. Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770; Northern Central R. Co. v. Canton Co., 30 Md. 347; Toledo R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Oregon Co. v. Mosier, 14 Or. 522, 13 Pac. 300, 58 Am. Rep. 321; Western Union Co. v. Burlington (C. C.) 11 Fed. 1; Tifft v. Horton, 53 N. Y. 380, 13 Am. Rep. 537. To these may be added Apsden v. Austin, 5 A. & Ellis (N. S.) 671, where the court said:

"It is possible that each party to the present instrument may have contracted on the supposition that the business would be carried on, and the service in fact continued, during the three years, and yet, neither party might have been willing to bind himself to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they either purposely or unintentionally have omitted. The former is but the application of a rule of construction to that which is written. The latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

The agreement then being one for the furtherance of a joint enterprise, and not for the grant of an interest or easement in realty, we are of opinion it was terminable at the option of either party on reasonable notice. No time was specified for its continuance, but clearly, under

the terms of this contract, its subject-matter, and the objects in view, the failure to specify any time could not imply that this agreement was for all time. As is the case in many joint enterprises without time limit, the parties probably assumed the success of the enterprise and benefits accruing therefrom to the parties afforded a guaranty of indefinite continuance. The outcome justified such belief, for this contract, without provision for continuance, has, through the advantages accruing to both parties, worked its own extension for nearly 50 years. The view that the contract, being without limit, was terminable, is in accord with the authorities. Echols v. New Orleans R. Co., 52 Miss. 610, was a contract for cord wood to be furnished without limit of time, save that it was to "continue as long as satisfaction be given by the contractors." It was held terminable on reasonable notice, although there was no default of the contractors, the court saying:

"Perpetual contracts of this character will not be tolerated by the law, or, rather, will not be enforced as imposing an eternal and never-ending burden. An agreement to furnish a support or service or a particular commodity at a specified price, or to do a certain thing without specification as to time, will be construed either as terminable at pleasure, or as implying that the thing to be done shall be implied within a reasonable time, and the obligations shall cease with the same limitation. Any other theory than this would subject incautious persons—a class, it may be remarked, which includes the majority of mankind—into lifelong servitudes, and greatly fetter and embarrass the commerce of the world. Indeed, it may be said that any other theory is a moral and practical impossibility, and, if indulged in by the courts, could not be enforced in the ordinary concerns of life."

In Jones v. Newport News Co., 65 Fed. 736, 13 C. C. A. 95, a coal tipple and trestle were constructed by a warehouseman under an agreement with the railroad that it would construct a switch thereon and deliver coal to him. There was no agreement as to time. It was held the railroad company could terminate the switch right, the court saying:

"It is not alleged that either the defendant or his predecessor agreed to keep the switch in the main line for any definite time, or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to time, the implication is that the switch was to be maintained at all times; i. e., forever. Such a construction is quite at variance with the views of the Supreme Court, as expressed in Texas & P. Railroad Co. v. City of Marshall, 136 U. S. 393 [10 Sup. Ct. 846, 34 L. Ed. 385]."

In the case of The B. & O. R. R. Co. v. The Ohio Company, referred to in the case of The Chattanooga Co. v. Cincinnati Co. (C. C.) 44 Fed. 456, it was held that though there was a grant by the Ohio & Miss. Ry. Co. that the B. & O. R. R. Co. "shall have the exclusive right to forward express matter over the said railroad of the party of the second part," and the latter company had established and opened offices all along the line of the railroad of the Ohio & Mississippi Company, and had acted under a contract for some years, it was nevertheless terminable by the Ohio & Mississippi Company. Coffin v. Landis, 46 Pa. 432, was an agreement without specification of time continuance. This the court refused to regard as perpetual, saying:

"It is evident, then, that were we so to construe the agreement as to hold obligatory upon the one party to employ, and upon the other party to serve,

during any period, we should be in danger of imposing liabilities which both parties purposely avoided assuming. And if it be admitted that neither of the parties contemplated a severance of the relation formed by the contract, at the will of the other party, it does not follow that we are at liberty to treat the agreement as containing a covenant against it. That would be to make an expectation of results equivalent to a binding engagement that they should follow."

Without discussing at length cases cited by counsel for the telegraph company, of which the Mississippi Logging Co. v. Robson, 69 Fed. 775, 16 C. C. A. 400, Great Northern Ry. Co. v. Manchester, S. & L. Ry. Co., 5 De Gex & S. Ch. Rep. 138, and Llanelly Ry. Co. v. London & Northwestern Ry. Co., 7 H. L. 550, are examples, it will be observed that present and valuable considerations in each case, on the execution of the several agreements, passed to the party that afterwards sought to terminate. Moreover, in considering the English cases, regard must be had to the statutory right of the railroad, by appropriate proceedings, to compel a running arrangement of the general nature provided by the agreement. Holding the agreement nonterminable was therefore, in effect, but giving the railroad what it could secure by statutory proceedings.

After full consideration, we are of opinion the present agreement conveyed no interest or easement in realty, and that it was terminable on reasonable notice, for which latter conclusion we find support in Texas, etc., Ry. Co. v. City of Marshall, 136 U. S. 407, 10 Sup. Ct. 846, 34 L. Ed. 385. We are also of opinion the relation between the parties was one of joint ownership and interest in the personalty subject to this particular agreement, but the extent of that ownership or interest is not here involved or determined.

Our view of both the two questions noted in the early part of this opinion being with the respondent, a decree sustaining the demurrer to that extent may be drawn.

BOARD OF TRADE OF CITY OF CHICAGO v. L. A. KINSEY CO. et al.

(Circuit Court, D. Indiana. July 14, 1903.)

No. 10,071.

1. EXCHANGES—PROPERTY IN QUOTATIONS—RIGHT TO PROTECTION IN EQUITY.
Conceding that the Board of Trade of the City of Chicago has a property right in the quotations of prices made on its exchange, based on legitimate transactions, it is not entitled to invoke the aid of a court of equity for the protection of its right in its quotations under evidence showing that something like 95 per cent. of the contracts made on its exchange are for the sale of commodities for future delivery, and are closed immediately after the transaction by a settlement of differences between its members, permitted by its rules, and made with its knowledge and consent at the close of each day's business.

2. SALES FOR FUTURE DELIVERY—VALIDITY—INTENTION OF PARTIES.
Whether a contract for the purchase and sale of a commodity for future delivery, made on an exchange, is legitimate and valid, or merely a wagering transaction, depends on whether it was the intention of the

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¶ 2. See Gaming, vol. 24, Cent. Dig. §§ 22, 23, 25.

parties at the time that there should be an actual delivery of the commodity, and payment therefor. Such an intention is not necessarily negatived by the fact that the contract is subsequently closed out without delivery, by the payment of differences; but where it is the habitual practice and custom of the members of the exchange to so settle contracts immediately after they are made, extending to almost the entire bulk of the transactions of the exchange, it must be presumed that such was the intention when the contracts so settled were made, and that no actual sale and delivery was contemplated.

In Equity. Suit for injunction.

Henry S. Robbins and D. P. Williams, for complainant.

Smith & Korbly, Charles D. Fullen, and S. N. Chambers, for defendants.

ANDERSON, District Judge. On March 25, 1902, the complainant filed its bill for an injunction to restrain the defendants from receiving, obtaining, using, selling, or distributing the quotations of prices of grain and other commodities dealt in on the floor of the complainant's exchange in the city of Chicago. A temporary restraining order was denied by the court, and on motion of the complainant for a temporary injunction the cause was referred to a master to take the evidence. On July 8, 1902, the motion for a temporary injunction was denied, and the cause was by the court, on its own motion, referred to Hon. Edward Daniels, master in chancery, to consider the evidence already taken, and to take such further evidence as the master should deem proper and pertinent to the issues, with direction to report the facts, with his conclusions of law thereon. On October 10, 1902, the master filed his report. Both parties have filed exceptions to the finding of facts contained in the master's report, and the defendants have filed exceptions to his conclusions of law. The exceptions to the finding of facts will be overruled, except in so far as inconsistent with this opinion.

I think the master's finding of facts is sustained by the evidence, and substantially covers the case. But in some particulars the master does not go as far as the evidence warrants, and I cannot agree with his conclusions.

The master states as his conclusions of law:

"(1) The continuous quotations of a trade exchange, as defined in the foregoing findings of fact, are a species of property.

"(2) The complainant has the common rights of property in the continuous quotations of the Board of Trade of Chicago as described in the foregoing findings of fact, unless the affirmative of either one of these four propositions can be established."

No. 3 of these propositions is as follows:

"(3) That said continuous quotations are made up either entirely, or at least of such a large proportion, of fictitious prices illegitimately created in feigned trading transactions conducted with the connivance of the complainant, contrary to the inhibitions of the law against gambling, so that all of said continuous quotations must be placed in the category of nuisances per se, in which no property can exist."

The master then holds that neither of these propositions is, in law, maintainable as regards complainant's continuous quotations, and

recommends a decree in favor of complainant. In discussing the above proposition 3, the master says:

"The argument which alleges vice in these continuous quotations in effect comes to this: In the time contracts made in the pits, delivery of the property is not intended, and the proof of this fact lies in the complainant's rule, under which such time contracts are entered into, which permits the closing out of such contracts by the direct method or the ring method of settlement. If such methods of settlement do not bespeak a gambler's intent, then they are valid, and upon this phase of this suit the only question is this: Do the direct method of settlement and the ring method of settlement necessarily imply an intent on the part of the parties to time contracts not to make or receive delivery of the property sold and bought? In my opinion, that question is answered in the negative by the case of Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183. Even if there be a few gambling transactions in the pits of the complainant (and that such is probably the fact is a matter of legitimate inference from the foregoing finding of facts), still that fact would not place all the prices made in the pits in the category of nuisances per se. The entire volume of such prices cannot be so condemned."

In my judgment, proof of the fact that delivery is not intended in these contracts does not, so far as this case is concerned, lie "in the complainant's rule under which such contracts are entered into, which permits the closing out of such contracts by the direct method or the ring method of settlement." The question whether delivery is really intended is not to be determined by the form of the contracts, nor by the method by which they may be settled. To determine this, the real nature and character of the transaction must be looked into. It may quite properly be said that a rule which permits of the adjustment of transactions by settlement upon differences instead of by actual delivery does not, of itself, prove that no delivery was intended; but other evidence may clearly show what the real nature of the transaction is.

The master, in his findings, states:

"Among the daily transactions in complainant's 'pits' there are 'hedging' contracts, 'spreads' and 'scalping contracts'; and all of these forms of time contracts are adjusted by both the 'direct' method and the 'ring' method of settlement. Upon the question what part of all the transactions in the pits are adjusted by the 'direct' method and the 'ring' method of settlement the evidence is not very satisfactory. It tends to show, however, and I accordingly so find, that at least three-fourths of the total transactions in the pits are adjusted by the 'direct' and 'ring' method of settlement."

And again the master states, "Most time contracts made in the pits" are settled by these methods. I think the evidence discloses that a much larger proportion than three-fourths of the total transactions in the pits is settled by the "direct" and "ring" methods; that the proportion is nearer 95 per cent. than 75 per cent. In other words, the evidence in this case shows that almost the entire bulk of the transactions in the pits (the reports of which make up the "continuous quotations") are transactions in which no delivery is made, and which are closed by the direct or ring method of settlement. The mere fact that in a given case or in a number of cases no delivery is made is not decisive. A man may buy or sell for future delivery, and actually intend at the time of making the purchase or sale to receive or deliver the property, and then, prior to the time of the maturity of the contracts, change his mind, and offset the contracts, and

settle upon differences. In such case the transaction is legal, if he in fact intended to receive or deliver the property at the time the contracts were entered into. The determining factor is the intention of the parties at the time of making the contracts. "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them. But such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." Clews v. Jamieson, 182 U. S. 461, 489, 21 Sup. Ct. 845, 45 L. Ed. 1183; Irwin v. Williar, 110 U. S. 499, 508, 4 Sup. Ct. 160, 28 L. Ed. 225; Pearce v. Rice, 142 U. S. 28, 40, 12 Sup. Ct. 130, 35 L. Ed. 925. It is perfectly plain that in almost all of the transactions, the reports of which make up the "continuous quotations," no delivery is in fact made, but that they are settled upon differences. The question then comes to this: Do the parties, at the time of making the contracts, intend delivery, or do they intend to do what they actually do—settle upon differences?

It is said that neither the number of instances in which these contracts are settled upon differences nor the proportion of them which are settled in this way is sufficient to establish that no delivery was contemplated. But certainly such facts bear powerfully upon the question of intent. Ordinarily, men are presumed to intend to do what they do in fact do. This is the presumption when the intent with which a single act is done is the subject of inquiry. Surely it cannot be said that this presumption is less strong in the case of a vast number of acts, done repeatedly and habitually. The evidence shows that the actors in these transactions, as their settled habit and practice, make contracts for future delivery, and immediately, with a uniformity of practice almost complete, settle these contracts upon differences; and they do this continuously, day after day, month after month, and year after year. Under the ordinary rule of judging the intent by the act, there seems no room for doubt that these contracts are a "mere cover for the settlement of differences"; that no delivery is intended.

The complainant asks this court to believe that the actors in these transactions do one thing and intend to do another thing. It must be conceded that in almost all these cases of purchases and sales for future delivery no delivery takes place. The court is asked to find that delivery is intended though no actual delivery is made; and this in the face of the fact that such purchases and sales are adjusted without delivery so soon after they are entered into. The master, in his findings, says:

"Most time contracts made in the pits are adjusted as between members of the complainant association before the specified time of delivery arrives by either the first or the second of the above-named methods. Direct settlements

are effected by offsetting similar contracts at the close of the business hours of each day in the following manner: As soon as it is practicable after the close of business in the 'pits' each broker (individual, firm, or corporation) conducting business in the 'pits' takes from the day's transactions on his books the contracts similar as to amount and time of delivery to counter contracts made with other members of the complainant association, and ascertains therefrom the difference of the aggregate prices of such similar contracts, and, if the difference be in his favor, the amount of such difference is charged to the other party in such counter contracts, and, if the difference is against him, such difference is credited to the other party to such counter contract. The following is a simple illustration: If during the day broker A. has sold to broker B. 5,000 bushels of December wheat at 75 cents per bushel, and broker B. has sold to broker A. 5,000 bushels of December wheat at 76 cents per bushel, after offsetting the contracts at 75 cents per bushel, there is a difference in B.'s favor of one cent on each bushel, or $50. This offsetting difference in cash is placed as a debit or credit, as the case may be, upon the clearing house sheet hereinafter described of the respective brokers, parties to said counter or offsetting contracts. The 'ring' method of settlement is as follows: Each broker (person, firm, or corporation) conducting business in the 'pits' has an employé, who is called a 'settlement clerk,' who keeps a record of all his employer's transactions in the 'pits.' The complainant association furnishes a room wherein all of such settlement clerks meet at stated hours each day, and compare their respective books, called 'settlement books,' which are required by the complainant association to be kept by each broker. Upon comparing their respective books, said settlement clerks ascertain what, if any, outstanding time contracts may be offset by some other corresponding time contract made by the parties with other members of the association, and which of such contracts are, by consent of the parties thereto, permitted to be offset, and thereupon, under the rules of the complainant association, are deemed to have been settled, provided the requirements of sections 6, 7, 8, and 9 of rule 22 of the complainant association are met as therein provided with reference to the clearing house sheet and other details of settlement therein specified."

In other words, the persons "conducting business in the pits" day after day meet in these pits, and ostensibly buy of and sell to each other enormous quantities of grain and provisions for delivery at certain specified times in the future, usually months in the future. There is no pretense whatever that these persons, or those for whom they act, have this grain and provisions on hand. This fact is met by the proposition that it is legal to sell for future delivery what one does not have, because he may procure it in time to deliver. Now, what do these persons, as soon as they make these alleged contracts, do? Does he who has sold proceed to procure the property, so that he may deliver it at the time he has agreed, or does he who has bought proceed to prepare himself to receive what he has purchased? Not at all. "At the close of business each day," "as soon as it is practicable after the close of business in the pits," these persons meet, and immediately proceed to settle their contracts upon differences by the direct method or the ring method of settlement. Between the time of making the contracts and their settlement, what circumstance has arisen to cause them to prefer to settle by differences instead of by delivery, as they ostensibly agreed? The only time that intervenes between the close of the transactions in the pits and the settlement of the contracts there made is the time required to find "corresponding time contracts," which may be set off against each other. These persons have "settlement clerks," and the clerks have books called "settlement books," and complainant provides a "settlement room" for

these "settlement clerks" to meet at stated hours each day, and compare these "settlement books," and ascertain what contracts may be settled by differences. There are no delivery clerks, no delivery books, and complainant furnishes no room in which these persons may meet and arrange for either the actual or symbolic delivery of the property ostensibly bought and sold. The entire machinery provided by complainant is for the purpose of settling these contracts upon differences; not for carrying them out by delivery.

The evidence also discloses that, when these persons "conducting business in the pits" meet to settle, all time contracts are settled upon differences, unless orders are specifically given not to settle in this way. Settlement upon differences is the rule; delivery is the exception, and the rare exception. Can it be said of intelligent men that they meet day after day and make ostensible purchases and sales of grain for future delivery, and day after day settle such purchases and sales upon differences with no pretense of delivery whatever, such being the almost universal practice, and yet that they actually intend delivery when the ostensible purchases and sales are entered into? To hold this the court must find that these persons actually intend delivery when they make the contracts, and change their minds between that time and the time of settlement, which, as the evidence shows, follows so swiftly after the contracts are made.

The master also finds that:

"It is fairly deducible from the evidence that the aggregate business transactions in grain (in the pits of the complainant association) was largely in excess of the total wheat and corn production of the entire United States during either of the years 1900 and 1901, and was many times over the entire receipts in Chicago of grain during each of said two years of 1900 and 1901, and of such receipts in Chicago less than twenty per cent. inspected up to grades of grain which could be delivered upon time contracts made by said sales and purchases in the pits."

So that it was physically impossible for more than a very small part of the grain ostensibly bought and sold in the pits to be delivered. Are men to be held to intend to do that which is and which they know to be impossible?

Again, the master finds:

"It is also true that a decrease in the total grain production of the United States does not cause a proportionate decrease in the volume of business done in the 'pits' of the complainant association, but, on the contrary, such business is larger during a year in which there is a shortage in the grain crop."

The less grain there is to be bought and sold, the more these persons buy and sell. There seems to be no legitimate relation between these dealings in the pits and the actual commodity.

If the form of the contracts and the methods by which their settlement may be accomplished are alone to be considered, the master's conclusion is correct. The contracts, on their face, are valid. "A contract which is on its face one of sale with a provision for future delivery being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of 'differences,' rests with the party making the assertion." Clews v. Jamieson, supra. Therefore the burden is upon the defendants to show that no delivery is intended. I think

the defendants have shown that such contracts are entered into without any intention, at the time, on the part of the parties to the contracts, that delivery shall take place, but that the intention is that the contracts shall be settled upon differences. Instead of real contracts for the future delivery of property, they are pretended contracts for immediate settlement upon differences. If this be the case, they are gambling transactions under the authorities above cited.

It may be said that some of these transactions are not tainted with this vice; that in them delivery took place and was intended. If the rule was delivery, and settlement upon differences the exception, a different conclusion might be reached. But delivery is the rare exception, and the intention to deliver is likewise rarely present. The complainant does not prevent the making of these illegal contracts, and permits the mingling of the illegal with the legal. I think that the proportion of these transactions which are illegal is so large as to characterize and taint them as a whole, and that whatever property right complainant may have in the "continuous quotations" in question is so infected with illegality as to preclude resort to a court of equity for its protection.

VOIGHT v. MIHALOVITCH.

(Circuit Court, S. D. Ohio, W. D. December 19, 1899.)

No. 5,227.

1. CUSTOMS DUTIES—CLASSIFICATION—CHERRIES IN ALCOHOL.

Certain cherries imported in casks, in a surrounding fluid containing alcohol added for the purpose of resisting fermentation and decay, the cherries being an inedible variety, intended to be used in the manufacture of cherry juice, are specially provided for in paragraph 263, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), as "fruits preserved in * * * spirits," and are not dutiable under paragraph 299, Schedule H, § 1, c. 11, of said act, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655), either as "cherry juice" or as an unenumerated article similar thereto, "either in material, quality, texture, or the use to which it may be applied," under section 7 of said act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693).

Appeal by Henry Voight, surveyor of customs at the port of Cincinnati, Ohio, from a decision of the Board of General Appraisers (G. A. 4296) on certain merchandise imported by Mihalovitch, Fletcher & Co.

The merchandise in controversy consists of the sour, wild red cherries known in Germany as "Kirschen Sauer," imported in casks, in a surrounding fluid containing more than 10 per cent. of alcohol, that was added for the purpose of resisting fermentation and decay. The cherries are not intended or fit for human consumption, but were imported to be used in the manufacture of the cherry juice of commerce. The importers entered the goods for duty under the provision in paragraph 263, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), for "fruits preserved in * * * spirits"; but the surveyor of customs at the port of Cincinnati classified them as "cherry juice," under paragraph 299 of said act, on the ground that they are not enumerated in the tariff, and under section 7 of said act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), which provides that unenumerated articles "shall pay the same rate of duty which is levied on the

enumerated article which it most resembles," "either in material, quality, texture, or the use to which it may be applied," were dutiable as cherry juice because they most resembled that article, within the meaning of said section 7. His view that the cherries are not enumerated in paragraph 263 was based on the theory that the expression in that paragraph, "fruits preserved in spirits," was a term of commercial designation, and did not include the cherries under consideration; also that said paragraph 263 covered only such fruits as are edible and intended for table consumption, and, under the rule of noscitur a sociis, these inedible cherries would be excluded. The Board of General Appraisers, on protest by the importers, reversed the decision of the surveyor, directing that the merchandise be reclassified as originally entered by the importers. The surveyor appealed.

William E. Bundy, U. S. Atty., and Harlan Cleveland, Special Asst. U. S. Atty., for the surveyor.

J. C. Harper and Judson Harmon, for the importers.

CLARK, District Judge. The decision of the Board of United States General Appraisers is before this court for review. There is no such conflict in the facts in this case, so far as it depends upon facts directly in issue and to be decided, as to require a statement of the case or a discussion in detail of the evidence. It may be said in a general way that the evidence to be considered consists of the facts and circumstances as they existed at the time of the enactment of the tariff act in question (Act July 24, 1897, c. 11, 30 Stat. 151, U. S. Comp. St. 1901, p. 1626), and those facts and circumstances are intended to enlighten the inquiry as to the true interpretation of those provisions of the tariff act in question. This is, in general, the purpose of the evidence in the case, and in that view the conflict is not serious or very substantial. It is true the experts differ somewhat sharply in opinion, but the importance of that difference is not very great, and such a conflict is quite common, as the wide experience of counsel on both sides has led them to admit. The circumstances thus brought out as facts, and intended to throw light upon the inquiry, are, among others, the trade history of the article in question, its growth, method, and purposes of manufacture, and its uses, the history of importations like this, the previous tariff legislation upon the subject, decisions of the board of appraisers, the practice of customs officers, and the disputes as to proper classification. These are facts brought out for their supposed value as bearing on a proper interpretation of the existing tariff act. The primary question directly in issue and to be decided is whether the imported article in question is "fruit preserved * * * in spirits," within the meaning of paragraph 263, Schedule G, § 1, c. 11, of the tariff act of July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651). The contention, as I understand it, is not that the article is the cherry juice of commerce, and subject to classification under paragraph 299, Schedule H, § 1, c. 11, of the tariff act of July 24, 1897, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655), instead of paragraph 263, but that in its condition as imported, and in its chemical elements, and considered in the light of the only purposes for which it is used, it is so similar to cherry juice as to remove its classification from paragraph 263, and render it subject to classification under the similitude clause of paragraph 299, section 7 of the act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693). The

questions of what is the cherry juice of commerce, and how far the article in question is identical with that, have been discussed, and are here considered only in order to determine whether this importation was properly classified as "fruits preserved * * * in spirits," or whether a proper classification would place it under the similitude clause as more closely resembling cherry juice. It is conceded, and has been distinctly decided, that cherry juice described in the tariff act has an established commercial meaning. U. S. v. Rheinstrom, 13 C. C. A. 261, 65 Fed. 984, 31 U. S. App. 271.

It could not, therefore, be successfully insisted that the article in question is the cherry juice of commerce, as it is not the manufactured article which satisfies that description as known to commerce. Of course, if the contents of a cask are separated, and the fruit and fluid in which it is preserved are separately considered, there would be still less ground in support of the view that the fruit, or solids, was cherry juice, although it might be argued with force that the fluid separated from the fruit was cherry juice, or should be so classified under section 7. This, however, I think untenable, in view of its commercial meaning.

It is also admitted, or too evident to be denied, that the words "fruit preserved in spirits" had no technical or commercial meaning different from their popular and ordinary meaning at the time of the enactment of the tariff law of 1897. It is also obvious and is admitted that paragraph 263, Schedule G, § 1, c. 11, of the tariff act of July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), contains new legislation not found in the similar sections of previous tariff acts. It is, moreover, an established fact that the red cherry juice importations like the one in question commenced in 1891 or 1892, and that the proper classification of such fruit became a question between the importers and the government officials; and conceding, as argued by counsel for the government, that the precise question now presented was not considered in any of the disputes, nor in the decisions of the board of general appraisers in relation to the general subject, it still remains true that the disputes necessarily directed attention at once to the difficulty found in the proper classification of fruit like that in these new importations. There can be no doubt that the customs officials charged with the duty of enforcing the tariff act in relation to these importations were fully aware that the purpose of these importations was to manufacture the red cherry juice from the articles imported, and to thereby secure a more favorable rate of duty than had previously been obtained by importing the manufactured or expressed cherry juice itself. In this situation of affairs it is difficult to believe that Congress would have enacted the law of 1897, with the full consideration in detail which is given to such an act, without their attention being specially invited to this subject by the government officials, who had experienced difficulty in the matter, and who were fully aware of the trouble which had grown out of importations of this kind. It would hardly be just to assume otherwise than that Congress was fully advised of the facts relating to this specific article, when dealing with the tariff act, and, if so, the fact that no different or more specific reference was made to the article

becomes significant. In view of the situation, it would have been quite natural for Congress, in paragraph 299, after referring to the cherry juice, to have added the words, "or materials used for manufacturing cherry juice," or the like specific description applicable to this article. Or again, in paragraph 263, this article could have been distinguished for the purpose of classification by adding to the enumeration there given the words, "and other fruits of an edible character, or intended for table use," or such similar terms. It would, I think, be difficult to maintain logically that an article should be classified under the similitude clause as a nonenumerated article, when such an article had been previously imported, and was well known, and therefore subject to specific description and enumeration. If the origin of importations of this kind was subsequent in time to the enactment of the tariff law of 1897, there would exist much more satisfactory ground for classification under the similitude clause, for the reason that the article was not previously known, and therefore not subject to specific enumeration or classification at the time of the passage of the tariff act. Furthermore, it is conceded that cherry is a fruit as originally put up, and if it had remained in Germany for the purpose of being there manufactured, as was the custom, it would undoubtedly at any time previous to its manufacture into cherry juice have remained a "fruit preserved in spirits," according to the ordinary and popular meaning of the words. Again, if we imagine our tariff law as being in force as an internal revenue law in Germany, it would seem quite clear that the cherries in question, as originally put up in casks for the purpose of preservation until cherry juice could be manufactured therefrom, would remain classified as fruits preserved in spirits, according to the popular meaning, notwithstanding any changes which might take place in the casks. Nor do I think such a classification would become different by reason of any changes resulting from motion in transportation between any places in Germany, such, for example, as transportation from Magdeburg to Hamburg. It is true that the change brought about as a result of transportation is much greater when the goods are brought to this country, but the change is a difference in degree, and not in kind. The other fruits enumerated in paragraph 263 are of a character suitable for human food, and to be used as such, as must be admitted, and, this being so, counsel for the government contends, and with great force indeed, for the application of that principle of construction recognized as the rule of noscitur a sociis. The application of this principle was pressed in argument at bar, and is again urged in the brief, and the great force of the argument must be acknowledged. In view of the fact that the article in question fully satisfies the description in the statute, or, stated otherwise, that the descriptive terms in the statute undoubtedly fit the importation in question, when taken in their ordinary and popular meaning, with the further fact that there is no technical or trade meaning, it may, I think, be well doubted whether the fundamental principle embodied in this familiar maxim noscitur a sociis applies in its full force. I am disposed to think that the force of the argument based upon this rule is somewhat broken, in view of the remark already made that the article in question, and

the method in which it had been imported, must have been known to Congress at the time of the tariff act, and that notwithstanding such knowledge the description in paragraph 263 was left so that, taken in its general and popular meaning, it would undoubtedly be applied to, and fit, the article or object in question. This, I think, must be true, notwithstanding that no reason should be given for associating the article under a general description in a class with other articles different in their use, but not in their name or method of preservation, as fruits preserved in spirits. In this connection, I think, too, the fact must be noted, as Judge Somerville says, that Congress imposed a duty of 25 cents more per proof gallon upon the excess of spirits used in the importation of preserved fruits than the duty upon imported brandy and spirits, intending thereby apparently to protect the government against frauds upon the revenue under color of importing fruits preserved in spirits. The fact that, in the tariff acts prior to 1897, Congress had found no occasion to deal with the fruits preserved in spirits or brandy on a per centum basis and with a limitation in that respect, must be treated as possessing some significance or influence in construing paragraph 263. It is true one case, In re Maron (1896), is cited as showing a previous controversy where the quantity of brandy and of cherries were about equal. But that case was clearly an attempt at fraudulent evasion of the customs laws, and should have been so treated. It will admit of question whether the fruits preserved in spirits or brandy, enumerated in paragraph 263, designed for human food or table use, and ordinarily put up for such purposes, would have brought about the new legislation in paragraph 263. If put up in casks or other large vessels, so as to furnish opportunity to import alcohol in that form, and thereby commit frauds upon the revenue, it would seem not difficult to deal with it as a fraud; for if the form and original identity of the fruit were so changed in transportation as the cherries in question, the article could no longer be practically used for human food or on the table, and no such claim could be made for it. Be this as it may, the fact is that the ordinary importations of fruit preserved for table use for many years had produced no legislation like the new provisions in paragraph 263, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), and we may infer that no such trouble had been experienced as to call for legislation like that in this paragraph, dealing not only with "fruits preserved * * * in spirits," but with such fruits when containing above 10 per cent. of alcohol, with a specific duty on the excess, leaving the remainder subject to the regular duty.

Somewhat broadly considered, I think it must be acknowledged that in the article in question we have the difference between the raw material and the manufactured product, between the materials and the article made therefrom in the process of manufacture. The article made is cherry juice, and the words "cherry juice" have a commercial meaning, and must be limited accordingly, while the words, "fruits preserved * * * in spirits," have no such restricted commercial meaning, and must be taken in their ordinary and comprehensive meaning. Arthur v. Morrison, 96 U. S. 108, 24 L. Ed. 764. Giving

to the words this popular comprehensive meaning, the article in question comes within the description, "fruits preserved in spirits," and must be classified accordingly.

Conceding that the question of proper classification is left doubtful, the result must be the same. In American Net & Twine Company v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821, Mr. Justice Brown, giving the opinion of the court, said:

"We think that the intention that these goods should be classified as gilling twine is plain; but were the question one of doubt we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language."

It would seem that Congress is willing that this material may be imported for the purpose of making cherry juice, subject only to the provisions of paragraph 263. If not, there is and was at the date of the enactment no difficulty in making its intention clear by specific and apt words of description. There was no concealment, false representation, or other act showing fraud in the case. If the importer can import the fruit and manufacture the juice in this country, and thereby avoid a higher rate of duty, the right to do so cannot be denied when no other valid objection exists.

As I concur in the opinion of Judge Somerville in the more particular discussion of the case, I refer to that opinion as giving my reasons more in detail, and with this reference I do not deem it necessary to carry the discussion beyond the general statements made from my study of the case.

The result is that the ruling of the board of appraisers is affirmed.

UNITED STATES v. LINNIER.

(Circuit Court, D. Nebraska. September 28, 1903.)

No. 157.

1. CRIMINAL LAW—JUDGMENT—POWER OF COURT TO PRONOUNCE FOR LOWER OFFENSE.

   In a criminal case in which a verdict has been returned finding the defendant guilty of a higher offense than was warranted by the evidence, the court has power to pronounce judgment thereon for such lower offense included in the one charged as the evidence warrants.

2. SAME—POWER TO ACCEPT PLEA OF GUILTY OF LOWER OFFENSE.

   A verdict finding a defendant guilty of murder in the first degree, as charged in the indictment, was set aside by the court, and a new trial granted, on the ground that, under the evidence, defendant was guilty of manslaughter only. Subsequently, and at the same term of court, defendant offered a plea of guilty of manslaughter. *Held*, that the court had power to accept such a plea and render judgment thereon, notwithstanding the objection of the district attorney, since it still had power to vacate its order setting aside the verdict, and to render judgment for manslaughter thereon, as it, in fact, should have done in the first instance.

Indictment for Murder. On offer to file plea of guilty of manslaughter.

W. S. Summers, U. S. Atty., and S. R. Rush, Asst. U. S. Atty.

J. M. Macfarland, for defendant.

McPHERSON, District Judge. The defendant was indicted for murder. The jury returned a verdict of guilty of murder, without capital punishment. The defendant filed a motion for a new trial, which a few days since was sustained, and a new trial granted. Thereupon defendant offered to file a plea of guilty of manslaughter, and allow the court to pronounce judgment thereon. All of the foregoing things occurred at the present term. The United States attorney objects to the court receiving such a plea, and objects to the court pronouncing judgment on such a plea. The questions now for determination are, what is the duty, and what the power, of the court in the matter?

I heard all the evidence in the case, having presided at the trial. While there are differences of opinion as to the case, I am entirely familiar with all its phases. And my knowledge and my beliefs, and mine only, must govern me in my actions. My views of the case are stated in an opinion filed in sustaining the motion for a new trial.

The United States attorney does not claim to have additional evidence. Under the theory of the prosecution, the government could not well have other evidence than what was introduced on the trial. He does say that "since the trial several suggestions have come to this office that lead me to believe the case has aggravating features, such as to justify a jury in returning a verdict of guilty of murder," etc. What these suggestions are, is not stated. By whom received, it is not stated. From whom received, can only be surmised. The court cannot act on statements so extravagantly hearsay, and when the author of the "suggestions" is not made known.

Briefly stated, my conclusions are that the defendant is guilty of manslaughter, and should be punished therefor, and that he is not guilty of murder, and should not be punished for that crime.

Having disposed of the question of what crime defendant is guilty under the indictment, and that he is not guilty of the higher crime of murder, the remaining question is, has the court the power or legal right to, and ought the court to, receive the plea of guilty of manslaughter, and pronounce judgment thereon?

State v. McCormick, 27 Iowa, 402–414: This case is one of the leading cases, if not the leading case, of the country, mapping out the distinction between murder at common law and murder of the first degree, as defined by statute. The defendant was convicted of murder in the first degree, and sentenced to death, which the evidence seemed to warrant. But the indictment was adjudged by the Iowa Supreme Court to only be good as a common-law indictment, and therefore only good for murder in the second degree, the punishment for which was life imprisonment, or for a term of years. The indictment not covering so high a crime as that of which he was convicted and sentenced by the district court, necessarily the judgment had to be set aside by the Supreme Court. A statute then in force in Iowa with reference to appeals in criminal cases provided, "It [the Supreme Court] may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered." The Supreme Court of Iowa adjudged that, on the verdict of guilty of murder in the first degree, it would render judgment as for murder in the second

degree, because that was the judgment the district court should have rendered. The opinion was by Judge John F. Dillon, then Chief Justice of Iowa.

State v. Schele, 52 Iowa, 608, 3 N. W. 632: In this case the defendant, and apparently over the objection of the district attorney, was sentenced for the crime of simple assault, in the face of a verdict for a higher crime, viz., an assault with intent to inflict a great bodily injury. The judgment was affirmed.

State v. Fields, 70 Iowa, 196, 30 N. W. 480: In this case the defendant was convicted of murder in the first degree. It was contended that the indictment was not good as covering that crime. The Supreme Court passed that question, but, with the consent of the Attorney General, rendered a judgment for the crime of manslaughter. This was done because the Supreme Court held that the evidence only showed the crime of manslaughter, and that the jury and the trial court were mistaken in holding it to be murder.

State v. Keasling, 74 Iowa, 528, 38 N. W. 397: In this case the defendant was convicted by the verdict of the jury of the crime of an assault with intent to commit murder. The court overruled his motion for a new trial, no doubt as contended for by the district attorney. But with the motion for a new trial overruled, the court sentenced him for a lesser crime, but which lesser crime was covered by the indictment. The Supreme Court affirmed the action of the trial court, with one judge dissenting, and another expressing no opinion on the point.

Com. v. Squire, 1 Metc. (Mass.) 258: The jury found the defendant guilty of doing an act feloniously. The court pronounced judgment as for a misdemeanor, and the judgment was affirmed.

Com. v. Mahar, 8 Gray, 469: The defendant was convicted of the crime of larceny from a room. The Supreme Court ordered the defendant to be sentenced for a simple larceny.

Sullivan v. State, 44 Wis. 595: The defendant was convicted of the crime of assault with intent to commit a great bodily injury. The case was reversed, with directions to the trial court to sentence him for assault. This, however, was done because of a defective verdict.

Anderson v. State (Neb.) 41 N. W. 951: In this case the defendant was convicted of murder in the first degree. On appeal the Supreme Court held the evidence only warranted a conviction for murder in the second degree, and the judgment was so modified as to be for murder in the second degree only. The Supreme Court did this by virtue of a statute. But such action was because it was that which the trial court should have taken.

State v. Watson (Wash.) 27 Pac. 226: The defendant was convicted on a verdict of the crime of assault with intent to murder, and he was sentenced to a term in the penitentiary. The Supreme Court reversed the case, with directions to pronounce the judgment as for a simple assault.

Simpson v. State (Ark.) 19 S. W. 99: The defendant was by the verdict of the jury and the judgment of the circuit court convicted of murder of the first degree. Because of the evidence, the Supreme Court reversed the case, with directions to the trial court to pronounce

judgment for murder in the second degree. The opinion cites with approval the Iowa cases I have referred to, and also the following: Hogan v. State, 30 Wis. 438, 11 Am. Rep. 575; Johnson v. Commonwealth, 24 Pa. 386.

Some of the cases cite the following, which I have not been able to examine: State v. Hupp, 31 W. Va. 355, 6 S. E. 919; State v. Hall, 108 N. C. 776, 13 S. E. 189.

Counsel for the government have submitted a brief on this question, but they fail to cite any case in conflict with the foregoing, and the points sought to be made do not meet the question, and I have not been able to find any case in conflict with the foregoing.

It can therefore be said that, instead of setting aside the verdict over the objections of both the United States attorney and the defendant, or of either, the court, on the verdict as it stood, because of the state of the evidence, could have pronounced, and it would have been the duty of the court to pronounce, judgment for manslaughter, provided, of course, the evidence shows the defendant to be guilty of manslaughter, and if there were no errors during the trial as to the crime. And the court having such power and such being its duty on a verdict, it is the more certain that a court can and should receive a plea of a lesser offense, and pronounce judgment thereon. Because the trial of the case was at this term, as was the order granting the new trial—the term not yet having adjourned—it would be entirely proper to vacate the order granting a new trial, and then pronounce judgment on the verdict, but pronounce judgment for manslaughter. This authority is recognized in the following civil cases: Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244; Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. Ed. 511; Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 997. And in the following criminal cases: State v. Daugherty, 70 Iowa, 439, 30 N. W. 685; Com. v. Weymouth, 2 Allen, 144, 79 Am. Dec. 776; Ex parte Lange, 18 Wall. 163, 167, 21 L. Ed. 872. And the following cases are cited, which I have not examined: United States v. Harmison, 3 Sawy. 556, Fed. Cas. No. 15,308; Rex v. Price, 6 East, 323. And such was the rule at common law. Freeman on Judgments (4th Ed.) § 69. As to this rule there can be no doubt. Therefore this court at this time has the power and the right to vacate the order granting a new trial, and then pronounce such judgment for such degree of crime as is covered by the indictment, or (the form not being material) the order granting a new trial can stand, and a plea be filed, and the judgment rendered thereon. The result is the same, excepting that in the latter case the defendant is absolutely bound by it. And the question is in no way met by the fact that the United States attorney objects to a judgment for manslaughter. Such objection is, in a measure, persuasive, but not in the slightest degree legally controlling. I do not speak lightly of the office of United States attorney. But it is the duty of that officer to prepare such indictments as ordered by the grand jury. When the indictment is returned, then it is his duty to move to dismiss, if he believes such order should be entered, or, if he believes otherwise, it is his duty to prosecute the case. In the case at bar he and his assistant have prosecuted the case, and to the fullest extent have performed

that duty. They now, as they have the right, ask for another trial. That is their judgment, but in which they are mistaken. And their opinion, no more than the opinion of defendant's counsel, can control. Both can and should urge their beliefs, supporting the same as best they can by argument and by authority. But the motion of neither is jurisdictional, and the argument of either one, in any case, can only be intended as persuasive. The United States attorney has no lawful power to have the grand jury return an indictment, nor direct what degree of crime shall be charged, nor say under what statute the case shall be prosecuted. The language of Justice Harlan in the opinion of Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 94, 42 L. Ed. 509, is pertinent:

"It is said that these indictments were not returned under that statute, and that the above indorsement on the margin of each indictment shows that the district attorney of the United States proceeded under other statutes, that did not cover the case of extortion committed by a Chinese inspector under color of his office. It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment, and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and, if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."

The United States attorney legally cannot prevent the return of an indictment. It is not material, either, that he prepares it or signs it. On his own motion he can file a bill of particulars, or the court may direct him to file it. But when filed it is no part of the indictment. And the United States attorney cannot amend an indictment by adding to or taking from it a word, even with the approval of the court. Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. It is and must be the work of the grand jury, and, when indorsed by the foreman and presented in open court in the presence of his fellow members, need have and can have no other evidence of its verity. The United States attorney cannot dismiss a criminal case. He may move to dismiss, but it is the judgment of the court only that can dismiss the case. He can make no valid agreement as to what the judgment shall be, either on a plea or verdict of guilty. All these things, as done by the court, must be done by the judge presiding, and he is alone answerable, excepting only his errors of law may be corrected by the appellate tribunals.

Therefore the defendant being guilty of manslaughter, and of that only, in the judgment of the court, the defendant will be permitted to file a plea of guilty of manslaughter, and on that plea the judgment of the court will be pronounced.

EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES v. FOWLER.

(Circuit Court, D. Delaware. October 1, 1903.)

No. 1.

1. INSURANCE COMMISSIONER—QUALIFICATION.

Section 1 of the Delaware act of March 24, 1879, entitled "An Act in relation to Insurance Companies," as amended March 17, 1881, 16 Del. Laws, 354, in providing that the Insurance Commissioner "shall not be a director, officer or agent of, or directly or indirectly interested in any insurance company except as an insured," creates a legal inability in one while holding the office of Insurance Commissioner to be or act as agent of an insurance company of another state for the receipt of service of process in Delaware.

(Syllabus by the Court.)

Thomas F. Bayard, for plaintiff.
William S. Hilles, for defendant.

BRADFORD, District Judge. The defendant, Edward Fowler, a citizen of Delaware, has demurred generally to the declaration of The Equitable Life Assurance Society of the United States, a corporation of New York, hereinafter called the insurance company, in an action on the case. The declaration, containing but one count, in substance alleges, aside from matters not requiring present consideration, that Fowler was on or about June 15, 1897, duly appointed in writing by the insurance company "the agent or person" in Delaware "upon whom service of process might be made on behalf" of the insurance company in Delaware; that this appointment was duly filed as required by law in the office of the prothonotary of the Superior Court in Kent county on or about June 18, 1897; that on or about June 15, 1897, the insurance company, by one of its officers, duly notified in writing Fowler of such appointment and of the filing thereof in the prothonotary's office; that afterwards, on or about October 1, 1901, Fowler, as agent of the insurance company, was served with a writ of summons at the suit of one William D. Denney in an action of assumpsit brought by him in the Superior Court in and for Kent county against the insurance company; that Fowler, on being so summoned as agent, was "in the proper and legal discharge of his duties as such agent", bound to notify the insurance company that he had been so summoned as agent, in order that the insurance company might appear by counsel and make defense in the action brought by Denney; that the insurance company had a full, just and legal defence to that action; that Fowler wholly neglected and failed to inform the insurance company of the bringing of the action by Denney, and has never informed or taken means to inform the insurance company of the fact that he, Fowler, as its agent was summoned in that action; that by reason of the failure of Fowler as its agent to notify the insurance company of the service upon him of the writ of summons in that action, the insurance company, having no knowledge of its pendency, made no defence or appearance therein, and consequently Denney obtained judgment by default against the insurance company, the damages being assessed at the sum of $2,213.38, with inter-

est and costs, for which final judgment was rendered; that after such final judgment was rendered Fowler "continued to neglect the proper and legal discharge of his duties as such agent, as aforesaid, and wholly failed and neglected to inform" the insurance company of the recovery of such judgment by Denney, so that the insurance company remained in ignorance of the recovery of such judgment until the time had elapsed within which it had a right under the law to have it opened and to enjoy an opportunity to make defence in that action; that, such judgment having been so recovered, the insurance company, on or about June 28, 1902, paid and discharged the same with interest and costs, aggregating the sum of $2,311.39, and thereafter made demand upon Fowler to reimburse and pay to it the amount of such judgment, interest and costs; and that Fowler has neglected and refused and still neglects and refuses to pay to the insurance company the whole or any part of such amount. A copy of the written designation of Fowler as agent is attached to and made a part of the declaration. It contains a certificate which in part is as follows:

"I, Thomas D. Jordan, Comptroller of The Equitable Life Assurance Society of the United States, do hereby certify that:

* * * * * * * * * *

(2) The said corporation designates Hon. Edward Fowler, Insurance Commissioner, residing at Laurel, as a person or agent within the State of Delaware upon whom service of process may be made and orders, rules and notices served in matters and things pertaining to the said corporation."

A copy of the record of the action brought by Denney against the insurance company, attached to and made a part of the declaration, shows, among other things, the return on the writ of summons as follows:

"Summoned personally Dr. Edward Fowler of Laurel, as agent of 'The Equitable Life Assurance Society of the United States', (a corporation of the State of New York), on October 1st, 1901. So Saith,

"Peter J. Hart, Sheriff."

The declaration is framed on the theory that Fowler at the time he was served with the writ of summons in the action brought by Denney against the insurance company was its agent to receive service of process, and as such agent was under an obligation and clothed with the legal duty to inform his principal of the institution of the suit. If Fowler was such agent he was by necessary implication under such obligation and clothed with such legal duty. The vital question is whether he was such agent. Section 5 of the act of March 24, 1879, entitled "An Act in relation to Insurance Companies", 16 Del. Laws, 24, appears as section 7 in the act as amended March 17, 1881, 16 Del. Laws, 354. That section, among other things, provides:

"No insurance company or corporation shall be engaged in, prosecute or transact any insurance business within the limits of this State, without first having obtained authority therefor, agreeably to the provisions of this act, and every such company, not incorporated under the laws of this State, shall, before doing business as aforesaid, deliver to the 'Insurance Commissioner' a certified copy of its charter or declaration of organization, and also a certificate, in such form as may be provided by the 'Commissioner', of the name and residence of some person or agent within this state, upon whom service of process may be made, and all process against such company issued

out of the courts of this State, may then and thereafter be served upon such person or agent so designated," &c.

Section 2 of the act as amended is in part as follows:

"Section 2. The following shall be the duties of the 'Insurance Commissioner': First. To see that all laws of this State respecting insurance companies are faithfully executed, and to require from all companies not chartered by the laws of this State, transacting the business of insurance in this State, a certified copy of their charter or declaration of organization, and a certificate of the name and residence of an agent or agents of said company resident in this State, upon whom service of process against said company may be made, both of which shall be filed in his office."

A comparison of sections 2 and 7 of the act as amended renders it clear that the term "agent" as employed in section 2 has in all respects the same force and effect as the terms "person" and "agent" in the phrase "person or agent" found in section 7. In section 1 is the following provision:

"The 'Insurance Commissioner' shall not be a director, officer or agent of, or directly or indirectly interested in any insurance company, except as an insured."

All the above quoted statutory provisions were in force, not only when Fowler was designated by the insurance company as its agent on or about June 15, 1897, but when he, at the suit of Denney, was served with the writ of summons October 1, 1901. This court takes judicial notice of the fact that Fowler was Insurance Commissioner of Delaware at the time he was so designated as agent, and of the further fact that in January, 1901, he ceased to be and has never since been Insurance Commissioner. The prohibition contained in section 1, save in one particular, is absolute and unqualified. "Except as an insured", the Insurance Commissioner "shall not be a director, officer or agent of, or directly or indirectly interested in any insurance company." A person employed by an insurance company to accept on its behalf service of process certainly is an agent of the company within the usual and common acceptation of the term. There is nothing in the act or in any act in pari materia to indicate that the word "agent" as used in section 1 should receive so narrow and qualified a construction as to exclude its application to "an agent * * * upon whom service of process against said company may be made", as mentioned in paragraph "First" of section 2, or to a "person or agent * * * upon whom service of process may be made", as mentioned in section 7. On the contrary, an examination of the various provisions in the act touching the duties of the Insurance Commissioner affords strong support to the conclusion that the term "agent", as found in section 1, was intended to apply to anyone employed by an insurance company pursuant to sections 2 and 7 to accept on its behalf service of process. It is, however, urged on the part of the plaintiff, first, that the prohibition in section 1 is directed to the Insurance Commissioner only in his official capacity, and, secondly, that the words "Insurance Commissioner", immediately following Fowler's name in his designation by the insurance company as agent, were used, not as indicating any official capacity in which he should act as agent, but solely as descriptio personæ. The latter con-

tention probably is correct; but the first cannot be sustained. In declaring that "the 'Insurance Commissioner' shall not be a director, officer or agent of * * * any insurance company", the legislature manifestly intended that no person while holding that office should be such director, officer or agent. To hold that the prohibition applies to the Insurance Commissioner in his official capacity, and not in his private capacity, would emasculate the provision and present a reductio ad absurdum. Fowler, then, being Insurance Commissioner, was expressly prohibited so long as he held that office from being or acting as an agent of the insurance company on its behalf to receive service of process. This prohibition was not declared for the benefit of the Insurance Commissioner, but for the protection of the insuring public. It is not a private or personal right or privilege to be waived or insisted on by the Insurance Commissioner at his option. It rests on public policy and creates a legal inability in anyone, while holding that office, to be an agent of or interested in any insurance company except as an insured. Such agency on the part of Fowler while Insurance Commissioner was forbidden and illegal. No consent, acceptance or agreement could create or impart vitality to it. The declaration is not based on the ground of estoppel, misfeasance or malfeasance, but proceeds solely on the theory of liability for breach of duty resulting from the relationship of agency supposed to have been directly created by the making and filing of the certificate designating Fowler as agent, and his notification thereof. But the making and filing of that certificate, and the notification to him, did not of themselves constitute him an agent or impose any duty upon him to act as such; for, as above stated, the law prohibited him while Insurance Commissioner from acting as agent. The declaration in its present form cannot be sustained. I have been strongly impressed with the injustice and hardship to which the insurance company has been exposed through the omission of Fowler, on the facts disclosed, to inform it of the institution of the Denney suit. It appears from the declaration that Fowler was promptly informed by the insurance company of his designation as its agent to receive service of process on its behalf. It was his duty under section 2, as amended, to "require" from the insurance company "a certificate of the name and residence of an agent * * * of said company resident in this state upon whom service of process against said company" might be made. It was further his duty under that section "to see that all laws of this State respecting insurance companies are faithfully executed." It does not appear that Fowler at any time before recovery of judgment by Denney repudiated the appointment on the ground of its illegality or for any other reason, or that, as Insurance Commissioner or in any other capacity, he denied or questioned that the insurance company in designating him as agent had pursuant to law complied with a prerequisite to the right to carry on business in Delaware. It further appears that Fowler ceased to be Insurance Commissioner in January, 1901, and thereafter was under no legal disability to act as agent for the insurance company, and that, although served October 1, 1901, with the writ of summons at the suit of Denney against the insurance company,

he did not at any time communicate or take means to communicate that fact to the insurance company, but left it in total ignorance of the suit and of the recovery of final judgment therein. And it is further averred that when the insurance company first learned of the Denney suit the time had elapsed within which the judgment recovered therein might have been opened and the insurance company permitted to avail itself of a defence alleged to have been full, just and legal. Under the peculiar circumstances of the case, and without intimating any opinion whether the declaration can or cannot be rendered sufficient through an amendment, leave will be granted to the plaintiff, should it be so advised by counsel, to amend the declaration within thirty days next following the date of filing this opinion. Should the declaration not be so amended judgment will be rendered on the demurrer in favor of the defendant.

UNITED STATES v. CLARK et al.

(District Court, M. D. Pennsylvania. September 30, 1903.)

No. 6.

1. INDICTMENT—MOTION TO QUASH—ERROR IN CAPTION.
   An error in the caption of an indictment in stating the term at which it was found is not ground for quashing the indictment, the caption being amendable by the record.
2. USE OF MAILS TO DEFRAUD—INDICTMENT.
   A count of an indictment charging the defendant with using the mails for the purpose of carrying out a fraudulent scheme is not rendered bad by further unnecessary allegations relating to the consummation of the scheme; such averments being disregarded as surplusage.
3. SAME.
   An indictment under Rev. St. § 5480, as amended [U. S. Comp. St. 1901, p. 3696], for using the mails for the purpose of carrying out a fraudulent scheme devised by defendant, must charge that the letters, etc., alleged to have been deposited in the mails were so deposited for the purpose of carrying out or executing such scheme, that being a material part of the offense, which cannot be supplied by intendment.
4. SAME—NUMBER OF OFFENSES CHARGED IN ONE INDICTMENT—STATUTORY LIMIT.
   Each letter put into the post office in pursuance of a scheme to defraud to be effected by the use of the mails constitutes a separate and distinct offense; and as, by the express provisions of the act of Congress, but three offenses committed within the same six calendar months can be joined in one indictment, a count which charges the defendant with having deposited within specified dates "a large number of letters, circulars, and booklets, to wit, 500 letters, 500 circulars, and 500 booklets, addressed to various persons whose names and addresses" are unknown, is bad. United States v. Loring (D. C.) 91 Fed. 881, dissented from.
5. INDICTMENT—JOINDER OF OFFENSES.
   Under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], counts for using the mails to defraud, in violation of section 5480, and for conspiracy to commit such offense, under section 5440 [U. S. Comp. St. 1901, p. 3676], where based upon the same transaction, may be joined in one indictment.

Rule to Quash Indictment. See 121 Fed. 190.

¶ 2. Nonmailable matter, see note to Timmons v. U. S., 30 C. C. A. 79.

S. J. M. McCarrell, U. S. Atty.
C. A. Van Wormer, for defendants.

ARCHBALD, District Judge. The caption is wrong, but that is amendable. The indictment was found at the June term last at Williamsport, and the title should show it. The statement therein that it was found in October, 1902, is a mistake of the draftsman, due no doubt to the idea that it was to stand as an amended and not as an original indictment. But the records of the court show the time, and by them it can now be corrected. 10 Enc. Plead. & Prac. 425. There are other defects, however, which are more serious.

The first and third counts are good, and so is the last. The joinder of the latter is another matter, which will be disposed of presently. The complaint made against the two former, that they combine a federal offense with one of false pretense against the state law, cannot be maintained. It is true that at the close each of these counts contain certain averments with regard to what may be called the consummation of the fraudulent scheme, and while it may be that these are unnecessary, if not to some extent objectionable, as tending to lead the mind away from the real issue, yet they do not vitiate that which is good in the counts, and may be disregarded as surplusage, allowing the rest to stand.

The second and fourth counts, however, are bad. In the second it is not charged that the letter there said to have been deposited in the post office was so deposited for the purpose of carrying out or executing the fraudulent scheme which the defendants are alleged to have devised. This is a material part of the offense, and cannot be omitted. It is the use of the mails as a means of accomplishing the fraud that is the gravamen of the charge, and we cannot supply it by intendment.

In the fourth count the defendants are charged with mailing on various days between May 26, 1901, and May 26, 1902, in pursuance of the scheme described, "a large number of letters, circulars, and booklets, to wit, 500 letters, 500 circulars, and 500 booklets, addressed to various persons, whose names and addresses are to the grand jurors * * * as yet unknown." Aside from its general indefiniteness, an omnibus count of this character cannot be sustained. Each letter put into the post office in pursuance of such a scheme constitutes a separate and distinct violation of the act (In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174; United States v. Martin [D. C.] 28 Fed. 812); and, according to its express provisions, but three offenses committed within the same six calendar months can be joined in the same indictment, to say nothing of the same count. Act March 2, 1889, c. 393, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696]. This does not prevent the government from prosecuting other offenses of the same character which have occurred within the period mentioned; that is to say, it is not required to select out three, and condone all the others. United States v. Martin (D. C.) 28 Fed. 812. The statute simply limits, for the purpose of trial and sentence, the number that may be embraced in any one indictment. I cannot accept the view expressed in United States v. Loring (D. C.) 91 Fed. 881, that all the letters mailed in pursuance of a single fraudulent

scheme are to be taken as constituting one offense, and that the sending of them as a whole may therefore be put into a single count. This interpretation of the law fails to distinguish the fraud from the use of the post office to effectuate it, with which the federal law is alone concerned. It is to be noted that the quashing of the second and fourth counts relieves the indictment from the exception which might otherwise have been taken to it as a whole, that, contrary to the provision of the section referred to, it charged more than three offenses committed within the same six calendar months.

The last count is for a conspiracy, under section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], to commit the offense charged in the first count, of which the fraudulent use of the mails, described in that and the others, are specified as the overt acts. As this, though a distinct violation of the law, and separately but similarly punishable, grows out of the same transaction, its joinder is not only proper on general principles, but is expressly required by the provisions of section 1024 of the Revised Statutes [U. S. Comp. St. 1901, p. 720].

The second and fourth counts are quashed, but the exceptions to the first, third, and fifth are overruled. The exception to the caption is sustained, with leave to the government to amend.

UNITED STATES v. CORRESPONDENCE INSTITUTE OF AMERICA.

(District Court, M. D. Pennsylvania. September 30, 1903.)

No. 7.

1. CRIMINAL LAW—INDICTMENT OF CORPORATION—NECESSITY OF PRELIMINARY COMPLAINT.

   In the prosecution of a corporation, the appropriate first step is the finding of an indictment, a preliminary complaint and hearing being unnecessary.

Rule to Quash Indictment.

C. A. Van Wormer, for defendant.
S. J. M. McCarrell, Dist. Atty., for the United States.

ARCHBALD, District Judge. This indictment was found at the June term, 1903, and the caption should so state, instead of describing it as found in October term, 1902; but this is amendable by the record, and there is no occasion, therefore, for quashing the indictment as a a whole.

The second and third counts are defective in not charging that the letters which are there spoken of were deposited in the post office in pursuance of the scheme to defraud, which the defendant is said to have devised. And the fourth count is objectionable as embracing a large number of different offenses, the statute limiting each indictment, to say nothing of each count, to three offenses, committed within the same six calendar months.

Aside from this, the indictment, limited to the first and fifth counts, is good. The fact that there was no previous complaint or binding over is of no consequence. The defendant is a corporation, and the

finding of an indictment is the appropriate first step, therefore, in the prosecution. U. S. v. John Kelso Co. (D. C.) 86 Fed. 304; Com. v. Lehigh Valley R. R., 165 Pa. 162, 30 Atl. 836, 27 L. R. A. 231; Boston, etc., R. R. v. State, 32 N. H. 215; State v. West North Carolina R. R., 89 N. C. 584.

The second, third, and fourth counts are quashed. The exception to the caption is sustained, with leave to amend. The remaining exceptions are overruled.

O'BRIEN v. HEARN et al.

(Circuit Court, S. D. New York. September 16, 1903.)

1. COSTS—SECURITY BY NONRESIDENT PLAINTIFF—DELAY IN MAKING APPLICATION.

A nonresident plaintiff, who may be required by defendant to give security for costs under the statute, will not be relieved from such requirement by a federal court because of defendant's delay until after answer in moving for the security, where no special prejudice to plaintiff is shown to have resulted.

On Application to Vacate ex Parte Order Directing Plaintiff, a Nonresident, to File Security for Costs.

Edward P. Lyon, for plaintiff.

Nadal & Carrere, for defendants.

LACOMBE, Circuit Judge. This application is made upon the theory that because defendants did not move at once, but obtained extensions of time to answer, and answered the complaint, they are to be refused the security provided for by the Code on the ground of laches. Neither the Code nor the rules limit the time within which application should be made to require plaintiff to file security for costs. Nevertheless the state courts have adopted the practice of refusing such relief, when there has been delay in making the application. Buckley v. Gutta Percha & Rubber Mfg. Co., 3 Civ. Proc. R. 428; Thomas v. Mutual Protective Union, 49 Hun, 171, 2 N. Y. Supp. 195. This practice, however, has not been followed in this district, at least when no special prejudice to plaintiff's right is shown to have resulted from defendant's delay in moving. Stewart v. The Sun (C. C.) 36 Fed. 307. Our calendars are now overcrowded with litigations like this, where the action might just as well have been brought in the state courts. If parties plaintiff in accident causes, so called, will insist upon their right to come here because they happen to live in Jersey City instead of Brooklyn, and thus delay and impede the trial of controversies involving federal questions, the least they can do is to comply with the provisions requiring them to secure the costs of the litigation, should it be found that their action is without merit.

Motion is denied.

¶ 1. See Costs, vol. 13, Cent. Dig. § 466.

In re LEDERER.

(District Court, S. D. New York. September 17, 1903.)

1. BANKRUPTCY—ABUSE OF PROCEEDINGS TO DELAY CREDITORS—DISMISSAL OF PETITION FOR DISCHARGE.

A bankrupt who filed a petition for discharge, but took no further steps in the matter for a year thereafter, is chargeable with an abuse of the proceedings for the purpose of delaying creditors; and, on proper application by a creditor, his petition for discharge will be dismissed, and an injunction staying proceedings by the creditor for the collection of his debt vacated.

In Bankruptcy.

Milton Mayer, for petitioners.
Franklin Bien, for bankrupt.

HOLT, District Judge. This is a motion to either dismiss the bankruptcy proceedings, or to declare them ended, or to vacate the adjudication in bankruptcy, or to deny the application for a discharge, or to grant such other relief as may seem proper.

George W. Lederer was adjudicated a bankrupt in involuntary proceedings on September 27, 1901. The matter was regularly referred to a referee. No proceedings were taken before the referee until September 26, 1902, when a petition for a discharge was filed with the referee. Since the petition for discharge was filed, no further proceedings have been taken in bankruptcy, except that on September 30, 1902, the bankrupt obtained an order staying all proceedings on the part of the creditor who makes this motion, who had brought a suit against the bankrupt. This, in my opinion, is a clear case of an abuse of bankruptcy proceedings for the purpose of delaying creditors. The fifty-ninth section of the bankrupt act of July 1, 1898 (chapter 541, 30 Stat. 561, 562 [U. S. Comp. St. 1901, p. 3445]), provides that "a voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners for want of prosecution or by consent of parties until after notice to the creditors." That part of the motion which asks to have the petition dismissed, or the adjudication vacated, therefore, must be denied, as no notice to creditors has been given. I think that the proper course to pursue is to dismiss the pending application for discharge for want of prosecution, and to vacate the injunction staying the creditor from proceeding at law. I think it proper to add that it is not necessary for creditors to wait in any case as long as they have waited in this case. If the bankrupt files a petition for discharge, and then fails to carry on the proceedings with reasonable promptness, the court, upon a proper application, will dismiss the application for discharge for want of prosecution, and vacate all injunctions staying proceedings at law.

The motion is granted so far as to order that the application for discharge be dismissed for want of prosecution, and that the injunction staying the moving creditors' proceedings be vacated.

LOUISVILLE & N. R. CO. v. MEMPHIS GASLIGHT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 21, 1903.)

No. 1,149.

1. QUASI PUBLIC CORPORATIONS—GAS PLANTS—OPERATING MATERIALS—CLAIMS—PRIORITY—MORTGAGES—BILL—DEMURRER.

At various times between May, 1892, and August, 1893, complainant furnished coal and coke to defendant gaslight company for use in its business, and for the amount due therefor obtained a judgment by confession against defendant in January, 1894. Executions were returned nulla bona against the corporation, and its assets were subsequently sold by trustees for the payment of mortgage bondholders, without the appointment of a receiver. On April 12, 1894, complainant filed a bill alleging such facts, and averring on information and belief that within 12 or 18 months before the bill was filed there had been a diversion of the company's earnings to the payment of interest on such bonds and for the improvement of the plant, but failed to allege the dates or amounts of such diversion, or that they occurred within the time when the expenses for coke and coal furnished accrued. *Held*, that the facts alleged were insufficient to entitle complainant to be paid out of the proceeds of the sale of the corporation's assets in preference to the mortgagee.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

John W. Judd, for appellant.
T. K. Riddick, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The question involved is whether an unsecured creditor of a gas company is entitled to be paid out of the proceeds of the sale of the plant, in preference to the mortgagees, because it furnished coal and coke used in operating the plant, although no receiver was ever asked for or appointed. The bill below was dismissed upon demurrer, and the case comes here by way of appeal from this judgment.

It appears from the bill that the defendant below, the Memphis Gaslight Company, was a quasi public corporation owning and operating a gas plant in Memphis, and charged (so it is alleged) with the duty of making and furnishing gas within that city for public and private purposes. In April, 1873, the company placed a first mortgage upon its plant to secure an issue of $240,000 of bonds, and in July, 1892, a second mortgage to secure an issue of $400,000 of bonds, $240,000 of which were to be reserved until the first mortgage bonds should be paid. During the months of May, November, and December, 1892, and January and February, 1893, the complainant below, the Louisville & Nashville Railroad Company, furnished the gas company coal and coke on an account amounting to $2,808.45, for which a note was given, and during the months of March, April, May, June, July, and August, 1893, furnished coal and coke on an account amounting to $3,657.55. On January 27, 1894, the railroad company took a judgment by confession in the state court against the gas company on this note and account for $6,809.90. On March 17, 1894, an execution on this judgment was returned nulla bona, and on April 21, 1894, the

railroad company filed its bill in the court below, setting out the above facts, averring, upon information and belief, that more than enough of the current income to pay the complainant's claim had been diverted to the payment of interest and the improvement of the plant within 12 or 18 months preceding, alleging that the trustee under the second mortgage was about to sell the plant and apply the proceeds to the payment of the bonds issued under the two mortgages, and praying that the court declare the preferential character of the complainant's claim, and require the trustee to set aside a sufficient sum from the proceeds of the sale to satisfy its judgment. No receivership existed or was prayed for.

The allegations respecting a diversion of the current income were of the most general nature. The bill averred, upon information and belief, that the gas company had made a considerable amount of money within the past 12 or 18 months, more than enough to pay the complainant's claim, and that much of this money had been used to pay the interest on the bonds and to improve the plant. No details were given.

On May 20, 1899, an amended bill was filed stating that after the filing of the original bill the trustee had sold and conveyed the property of the gas company, and asking such additional relief as might be proper under the changed circumstances.

The appellant relies upon the doctrine announced in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, in the case of a railroad in the hands of a receiver, and seeks to apply it to a gas plant not in the hands of a receiver, urging that a gas company is a quasi public corporation, charged with the duty of furnishing a public convenience, which should be supplied without interruption, and therefore those who furnish material or labor to keep it in operation should be accorded an equitable lien in preference to mortgagees. In the interest of the public it is insisted the gas plant must be kept "a going concern," and therefore those who keep it going should be paid first out of the proceeds of its sale.

In the case of Wood v. Guarantee Trust Company, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472, an attempt was made to apply the doctrine of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, to a waterworks company which supplied water to a municipality, and Mr. Justice Lamar, speaking for the court, said (page 421, 128 U. S., page 132, 9 Sup. Ct., 32 L. Ed. 472):

"The doctrine of Fosdick v. Schall has never yet been applied in any case, except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out. There is other ample ground upon which to decide this question."

This probably still remains true of the Supreme Court, but other federal courts have applied the doctrine to street railway, telephone, and telegraph companies. Manhattan Trust Company v. Sioux City Cable Railway Company (C. C.) 76 Fed. 658; Central Trust Company v. Clark, 81 Fed. 269, 26 C. C. A. 397; Keelyn v. Carolina Mutual Telegraph & Telephone Company (C. C.) 90 Fed. 29; Illinois, etc.,

Banking Company v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Guaranty Trust Company v. Galveston City Railway Company, 107 Fed. 311, 46 C. C. A. 305; and other cases.

Obviously, street railroads and telephone and telegraph companies are similar to railroad companies in a sense gas companies are not. A gas company is more like a waterworks company. It is more of a private concern—a manufacturing enterprise. It supplies a public convenience, but it does not enjoy the same privileges and franchises, nor would its stoppage result in that injury to the public and detriment to the mortgaged security which would flow from the stoppage of a railroad. A gas company is not so dependent upon credit, nor is there usually the same need of a receiver to keep its plant in operation. The present case illustrates this. No receiver was ever prayed for or appointed. The plant was kept in operation by the company until the trustee under the mortgages sold it, and it is now being run by another company.

It is not necessary, however, to elaborate this distinction, or to decide that under no circumstances could the doctrine of preferential claims be applied to a gas company. It is enough to say that the bill does not show a state of facts which would justify the application of the doctrine, even if the defendant below were a railroad company; for, to displace the lien of mortgagees and charge the corpus with an operating expense as a preferential claim, something more must be shown than that the supplies were used to run the road and are unpaid. There must be a receivership, the supplies must have been furnished within a limited time (in this circuit six months) before the receivership, and it must appear there was a diversion of the current earnings for the benefit of the mortgagees, either by the payment of interest or the betterment of the mortgaged property.

In the leading case of Fosdick v. Schall there was an application for a receivership by the mortgagees. It was held that this put it within the discretion of the court to direct the receiver to pay out of the income of the receivership certain preferential claims which ought to have been paid out of the current earnings of the company, but the court said (page 253, 99 U. S., 25 L. Ed. 339):

"The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity."

In Miltenberger v. Logansport Railway Company, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, the necessity of authorizing a receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the corpus of the property, is explained, yet the discretion to do so, it is said (page 311, 106 U. S., page 162, 1 Sup. Ct., 27 L. Ed. 117), "should be exercised with very great care." The claims of operatives, of supply men, and of connecting lines for freight and ticket balances for a limited time before the receivership, must be paid to preserve the credit needed to enable the receiver to keep the road in effective operation. These considerations, says the court (page 312, 106 U. S., page 163, 1 Sup. Ct., 27 L. Ed. 117), "may well place

such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise." These and other cases are reviewed, and the doctrine in question discussed, in the opinion delivered by Mr. Justice Harlan in the recent case of Southern Railway Company v. Carnegie Steel Company, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458.

In the case of Kneeland v. American Loan Company, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379 (approved in Thomas v. Western Car Company, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, and V. & A. Coal Company v. Central Railroad Company, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068), attention is called to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine of Fosdick v. Schall, and the court, speaking by Mr. Justice Brewer, uses the following language (136 U. S. 97, 10 Sup. Ct. 953, 34 L. Ed. 379):

"The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens."

The limited application of the doctrine of Fosdick v. Schall, thus adverted to by the Supreme Court, has always obtained in this circuit. The doctrine has never been applied except in the case of a receivership, and only where "the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage" (International Trust Company v. Brick & Contracting Company, 95 Fed. 850, 37 C. C. A. 396, 406), and "almost universally" has been restricted to preferential claims accruing within six months prior to the receivership (Central Trust Company v. Railroad Company, 80 Fed. 629, 26 C. C. A. 30).

The complainant below sold the gas company coal and coke, which was used in making gas, and failed to collect the judgment on the note and account for these supplies, because of the outstanding mortgages. The first of this coal and coke was furnished in May, 1892, and the last in August, 1893. The judgment by confession in a state court was taken in January, 1894, and this bill filed in April, 1894. Twenty months had elapsed after the first item fell due, and five months after the last, before the judgment by confession was taken. No receivership existed when the bill below was filed, and none has ever been created. No diversion of the current earnings is charged to have occurred within the time when these operating expenses accrued. There is only the vague assertion, on information and belief, that within twelve or eighteen months before the bill was filed there had been a diversion, without giving dates or amounts.

If this were a claim against a railroad company, no facts are shown which would justify the court below in displacing the lien of the mort-

gagees for the purpose of paying it. Nor has any reason been suggested which would justify the enlargement of the doctrine of preferential claims so as to cover this one. The mortgagees asked no favors of the court, but stood upon their rights as lienholders. While the coke and coal were used to run the plant, it does not appear that without the credit extended in furnishing these supplies the plant would have shut down to the inconvenience of the public and the detriment of the mortgaged property. The complainant below stopped supplying coal and coke in August, 1893, but the plant did not shut down, nor was it necessary to apply for a receiver with authority to pay this and similar claims, in order to keep it "a going concern," and thus preserve the integrity of the mortgage security. The Memphis Gaslight Company kept on running the plant until it was sold by the trustee under the mortgages, and since then it has been operated by its successor.

The judgment of the Circuit Court is affirmed.

TALBOT v. MASON.

(Circuit Court of Appeals, Sixth Circuit. July 21, 1903.)

No. 1,176.

1. APPEAL—ESTOPPEL—ACCEPTANCE OF CONSENT ORDER.
A claimant who, on the entry of an order denying his petition for an allowance from a fund in court on the ground that he had no legal or equitable claim thereon, accepted an offer made in open court by counsel for opposing interests to consent to an allowance of a smaller sum, which allowance was accordingly made, based expressly on the consent, and who accepted payment thereunder, was thereby estopped to prosecute an appeal from the order disallowing his claim.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Russell C. Ostrander and Thomas H. Talbot, for appellant.
Horace G. Stone, for appellee

Before LURTON and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from an order of the Circuit Court denying the petition of the appellant for an allowance of counsel fees payable out of the fund in court in the case of Mason et al. v. Pewabic Mining Company et al.

On March 31, 1884, Mason and others, minority stockholders of the Pewabic Mining Company, a Michigan corporation whose charter had expired in April, 1883, filed their bill in the Circuit Court for the Western District of Michigan against the company, its directors, and a new corporation called the Pewabic Copper Company, formed by the majority stockholders of the mining company for the purpose of acquiring its property, in which the complainants sought to prevent the proposed transfer and sale of the property of the mining company to the copper company, to obtain a public sale of such property, and an accounting by the directors of the mining company. The Circuit

Court decreed a sale, but denied an accounting. Mason v. Pewabic Mining Company (C. C.) 25 Fed. 882. The case was carried to the Supreme Court and the decree affirmed, except with respect to the accounting, as to which it was reversed and a reference to a master directed. Mason v. Pewabic Mining Company, 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524. Under this mandate the Circuit Court ordered a reference, report, and sale at public auction, and on February 3, 1891, the master filed his report of sale, which was confirmed. There was another appeal to the Supreme Court, and the decrees of the Circuit Court were, on May 16, 1892, in all respects affirmed. Pewabic Mining Company v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

On February 28, 1893, after affirmance by the Supreme Court of the decree confirming the sale of the property for $710,000, Dickinson & Russell, counsel for the complainants in the original suit, filed a petition for an allowance of $71,000 out of the amount realized on the sale, to which resistance was made and the petition denied, whereupon an appeal was prosecuted to the Supreme Court, which, on May 14, 1894, dismissed the appeal for lack of jurisdiction. Mason v. Pewabic Mining Company, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745.

While the case was pending before the master, 17 claims against the fund arising from the sale of the property were presented for allowance, including, among others, a claim of Thomas H. Talbot for legal services rendered the mining company and its directors after the first appeal to the Supreme Court had been decided and a mandate sent down directing the reference to a master for an accounting. The firm of Dickinson, Thurber & Stevenson, representing the complainants in the original suit, successfully resisted the allowance of these claims by the master, and his report was sustained by the court. From this decree, nine of the complainants appealed to this court, which, on December 4, 1894, affirmed the decree with respect to all the claims except that of the Franklin Company, which was remanded for another reference. Mason v. Pewabic Mining Company, 66 Fed. 391, 13 C. C. A. 532.

With respect to the claim of Mr. Talbot, we said in that case (66 Fed. 398):

"Neither have we overlooked the further fact that the counsel for the complainants sought to have their compensation charged upon the fund, and that appellants, or some of them, actively resisted the claim thus asserted. It is the right of every beneficiary who is interested in the distribution of a common fund to contest each claim demanding participation. Each is interested in cutting down every other claim, that his own share may be thus enlarged. We do not understand that, for every contest thus made, the contestant establishes a charge upon the common fund. Self-interest is the motive for such defenses, and the resulting enlargement of his own share, in case of success, is the anticipated reward."

Subsequently, on February 21, 1896, the firm of Dickinson, Thurber & Stevenson filed its petition for an allowance of fees and expenses in successfully resisting the claims referred to, and on May 7, 1896, the Circuit Court allowed the petition, reciting that, although notice of the hearing had been served upon all parties adversely interested, no one had appeared except Thomas H. Talbot, of counsel for the Pewabic

Mining Company, Daniel L. Demmon, and Thomas H. Perkins, stockholders in said company, and that he had not opposed the granting of the petition. In other words, all parties having been notified of the application, and no one opposing it, the allowance was made as prayed for.

On February 8, 1902, the appellant, Thomas H. Talbot, filed his petition in the court below, asking for an allowance of $10,000 out of the fund in court, as equitable compensation for his services in successfully opposing the petition of Dickinson & Russell for $71,000 for professional services resulting in the sale of the property of the mining company for $710,000. In this petition the appellant set out that he was in 1887, and ever since has been, engaged as counsel for the mining company; that it devolved upon him to represent the mining company in the matter of the allowance or refusal of the petition of Dickinson & Russell; and, after examining the legal questions involved, he reached the conclusion that it ought not to be allowed. Accordingly, "with the concurrence and approval of the directors" of the mining company, of whom he was one, he determined to oppose the allowance of the compensation prayed for, and did so successfully. For this he asked an allowance of $10,000.

On May 21, 1902, the matter came on for hearing before the court below, and the following entry was made:

"This matter came on to be heard, and was argued by Russell C. Ostrander, counsel for the petitioner, and Horace G. Stone, counsel for all parties opposing said petition, and after mature deliberation the court announced its decision and judgment that the prayer of said petitioner should be denied and said petition dismissed, for the reason that the claim of said Thomas H. Talbot is not a legal or equitable claim against the fund from which recovery is sought; and thereupon counsel for the parties opposing said petition announced in open court that all of the parties to said cause interested in said fund and opposing said petition consent that an allowance of $1,000 be paid to said petitioner out of said fund; and thereupon, it is ordered, adjudged, and decreed that in compliance with said consent there be allowed out of the fund now in the custody of the court to the said Thomas H. Talbot, petitioner, the sum of $1,000."

On August 13, 1902, the following further order was made:

"An order having been duly entered in this cause on the 21st day of May, A. D. 1902, allowing the claim of Thomas H. Talbot in part, and directing the payment to him of the sum of $1,000 as the total amount allowed on said claim, on reading and filing the request of said Thomas H. Talbot to pay said sum to Russell C. Ostrander, it is ordered that there be paid to said Russell C. Ostrander out of the moneys now in the registry of this court in this cause the sum of one thousand dollars."

Acting under this order, on August 20, 1902, Mr. Ostrander received and receipted for the $1,000 allowed Mr. Talbot.

Thus it appears that Mr. Talbot's claim was argued by counsel for both sides, and the court, "after mature deliberation," announced its decision that the prayer be denied and the petition dismissed, for the reason that Mr. Talbot's claim was not a legal or equitable one against the fund in court. It further appears that, after the court had thus delivered its decision, the counsel for the parties opposing the petition announced in open court their consent that an allowance of $1,000 be paid to Mr. Talbot out of the fund, whereupon the court decreed that,

"in compliance with said consent," there be allowed Mr. Talbot the sum of $1,000. The subsequent order recites the allowance to Mr. Talbot of the sum of $1,000 "as the total amount allowed on said claim," and directs that it be paid to Mr. Ostrander at Mr. Talbot's request. This was accordingly done.

This is not the case of an appeal from a judgment allowing as of right part of a claim and denying the balance. If Mr. Talbot, by the deliberate judgment of the court and against resistance, had recovered a part of what he claimed, and had appealed from the part denied, those opposing might have appealed also, and thus the matter be brought before us in the shape in which it was presented to the lower court. This was not done. Mr. Talbot did not succeed in part. He was defeated altogether. Those opposing him were not defeated in part, so they could appeal. They were successful altogether. The judgment allowing him $1,000 was a consent judgment. It expressly states it was made "in compliance with said consent." It rested solely upon the agreement of the parties. The court was the mere medium of carrying this out, because the fund was in charge of the court. Mr. Talbot claimed $10,000 out of the fund. The court found he was entitled to nothing. After the matter had thus been disposed of, the opposing counsel announced they would consent that an allowance of $1,000 be made. This proposition, made in open court, was essentially similar to a like one made out of court. Whether made in court or out of court, such an offer is one to substitute the consent of the parties for the judgment of the court. If it had been made out of court, if the successful parties had said to Mr. Talbot, "You have been beaten in court, but we will pay you $1,000 for the services you rendered," and he had accepted the offer and taken the money, would he not have been estopped to prosecute his original claim further? The same result followed his acceptance of the offer made in court. The consent judgment was offered as a substitute, and, when accepted, took the place of the deliberate judgment. The petitioner had his choice between the two, but he could not take advantage of both. He could either take nothing under the first and prosecute his appeal, or $1,000 under the second and quit. He chose the second alternative, and the appeal must for this reason be dismissed, with costs.

SULLIVAN v. PIERCE.

(Circuit Court of Appeals, Fifth Circuit. October 6, 1903.)

No. 1,053.

1. SALES—RESCISSION BY SELLER—FALSE REPRESENTATIONS.
   Unless statements and representations made by a buyer to the seller of property were relied upon by the latter, and were the inducing cause of the sale, they afford no ground for its rescission by the seller, and it is immaterial whether they were true or false.

2. SAME—RELIANCE ON STATEMENTS—CONFIDENTIAL RELATION OF PARTIES.
   The confidential relation existing between partners may be presumed to have continued after they formed a corporation to which the partnership property was transferred, and in which they were practically the only stockholders, and to have induced one in selling his stock to the

other, who was the active manager of the business, to place reliance on the latter's statements in respect to the condition and value of the property to the same extent as though the partnership had continued, in the absence of evidence to the contrary.

8. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to entitle complainant to a rescission of a sale by him to defendant of his stock in a corporation of which they were practically the only stockholders, on the ground of false and fraudulent representations made by defendant, who was the active manager of the business, it being shown that complainant was the minority stockholder; that the relations of personal friendship and confidence which for many years existed between the parties had been broken some time before the sale, making complainant desirous of terminating their business connection; and that in making the sale he did not act in reliance on any statements or representations made by defendant, but on his own independent knowledge and judgment, and received a price not greatly below the actual value of his interest in the property at the time.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

M. E. Kleberg and Charles W. Ogden, for appellant.

J. W. Terry and F. C. Proctor, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit was brought by Daniel Sullivan, a citizen of Great Britain, against Abel H. Pierce, a citizen of Texas, to rescind a sale. The parties had been friends for many years, and each had confidence in the business integrity of the other. They formed a partnership for the purpose of purchasing real estate and cattle and to raise and sell cattle. Sullivan put in one-fourth of the capital, and Pierce and his brother three-fourths. Pierce soon bought his brother's interest, so that the assets of the firm were owned by Pierce and Sullivan, the former owning three-fourths interest and the latter one-fourth. Pierce was the active or managing partner. He bought for the firm about 55,000 acres of pasture and farm lands, and cattle to stock them. The investment of cash advanced and accruing profits amounted to large sums, variously estimated from $200,000 to $300,000. During the partnership, which existed about a year, Pierce lived on or near the ranch, and Sullivan in a county near by. Pierce was a "cowman," and was in charge of the partnership business, and Sullivan was a banker. Pierce furnished Sullivan annually with an account or statement showing the condition of the partnership business. By mutual agreement, in the year 1883, a corporation was formed to own the ranch and cattle, which was capitalized at $1,000,000. Stock of the par value of $250,000 was issued to Sullivan, and stock of the par value of $750,000 was issued to Pierce, less a few shares, probably 5 or 6, which were held by a member of Pierce's family. By agreement, Pierce was to be, and he did become, president, and Sullivan secretary, of the corporation. The officers received no salaries. Pierce continued to manage the business just as he did during the partnership, but there were regular meetings of the directors, of which minutes were kept.

On May 9, 1896, after correspondence and negotiations, which will be referred to later, Sullivan sold his stock in the corporation to Pierce

for $50,000 in gold, $10,000 to be paid before July 1, and $40,000 on or before December 1, 1896, with 6 per cent. interest. Pierce paid the purchase money and received the stock. Two years after the sale, May 9, 1898, this bill was filed for its rescission. It charges that the sale was procured by fraud. It is alleged that the complainant had great confidence in the defendant, and in making the sale relied on his assertions regarding the property. The following are the false and fraudulent statements alleged in the bill to have been made by the defendant to the complainant: "(1) That the land, if put up and sold for cash, would not bring the amount paid for it; (2) that a large and valuable plantation upon the land had been totally ruined by Johnson grass; (3) that high taxation and continued land litigation had depreciated the value of the land; (4) that the stock interest in that section of the country was on the heels of the biggest die up that was ever known in that country, thereby intending to cause your orator to believe that a large number of the cattle belonging to your orator and said defendant, as stockholders of the said Pierce-Sullivan Pasture & Cattle Company, had recently died; (5) that the ranch would not pay two per cent. on the investment; (6) that complainant's interest in the property was not worth more than $50,000."

The defendant having answered, and evidence having been taken (nearly 2,000 printed pages), the Circuit Court dismissed the bill, refusing on the merits to cancel the contract of sale. The complainant appealed, and the decree of the Circuit Court, with specifications, is assigned as error.

The theory of the bill is that there were confidential relations between the complainant and the defendant growing out of their long and intimate business and personal association, and that the sale was made by the complainant "believing that said representations were truthful, and represented the actual facts, and relying upon the obligation of the defendant to deal fairly and truthfully with him in relation to said property." It is averred, and an effort made to prove as an essential part of the complainant's case, that the relations between the parties to the contract were such that the complainant was entitled to and did rely in making the sale on the defendant's representations, and that he did not rely on knowledge obtained from other sources and on an independent investigation.

It is clear that if Sullivan sold to Pierce, exercising his own judgment as to the value of his interest, depending on his knowledge of the value of the property obtained from other sources, and not relying on Pierce's statements, that it is immaterial whether Pierce's statements were true or untrue. It is a necessary step in the complainant's case to show that in making the sale he relied on the alleged false representations of the defendant. Until that appears, we are not called on to investigate in detail whether the statements are true or false.

The evidence abundantly shows that for many years the complainant and the defendant were intimate friends; that they had large business dealings, showing mutual confidence; that they became partners; that the defendant was the active partner in control of the business; and that the relation between them was one of great personal confidence, aside from what the law implies from the fact of their part-

nership and the mode of conducting the business. Notwithstanding the fact that they formed a corporation and transferred to it the partnership property—they being practically the only stockholders and the business being conducted in practically the same way as during the partnership—this relation of confidence would be presumed prima facie to continue. Although the sale of the stock was made by the secretary to the president of the corporation, the peculiar facts of the case are such that we may look at it as practically a sale by one partner to another of his interest in the partnership property. Looking at the substance, and not at the form, we may consider the trade as one made between partners; and prima facie, in the absence of evidence to the contrary, we would conclude that the complainant relied on the statements and representations of the defendant. But we find the record pregnant with evidence—much of it the evidence of the complainant—which rebuts this conclusion. The evidence does not present to us the picture of one partner confidently relying on the representations of another, and being induced to make a sale by such representations, but of two unfriendly men, anxious to separate their joint holdings, and negotiating at arm's length to produce that result, each acting on his own judgment, and the seller placing no confidence whatever in the buyer's statements.

In February, 1895, the pleasant personal relations between the complainant and the defendant were interrupted by a disagreement between members of their families, and the latter announced that he would never enter the banking house of the former again. Sullivan claimed that it was agreed that the corporation's stockholders' meetings should be at San Antonio, and that the president was to have no salary. On February 3, 1896, Pierce, the majority stockholder, caused the by-laws to be so changed as to remove the company's office from San Antonio to the company's ranch, and to permit the president to be paid a salary. Sullivan, who was present at the meeting when these changes were made, charged, by his attorney, that they were made "to perpetrate a fraud." On February 10, 1896, by letter, Sullivan called on Pierce for statements of account, and on February 24, 1896, drew on Pierce for $4,527.90, an amount claimed as due him by the statement of account. The draft was not paid. On March 4th, Sullivan appointed Herman Brendel his agent "to make full investigation into all matters of account, statements, and books pertaining to all business transactions" between complainant and defendant, including the business of the Pierce-Sullivan Pasture Company. From March 10 to April 4, 1896, Pierce wrote three times to Sullivan to have the seal and books of the company sent from San Antonio to the company's new office on the ranch. On March 31, 1896, Sullivan, by Brendel, his cashier, replied that Pierce's letters were referred to his (Pierce's) attorney. On April 9, 1896, Pierce wrote Sullivan about the company's books: "If you desire to send any detective or expert down here to examine them, he shall be shown every courtesy," etc. "If I have been robbing you as long as you have reported I have been, why have you not discovered it before?" Brendel, duly authorized to investigate the company's books for Sullivan, visited the ranch. He returned, and reported to his employer that he was

not allowed a fair opportunity to examine the books, and that Pierce, charging Brendel with making remarks concerning the company's business reflecting on Pierce, had threatened to have Brendel killed.

A mere recital of these occurrences is sufficient to show that unfriendly feeling existed between the parties, and that Sullivan was not in a condition of mind to rely implicitly on representations made by Pierce.

On April 10, 1896, Sullivan wrote to Pierce a proposition to sell his interest "for cost and eight per cent." On April 15th Pierce declined, and offered to sell on the same terms. On April 17th Sullivan wrote again, asking Pierce what he "would consider a fair figure" at which he would buy Sullivan's interest. On April 22d Pierce replied, offering $50,000 for Sullivan's interest, $10,000 to be paid on or before July 1, and the balance on or before December 1, 1896, with interest at 6 per cent. from July 1, 1896. On April 24, 1896, Sullivan replied, offering to take $75,000 for his interest on the terms as to payments and interest as proposed by Pierce. On April 27th Pierce wrote again, declining to give $75,000. On May 1, 1896, Sullivan again wrote, saying that he would like to settle the ranch affair "amicably," and suggested an interview. In subsequent letters they agree to meet in Galveston, at the Tremont Hotel, on May 9, 1896. In Pierce's letters (which we have not quoted in full) several of the representations are made which are charged in the bill. The general tone of Pierce's letters tends, in the trader's usual way when buying, to depreciate the property, and the general tone of Sullivan's letters, as is usual with a seller, tends to appreciate the value of the property. It is Sullivan who offers to sell, and who requests the interview. The correspondence shows a minority stockholder, unable to control the corporation, anxious to sell, and a majority stockholder in control, willing, but not seemingly anxious, to buy.

The parties met, as agreed, on May 9, 1896. Sullivan, being asked what occurred at the Tremont Hotel, answered: "It was very short. I told him I had come to see if we could make an amicable deal for the property, and he said he would not give me any more than he had written me. I told him I wouldn't take that. I began at $75,000. I told him I would take $60,000. He said he wouldn't give it to me. He said, 'You will have to take my offer or let it stand as it is.'" After testifying that he finally accepted Pierce's offer, he was asked: "What did you think of it at the time?" He answered: "I thought it was worth a good deal more; if he would have divided with me, I wouldn't have taken double the money." Pierce, testifying as to the interview, says he offered to sell to Sullivan at $180,000; that is, at the rate of $60,000 for a one-fourth interest. Sullivan in this interview accepted Pierce's offer of $50,000, but stipulated for payment in gold. Later, Pierce offered to pay the notes before they were due if Sullivan would discount them; and it is a significant fact that Sullivan, on May 26, 1896, expressed the opinion in a letter to Pierce that the occurrence of a named political event would cause "gold to command 25 per cent. premium at once," and on the happening of another event suggested that "gold will be a way up, possibly 2 to 1." "With these prospects in view," he added, "I would not entertain your proposition

to discount your notes, as the chances are I will make more by waiting."

The unquestioned facts and circumstances preceding and following the sale are such that we cannot believe that Sullivan was induced to make it by the representations of Pierce. At the time he made the sale he probably believed, as he testified, that the property was worth more than he sold it for. If he could have obtained a division, he said, "he would not have sold it for double the money." We cannot reconcile this evidence with the contention that he accepted the $50,000 on the faith of Pierce's assertion that it was a fair price. There were strong reasons why Sullivan might wish to sell. He was a minority stockholder, on unpleasant terms with the management of the corporation. He was a banker, making large interest on money in his business. He was getting small or no dividends on his stock. The majority stockholder had the power (never exercised, however) to lessen his dividends by fixing a salary for the president. He was suspicious that the property was managed unfairly. His agent sent to investigate had been threatened. The office of the corporation had been moved from San Antonio to a place inconvenient to Sullivan. These and other reasons, while they would tend to prevent his relying on Pierce's representations, would naturally make him desire to sell his stock. He had tried to sell to others, and now he turned to Pierce, and offered to sell to him. We think the learned judge in the court below correctly held that the evidence does not show that Sullivan was induced to make the sale by his reliance on representations made by Pierce.

But it is urged that the price paid is grossly inadequate. The evidence tends to show that cattle and grazing lands were very low when the sale was made. In the two years following the sale they greatly increased in price, probably nearly doubled in value.

The difficulty in estimating the value of lands and cattle is considerable. It is clear they are worth as much to the owner as they would sell for in cash. But, when the tract and herd are so large that there is no market for the whole, their value as a whole becomes a matter of opinion. The witnesses in this case place greatly differing valuations on the lands involved. The question here is, of course, what was the value of the property at the date of the sale. The complainant early in his effort to sell offered to take $75,000 for his interest, later he offered to take $60,000, and finally accepted $50,000. The defendant says that at the time of his purchase he offered to sell his three-fourths interest at the rate of $60,000 for a one-fourth interest. The learned judge who so carefully considered the case in the circuit court thought the one-fourth interest was probably worth $75,000. It requires conscious effort, when we attempt to estimate the value of the property at the date of the sale, to exclude from our minds the effect of the great increase in value immediately following the sale. Such increase, doubtless unconsciously to the witnesses, affected their testimony. This great advance in values made the complainant regret his sale, and probably sharpened his wits to discover badges of fraud.

We shall not attempt the useless labor of analyzing all the evidence on this point. When we exclude from our minds the effect

of the great increase in value within a short time after the sale, we are of opinion that the complainant, on the evidence, did not sell his interest for a sum greatly less than its value at the date of the sale. Exclude the great rise in values which necessarily occurred between the sale and the filing of the bill, and we find no fact alleged in the bill and disclosed by the evidence which, if known to Sullivan, would have probably prevented the sale. Leave out that fact—which was a subsequent occurrence unknown to both parties—and the sale seems fair, and not unwise. Sullivan's business, his relation to the company as a minority stockholder, and his then unpleasant personal relations with Pierce, would naturally lead him to sell. Pierce, owning three-fourths of the stock, his business being that of a "cowman," and the unpleasant relations with Sullivan, would naturally cause him to be willing to buy Sullivan's interest. With full knowledge of all facts disclosed by the record, but in ignorance of the rise in values that would occur in a year or two, we think the evidence shows that Sullivan would have sold his interest for $50,000 in gold, and we do not think that at that time he could have sold it as a whole at one sale for a larger sum. The sale does not reflect on his character, established by the record, as a shrewd man of affairs, for he did not deal unwisely on existing facts. He only failed in a matter of prophecy. He predicted that gold would go up and cattle down. If this had occurred, if cattle and grazing lands had fallen greatly in value, Pierce would have lost money by his purchase and Sullivan would have profited by the sale. We find nothing in the record to satisfy us that Sullivan should not be bound by his sale.

The court, we think, decided correctly in refusing to rescind the contract. The decree is affirmed.

PITCAIRN v. PHILIP HISS CO.

(Circuit Court of Appeals, Third Circuit. October 8, 1903.)

1. CONTRACTS—MODIFICATION BY PAROL.
   According to the modern view, the rule which prohibits the modification of a written contract by parol is a rule of substantive law, and not of evidence.
2. SAME—EFFECT OF ADMISSION OF EVIDENCE WITHOUT OBJECTION.
   The fact that parol evidence to modify a written contract was introduced without objection in an action on such contract does not affect the right and duty of the court in instructing the jury to pass upon the competency and legal effect of such evidence, especially in a federal court, where it is the settled rule that a written contract cannot be reformed in an action at law.
3. SAME—CONTRACT FOR DECORATING HOUSE.
   Written contracts for the repair and decoration of a house and furnishings cannot be modified in an action thereon by the contractor by evidence of a parol agreement, made at the time the contracts were signed, that the work should be done to the satisfaction of defendant's wife, or defendant would not be required to accept and pay for the same, no such condition being expressed in the writings.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

The contract on which the plaintiffs brought suit was made out by the following written proposals and acceptances:

"January 28th, 1899.

"Mrs. Robert Pitcairn, Pittsburgh, Pa. Dear Madam—Below please find our estimate for the complete decoration of walls and ceilings of your main, first, second and third halls.

"The protecting and cleaning of the floors and woodwork is included. The ceilings to be gilded in dull gold and overlaid with a carefully designed ornament of appropriate style, in rich Italian colors. The walls to be of rich red damask pattern, painted and glazed on canvas. The decoration of the vestibule is also included.

"We will do the above work in the most artistic and workmanlike manner for the sum of sixty-five hundred ($6,500.00) dollars.

"We also propose to repaint and regild the reception room ceiling for the sum of three hundred ($300.00) dollars. Very respectfully submitted,

"Accepted by The Philip Hiss Company,
"Mrs. Robert Pitcairn. Per Philip Hiss, Prest."

"January 28th, 1899.

"Mrs. Robert Pitcairn, Pittsburgh, Pa. Dear Madam:—We propose to recover, re-gimp and re-fringe two (2) sofas and five (5) chairs, in your lower hall, using moleskin mohair velvet in combination with your tapestries, for the sum of six hundred and twenty-five ($625.00) dollars.

"Also the sofa and two (2) chairs in second hall in moleskin mohair velvet for the sum of two hundred and fifty ($250.00) dollars.

"We will also re-make and re-line five and one-half (5½) pairs of portiers with moleskin mohair velvet, using your tapestry borders, for the sum of eight hundred and twenty-five dollars $825.00. All this work to be done in the best manner. Very respectfully submitted,

"Accepted by The Philip Hiss Company,
"Mrs. Robert Pitcairn. Per Philip Hiss, Prest."

"January 28th, 1899.

"Mrs. Robert Pitcairn, Pittsburgh, Pa. Dear Madam:—We propose to make one fine Aubusson carpet for room over dining room, for the sum of seventeen hundred and seventy dollars $1,770.00

"Also for halls of English handwoven rugs—

No. 1, 2, 3, 4, and 5	2,425.00
No. 6, 7, and 8	1,382.00
Stairs and landings	2,233.00
Total, including designing and laying, seventy-eight hundred dollars	$7,800.00

"Respectfully submitted,

"Accepted by The Philip Hiss Company,
"Mrs. Robert Pitcairn. Per Philip Hiss, Prest."

"July 14, 1899.

"Mrs. Robert Pitcairn. Dear Madam: We will refinish, reupholster and cover in Aubusson tapestries thirty present chairs and make four new chairs to match $5,000.00

1 rug, plain center, hand woven 2,900.00

"Yours very truly,

"Accepted by The Philip Hiss Co.,
"Mrs. Robert Pitcairn. Philip Hiss, President."

"Mrs. Robert Pitcairn. Dear Madam: Below please find estimate for work at your house.

"Office. Building the extension to third floor, including two bath rooms (in one of which the old fittings are to be used), also light to be introduced by side window into pantry under office. New part of office to have wood work and wall coverings in accord with old part, color of wall stuff to be selected. New rug, sofa re-covered in velour, 2 new easy chairs in velour, 2 old leather

desk chairs in hand woven tapestry, curtains for doors and windows, cost to be $8,550.00.

"Library. Ceiling repainted, walls covered in hard brocatelle, wood work refinished, caps of doors and windows made less heavy, ends of ceiling wood work refitted, new curtains and portiers of Genoaese velour, furniture recovered in same, 1 large and 2 small rugs, cost to be $7,975.00.

"Billiard Room. Ceiling and walls redecorated, tops of windows lowered, new mantel of old wood, wood work cleaned and finished, curtains of material to be selected, furniture recovered of leather of quality of present leather in new design, cost to be $4,500.00.

"Son's Room. Walls and ceilings redecorated, furniture recovered and curtains, new rug, wood work cleaned, cost to be $2,200.00.

"Daughter's Room. Walls and ceilings redecorated, wood work and mantel (shutters not included) of maple (bird's eye panels), curtains and furniture covers of damask selected, new rug, 2 bureaus, 1 bed (5' 6") and bedding, 1 easy chair, 1 rocker, 2 small chairs, 1 work table (3x2) of bird's eye maple, cost to be $5,200.00.

Summary,

Office, baths, &c.	$ 8,550.00
Library	7,975.00
Billiard room	4,500.00
Son's room	2,200.00
Daughter's room	5,200.00
Refinishing wood and floors of halls, all bed rooms (not over), about	2,000.00
Putting shutters and wood work in order, not over	1,000.00
	$31,425.00

"An allowance of $1,500.00 for plumbing and tiles is included in above estimate.

"No wiring or heating work included. Very truly,

"Accepted: The Philip Hiss Co.,

"Robert Pitcairn. Per Philip Hiss, President.

"September 14, 1899."

The defendant contended that the work was to be done to the satisfaction of his wife, and testified as follows: "Q. What was the conversation you had with Mr. Hiss at the time you signed this contract (referring to the $31,000 proposal which he had accepted)? A. The chief point in the conversation was that he, as well as everybody, knows that I did not attend to that business for my house; that it was entirely in the hands of Mrs. Pitcairn, and had been for over 40 years. Q. Well, was there anything said about this contract or your liability under the contract at that time? A. I declined to have anything to do with the matter, when he told me that he had come to see me at the special request of Mrs. Pitcairn, who would be very much pleased, on account of the size or amount, if I would sign it. I told him that I did not want to sign it or have much to do with the matter on account of my experience; that I was very much afraid it would be too much for Mrs. Pitcairn, but that my whole desire was to please her. Mr. Hiss distinctly stated that that was his desire, and he knew he could please her, and would please her, and desired to be distinctly understood that if he did not please her he would make no charge. Q. Did you have that distinct understanding with him immediately before you signed this contract? A. He reiterated that, and plead with me, on account of Mrs. Pitcairn, and I, on a sudden impulse, 'On that condition,' I said, 'I will sign it,' and signed it."

Mrs. Pitcairn also testified to a similar effect in regard to the acceptances signed by her: "Q. What statement, if any, Mrs. Pitcairn, was made to you by Mr. Hiss as to how this work was to be done in your house? A. When Mr. Hiss presented the design or sketch or suggestion to me I rather hesitated, and he said: 'Mrs. Pitcairn, if you will allow me to do this work, I will do it to your entire satisfaction; otherwise you will not be required to pay for it or accept it.'" And Mrs. Pitcairn is also corroborated in this by Mrs. Reese,

a niece, who lived in the house: "Q. Did you hear the conversation between Mr. Hiss and Mrs. Pitcairn shortly before these contracts were signed? A. I did. Q. Can you state what was said between the parties as to these contracts shortly before they were signed, as to how the work was to be done, and so on? A. Well, it was with regard to the hall. That was the first contract given. * * * The design was shown me, and I said, 'Well, that was pretty, if it turned out all right.' Mr. Hiss said: 'I will make that all right. I will make a grand hall of that. Mrs. Pitcairn will be perfectly satisfied; if not, she don't need to accept or pay for it.' Q. Was that said in the presence of Mrs. Pitcairn? A. It was." And again: "Q. Now, Mrs. Reese, after this contract was signed, and the other decorating was being done throughout the house, did you hear any conversation between Mrs. Pitcairn and Mr. Hiss relating thereto? * * * A. Well, Mrs. Pitcairn objected to the work not being as she desired, and Mr. Hiss said he would make it all right. He assured her he would make it all right. * * * He said: 'Let me put the things in place. Let me complete the work, and I am sure you will be satisfied. If not, you don't need to accept it. You don't have to take it or pay for it.'"

Clarence Burleigh and W. W. Smith, for plaintiff in error.

Wm. M. Hall, Jr., for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law. 21 A. & E. Enc. Law (2d Ed.) 1079; Thayer's Evidence, p. 390 et seq.; 1 Greenleaf, Evidence (16th Ed.) § 350a. Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown. Where, by statute, a writing is required either to create an obligation or to effect a result, as in the case of deeds and wills, or of contracts within the statute of frauds, it is readily understood that it is the writing alone that is to speak; but this is equally true of contracts which by the convention of the parties have assumed a similar form. The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part. If through fraud, accident, or mistake it fails to express the contract as it was intended to be made, equity will reform it upon proper proof. But still it is the writing as corrected that is the measure of the parties' undertaking, and they cannot be otherwise held. There is much admitted confusion on this subject, due in part to the way in which in some jurisdictions the rule is administered; and the failure to recognize the true basis of it is all that creates any difficulty here.

This is a suit to recover the balance due for decorating and furnishing the interior of the defendant's residence. The contract for the work was expressed in certain written proposals or estimates, aggregating some $56,000, made by the plaintiff, and accepted in writing by the defendant, or by his wife in his behalf. The jury gave a verdict of $47,000, which, allowing for a bill of extras of $3,300, and deducting admitted payments of $10,000, substantially covered the plaintiffs' claim. The defendant contended that the work, by

express agreement, was to be completed to the satisfaction of Mrs. Pitcairn, and that as she was dissatisfied with it in many particulars, and as some of it had been done in actual disregard of her wishes, he was not bound to pay. No such condition appears in the writings; but Mr. Pitcairn testifies that it was agreed to by Mr. Hiss at the time he accepted the $31,000 contract, and that he signed solely on the strength of it, and Mrs. Pitcairn and her niece Mrs. Reese testify to similar assurances with regard to the others which had preceded it. Mr. Hiss emphatically denies these assertions, and says that he merely undertook to please Mrs. Pitcairn so far as he could. All this evidence was admitted without objection, and on the strength of it the defendant's counsel at the close of the case requested the court, in substance, to charge that if the jury found, as they might, that the work was to be done to the satisfaction of the defendant's wife, or otherwise he would not be bound, and that Mrs. Pitcairn, acting honestly and not capriciously, was not satisfied, even if the jury believed that she ought to have been, the plaintiff was not entitled to recover. These instructions were refused, the court saying: "The contract in suit having been reduced to writing in the shape of written propositions by the plaintiff, and written acceptances by the defendant, signed by the parties or their representatives, respectively, such written contracts cannot be contradicted or varied by evidence of an oral agreement * * * before or at the time of the execution of the contracts." The case turns on the correctness of this charge. It is contended by the defendant that, as the evidence referred to was before the jury without objection, it could not be withdrawn from their consideration, and should have been submitted to them in the way requested. But to this we cannot agree. Notwithstanding its admission, it was still for the court to declare what, as a matter of law, was the contract between the parties—whether it was to be confined to that which was expressed in the writings, or could be extended to the verbal assurances alleged to have been given outside of them. This did not depend on how the evidence came in—whether with or without objection; it still devolved on the court, instructing the jury, to pass upon its competency and legal effect, and that is all that was done in the ruling complained of. The court simply held that the writings were to be taken as constituting the agreement, and that extrinsic evidence could not be resorted to, to modify it. No error was committed in so applying the familiar rule. Whatever be the case in other jurisdictions, in a federal court a written contract cannot be reformed on the trial of an action at law, and, disguise it as we may, that is what the attempt to make effective the evidence in question plainly amounted to. The contract, as made out by the proposals and acceptances, was to do certain work of definite character and extent for certain specified prices. It may have lacked details, to be filled out by oral direction; but that it was to be done to the satisfaction of any particular person, who thereby became the sole arbiter as to whether it had been done as it ought, is nowhere suggested in it, and cannot now be supplied without introducing a most material variation, as the present controversy abundantly shows. It would have been easy for the defendant when he signed to have written, "Accepted on condition that

the work shall be done to the satisfaction of Mrs. Pitcairn," if these were the terms on which he proposed to alone be bound; and without this we must assume that what passed between him and Mr. Hiss at the acceptance of the last proposal, and between Mr. Hiss and Mrs. Pitcairn at the execution of the others, was regarded as mere assurances of the intention and ability to please, much as a salesman commends without warranting the excellence of his wares.

Neither can the alleged undertaking of Mr. Hiss be regarded as a separate agreement resting in parol outside of the writings, and constituting a condition precedent, on fulfillment of which the obligation of the principal contract was to attach. It must stand, if at all, as an added term, by which the right of the plaintiff to final compensation is measured and concluded, entering into it vitally from the start.

Unless, therefore, the rule which prohibits the introduction of extrinsic evidence is to be disregarded, the writings must be taken as expressing the contract between the parties, and there was no waiver by the plaintiffs of their right to adhere to them, and to have the case determined thereby, merely because parol evidence as to what passed outside of them was permitted to come in. The competency of this evidence, as a matter of law, to affect the writings, was not necessarily conceded by the failure to object at the time. Moody v. McCowan, 39 Ala. 586; Hamilton v. Railroad, 51 N. Y. 100. Nor were the plaintiffs precluded from raising that question without at least something to show that the defendant had been prejudiced in consequence in his proofs.

It is said, however, that the plaintiffs in their case in chief called Mr. Hiss to show that in the choice of material they were to be guided by Mrs. Pitcairn's wishes and taste, which was an important variation of the contract, and that, having given their version of the transaction, the defendant, on familiar principles, was entitled to give his. Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631. But the agency of Mrs. Pitcairn and her authority to represent her husband were unquestioned. She signed four of the acceptances, covering an expenditure of $25,000, and if Mr. Pitcairn's wishes had been followed she would have signed for the whole. The entire disposition of the work, as he pointedly declares, was committed to her charge. Her selection of materials, and her expressions of taste, therefore became his, and proof that she was constantly consulted in the course of the work in no wise constituted a variation of the contract, nor opened the door for the very serious modification of it which was sought to be made. The plaintiffs simply showed that they had followed the directions of one who admittedly stood for the defendant in the transaction, not in variation of the contract, but in compliance with its implied, if not its express, terms.

The judgment is affirmed.

GREIST MFG. CO. v. PARSONS.*

(Circuit Court of Appeals, Seventh Circuit. April 14, 1903.)

No. 944.

1. PATENTS—INVENTION—SEWING MACHINE ATTACHMENTS.
The Johnston patent, No. 324,261, for a ruffling or gathering attachment for sewing machines, covers a combination of old elements to produce a device new in form, but old in function, having no new mode of operation, and producing no new result, and is void for lack of invention.

2. SAME—IMPROVEMENT IN MECHANICAL DEVICE—REDUCING COST OF CONSTRUCTION.
A patent for an improvement in a machine which is a combination of mechanical elements adapted to the production of a mechanical result cannot be sustained on the ground alone that because of the changes made in the arrangement of the parts the machine may be more cheaply made.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Appellant unsuccessfully sought to hold appellee for infringement of the first, third, and fifth claims of letters patent No. 324,261, August 11, 1885, to Johnston, appellant's assignor. The circuit court ruled, in substance, that the claims, if valid, were limited by the prior art to the precise structure shown in the drawings and described in the specification, and that, so construed, they were not infringed by appellee's device.

The claims in suit and a part of the specification read as follows:

"This invention has reference to that class of ruffling or gathering attachments (for sewing machines) now most commonly used which have a reciprocating blade to form the goods into plaits or folds; but it is in part applicable to other rufflers or gatherers.

"The invention consists, first, in new means for regulating the stroke of the ruffler-blade. In letters patent 259,643, granted to me June 13, 1882, a ruffler is described in which the blade is reciprocated by a pin moving between two stops, and the stops are made adjustable toward and away from each other by one movement of an adjusting device, so that the said blade moves farther forward in making full than in making scant gathers.

"In letters patent No. 264,038, granted to me September 5, 1882, an improvement upon or modification of the former invention is described, the stops being formed by the walls of a groove of varying width cut in the periphery of a cylinder. By turning the cylinder the reciprocating pin acts in different parts of the groove, so that the lost motion is varied according to the different widths of said parts.

"The present new means for regulating the stroke may be considered as an improvement upon or modification of both the former ones described in said patents.

"Instead of the pin a contact device, pivoted or otherwise supported so that it can be turned, is interposed between the stops, and the adjustment is effected by turning the said contact device. The part to which the stops are fastened or in which they are formed may be reciprocated and communicate its motion to the part which carries the contact device, or the part carrying the adjustable contact device may be reciprocated and impart its motion to the other. Both forms will be shown. This construction of a contact device, adjustable by turning and interposed between stops, can be used not only when the said contact device and stops are such that the ruffling-blade is advanced farther in making full than in making scant ruffles, but also when this is not the case, the effect depending upon the shape of the contact device and stops.

* Rehearing denied October 6, 1903.

"Another improvement consists in combining, with two levers for communicating motion from a moving part of the sewing machine to the ruffler-blade, adjusting means carried thereby for altering the stroke of said blade when one or both said levers is supported and turned upon a fixed center or pivot, and when the adjusting means are so constructed and arranged that the ruffler-blade is advanced farther in making full than in making scant ruffles or gathers. * * *

"It may be observed that there is no novelty, broadly, in placing the means for regulating the stroke upon the levers for operating the ruffler. The only novelty, so far as that feature is concerned, resides in the placing there of the particular kind of regulating means indicated, and in the adapting or constituting of such means to operate in that position. * * *

"It is evident that modifications may be made in details without departing from the spirit of the invention, and that parts of the invention may be used separately. * * *

"What I claim is:

"(1) In combination with a ruffler-blade operating mechanism comprising two reciprocatory parts, stops upon one of them, and an interposed pivoted contact device carried by the other of said parts, and adjustable with respect to both stops to vary the amount of lost motion, and also to a less extent the forward limit of the blade's motion, so that said blade is advanced farther in making full than in making scant gathers, substantially as described.

"(3) The combination, with the ruffler-blade and ruffler-frame, of the two levers pivoted at a common point to the ruffler-frame, stops on one lever, and an adjustable interposed contact device carried by the other, substantially as described.

"(5) The combination, with a ruffling device or blade, two reciprocatory parts, and stops on one of said parts, of a journaled or pivoted contact device interposed between the stops and adjustable by turning on its journal or pivot, substantially as described."

The prior art is illustrated in the record by the following patents: 120,173, October 24, 1871, to Toof; 125,230, April 2, 1872, to Toof; 130,592, August 20, 1872, to Perkins; 139,064, May 20, 1873, to Johnston; 146,005, December 30, 1873, to Johnston; 157,462, December 8, 1874, to Sievers; 158,834, January 19, 1875, to Darby; 181,879, September 5, 1876, to Toof; 200,431, February 19, 1878, to Burgess; 211,679, January 28, 1879, to Wilson; 229,877, July 13, 1880, to Elliott; 231,844, August 31, 1880, to Onderdonk; 233,025, October 5, 1880, to Rowley; 235,235, December 7, 1880, to Harris; 238,086, February 22, 1881, to Carter; 245,471, August 9, 1881, to Farwell; 258,939, June 6, 1882, to McMullen; 259,511, June 13, 1882, to Edgecomb; 259,643, June 13, 1882, to Johnston; 260,633, July 4, 1882, to Amaden; 263,332, August 29, 1882, to Garretson; 264,038, September 5, 1882, to Johnston; 264,456, September 19, 1882, to Hamilton; 266,544, October 24, 1882, to Smith; 269,781, December 26, 1882, to Giddings; 271,890, February 6, 1883, to McCaslin; 272,427, February 20, 1883, to Grotz; 280,926, July 10, 1883, to Griest; 290,478, December 18, 1883, to Sackett; 293,090 and 293,091, February 5, 1884, to Sackett; 296,740, April 15, 1884, to Goodrich; 311,119, January 20, 1885, to Griest.

John W. Munday and Henry Love Clarke, for appellant.

John G. Elliott, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). The patent relates to alleged improvements in sewing-machine attachments for making ruffles, plaits, or gathers. In the operation of these attachments, as a genus, a steel blade moves back and forth near the needle in the direction of the feed; levers are so connected that the up-and-down motion of the needle-bar is converted into the to-and-fro movement of the ruffling-blade; the two pieces of cloth to be sewn together are placed under the needle, with the ruffling blade in contact

with the upper piece; and as the needle rises out of the cloth the ruffling-blade pushes the upper piece into a fold which is secured by a stitch when the needle descends. To regulate the size of the fold, one species had means for controlling the amount of "lost motion" between the needle-bar and ruffling-blade. The less the lost motion, the greater the stroke of the ruffling-blade, and vice versa. Within this species, one class adjusted only the limit of the backward stroke of the ruffling-blade, while another adjusted also, to a less extent, the limit of the forward stroke, so that the blade moved farther forward in making full than in making scant gathers, in order to bring the stitches nearer the center of the folds. This was all old. To the creation of genus or species or class the disclosure in the present letters contributed nothing. The alleged improvement is a mere variation within the last-named class.

The mechanism, so far as the claims in suit are concerned, may be described as consisting of two levers, pivoted at a common point, one connecting with the needle-bar and the other with the ruffling-blade, which levers are made to co-operate with each other by means of two stops mounted on one of the levers and a cam-shaped contact device pivoted to the other lever and interposed between the stops. By turning the cam on its pivot, its opposite edges may be caused to recede from or approach both stops simultaneously, whereby the amount of lost motion between the levers is varied, and the limit of both the forward and backward stroke of the ruffling-blade is adjusted.

We do not concur with appellee in the contention that Johnston in his specification disclaimed all novelty except in the form of the stops and pivoted cam. The wording of the disclaimer, in connection with that of the claims in suit, indicates that Johnston asserted priority in pivoting the levers at a common point and putting upon one lever two stops and a cam between them pivoted to the other lever; that the novelty lay in the placing of the cam between the stops, and in adapting them to co-operate in that position, and not in the precise form of cam and stops shown in the drawings and described with particularity in the specification. And a careful examination of the 35 reference patents fails to disclose a ruffler that may not be distinguished from the exact terms of each of the claims sued upon. But the prior art is full of various combinations of levers, stops, and cams, which were operative to produce all the work that can be done with appellant's ruffler. It was old to pivot the levers at a common point, and place two stops upon one of the levers, and upon the other an adjustable contact device to act between the stops. Smith, No. 266,544, for example, shows this. The kinds of contact devices were many. And Johnston, No. 259,643, had demonstrated the effectiveness of the cam, by a single movement thereof, not only to vary the limit of the backward stroke of the ruffling-blade, but also, to a less extent, the forward stroke. He did this by means of a pin between two stops, one of which was a cam, and the other a plane which, by connection with the cam, moved toward or from the pin in accordance with the cam's movement. This was not a cam between two pins, but, in

effect, a pin between two cams that could be moved as one; and, taking either the forward or backward stroke of the ruffling-blade, the difference was that between a pin striking against a cam and a cam striking against a pin. Each element of the claims in suit was old in this very art, and had been used to perform the same function assigned to it in Johnston's present device. This ruffler introduces no new mode of operation, produces ruffles no better and no faster, and does not afford to the user (though it may to the manufacturer) any advantage over others. The novelty consisted in selecting and rearranging old elements to produce a machine new in form, but old in function, and therefore an old machine. And though Johnston made a better selection and arrangement than did Horace's painter, who "joined a human head to neck of horse, culled here and there a limb, and daubed on feathers various as his whim, so that a woman, lovely to a wish, went tailing off into a loathsome fish," the genius of the artist was not more wanting in the one case than that of the inventor in the other; for "it is not invention to combine old devices into a new article without producing any new mode of operation." Walker on Patents (3d Ed.) § 37; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574; Interior Lumber Co. v. Perkins, 80 Fed. 528, 25 C. C. A. 613; Kelly v. Clow, 89 Fed. 297, 32 C. C. A. 205.

Appellant urges very earnestly that Johnston gave a good consideration, for which the grant of a monopoly should be sustained. That consideration is the alleged cheapness of manufacturing this ruffler. It is said that Johnston made such a selection and arrangement of elements that the parts of the ruffler can be stamped out of sheet metal by the use of presses and dies. But the patent is for improvements in a machine which is a combination of mechanical elements adapted to receive and apply motion to the production of a mechanical result. And the patent would as certainly be infringed by a ruffler of which the parts were forged or cast or machined as by one made of stampings. The consideration of cheapness therefore lies in the process, and not in the product.

The decree is affirmed.

EATON & PRINCE CO. v. WADSWORTH.

(Circuit Court, N. D. Illinois, N. D. October 21, 1903.)

1. PATENTS—INFRINGEMENT—SAFETY BRAKE FOR ELEVATORS.
The Eaton, Prince, and Livesey patent, No. 347,778, for a safety brake for elevators, claim 3, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 347,778, for a safety brake for elevators, granted to Thomas W. Eaton, Frederick H. Prince, and Joseph H. Livesey, August 24, 1886. On final hearing.

Frank T. Brown, for complainant.
Thomas F. Sheridan, for defendant.

KOHLSAAT, District Judge. Complainant files its bill for infringement of claims 1 and 6 of patent No. 347,778, for a safety brake for elevators. After the filing of the bill it withdrew the charge of infringement as to claim 1, so that the cause stands now only as to infringement of claim 6, which reads as follows, viz.: "In an elevator safety brake the combination with an expansible ball governor of a trigger located, relatively to the governor, substantially as shown, whereby said trigger is operated directly by contact therewith of the governor balls, essentially as specified." The defendant, by way of defense, sets up (1) lack of patentable novelty; (2) that the patent is a mere aggregation; (3) that there is no infringement. The only patent in the prior art, so far as the record discloses, in which an expansible ball governor is used for the purpose of tripping a braking device in connection with an elevator, in a combination similar to that of complainant, is the Small patent, No. 228,284. In that patent the flexible ball governor is the same as that used by complainant, except that the free end of the governor fits over a sliding sleeve in the shaft, which operates the governor, to which sleeve is rigidly secured a dog or trigger, the other end of which rests in a guide in the upper brace or cage of the elevator, thereby preventing the sleeve from rotating with the governor. This trigger supports a bell crank lever, which operates the braking device. Whenever the elevator begins to move at an undue speed, the governor balls expand by centrifugal force, thereby contracting the governor longitudinally, and dragging with its sliding end the sliding collar and the dog, whereby the lever is released and the braking device applied. The specifications provide, however, that the governor may be in any suitable form. Thus it will be seen the governor in this device drags what might be termed the trigger from restraining contact with the braking apparatus.

In the patent in suit the same expansible governor is used, and the only substantial difference between the two devices is that the governor balls in the patent in suit, when the speed is too great, expand, and strike the trigger and release the lever which applies the braking apparatus. The one pulls the trigger out of the restraining contact with the lever. The other knocks it out. Both operate simultaneously with the undue expansion of the governor. The direct contact element of the claim is, in my judgment, the sole differentiation of

complainant's patent from the prior art. It is not claimed by complainant that such direct contact by the balls of an expansible governor with a trigger or tripping device is new, outside of the elevator art. It is old in the prior art. Indeed, it is shown to have been in use in connection with elevator safety attachment in the C. R. and N. P. Otis patent, No. 110,993, the R. H. Hill patent, No. 210,693, the Ripp & Mills patent, No. 226,553, and others; but the braking devices set in motion in these patents seem to be more complex than in the patent in suit, so that perhaps they should not be considered as anticipation, in the same art.

The language of the patent in suit, taken in connection with the file wrapper, would seem to limit the device to an expansible ball governor. All that it has done is to take an old form governor as used in the Small patent, and make it kick instead of pull the trigger out of restraining contact with the braking apparatus. To do this, it has used a device old in other relations, and known to the elevator art in a different combination.

Defendant's governor is what might be called a disk governor. Its palls operate by centrifugal motion or force. It differs, however, quite as much from complainant's device as the latter does from the prior art, in view of which I am constrained to hold that complainant has failed to establish infringement.

The bill must be dismissed for want of equity.

GREENWICH INS. CO. et al. v. CARROLL, State Auditor.

(Circuit Court, S. D. Iowa, C. D. October 13, 1903.)

No. 2,410.

1. STATUTES—CONSTITUTIONALITY—IOWA INSURANCE LAW.
   Iowa Code, §§ 1754, 1755, prohibiting combinations between fire insurance companies doing business in the state in relation to rates, agents' commissions, or the manner of transacting business in the state, and providing for the revocation by the state auditor of the permits of any companies found to have violated such prohibition, are not in violation of the provisions of the state Constitution prohibiting the granting of special privileges and immunities, and requiring that when they can be made applicable all laws shall be general and of uniform operation throughout the state.

2. EQUITY JURISDICTION—ENJOINING ENFORCEMENT OF INVALID STATUTE.
   A court of equity, state or federal, has jurisdiction to enjoin the enforcement of an invalid law when its enforcement would cause loss of business, expense and hardships to complainant, and result in irreparable injury.

3. CONSTITUTIONAL LAW—LIBERTY TO CONTRACT—IOWA INSURANCE STATUTE.
   The provisions of Iowa Code, § 1754, which make it unlawful for two or more fire insurance companies doing business in the state to enter into any agreement as to the amount of commissions to be allowed agents or as to the manner of transacting fire insurance business in the state, are invalid as depriving insurance companies of the liberty to contract secured to all persons by the fourteenth constitutional amendment and of the equal protection of the laws.

¶ 2. See Injunction, vol. 27, Cent. Dig. § 156.

In Equity. On demurrer to bill.

James C. Davis and George H. Carr, for complainants.
Charles W. Mullan, Atty. Gen., for defendant.

McPHERSON, District Judge. This case is pending on defendant's demurrer to a bill in equity, filed by a number of foreign fire insurance companies, against the defendant, who is Auditor of the state and Insurance Commissioner. The bill asks that defendant be restrained from taking action against them under certain statutes of the state, alleging that the statutes in question are void because in conflict with both the state and federal Constitutions. It is alleged that all these companies have been engaged in doing a fire insurance business in the state for a great many years, paying the fees and taxes, and in all respects complying with the laws relating to such companies; and it is also alleged that, prior to the adoption of the statutes in question, they had established their business in equipping offices, paying out large sums in advertising and so on, and from year to year, including the current year, they having fully complied with the laws of the state in making their reports as well as all other things, and the Auditor gave each of them a certificate authorizing them to continue in business. They each have an extensive business in Iowa, carrying large and numerous risks on property in the state. It is alleged that there are 85 foreign companies, including complainants, doing business in the state, and which pay to the state annually large sums as fees and taxes.

The statutes complained of were enacted in the year 1896, and are now parts of the Code, being as follows: Section 1754 provides that it shall be unlawful for two or more fire insurance companies doing business in this state, or for the officers, agents, or employés, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amounts of commissions to be allowed agents for procuring the same, or the manner of transacting fire insurance in this state. Penalties and fines are to be imposed for a violation of the statute. Section 1755 provides that the Auditor shall summon before him and examine under oath all those he suspects of violating the statute; and if they fail to appear, or if he finds that they are doing the things inhibited, he shall revoke their permits to do business, and thereafter they shall not do business in the state. It is alleged that the Auditor is about to proceed against them, and that he will oust them from the state unless he is restrained.

The first question presented is, are the statutes in conflict with the state Constitution? Section 6, art. 1, provides that all laws of a general nature shall have uniform operation, and that privileges and immunities shall not be granted which shall not on the same terms be granted to all.

Section 30, art. 3, provides "that where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." The question was fully discussed in all its phases in the case of State v. Garbroski, 111 Iowa, 496, 56 L. R. A. 570, 82 N. W. 959, 82 Am. St. Rep. 524. The statute under discussion pro-

vided that peddlers plying their vocation outside of a city or town should pay a license or tax, but that a person who had served in the Civil War need not pay the fee. The statute was held unconstitutional. It is apparent to all that the statute involved in that case is not akin to the statutes now before the court. Judge Ladd in the Garbroski Case reviews many, if not all, the cases upon the subject, and one need not look further for the correct rule, or for the authorities, than his admirable opinion in the Garbroski Case.

All laws of a general nature shall have a uniform operation. These laws in question do have a uniform operation. No one can expect that all laws shall operate upon all people. We have laws with reference to the Legislature, and those laws operate upon that body alone. So as to the office of the Auditor, and a score of other offices, state, county, and municipal. And it is the same as to private affairs. Railroad companies are held liable for an injury to an employé brought about by the negligence of a fellow servant. Such legislation, as all know, is valid. Hundreds of statutes have been enacted in this state known by all to be intended to apply in each case to a single city or town, corporation or trade. That they are valid but few doubt. Statutes were enacted many years ago applying to bridges across the Mississippi river when there was but one bridge, and now there are but few. No one doubts their validity. Years ago statutes were passed authorizing the sale of a railroad to one at the state line, to thereby make a connecting line. But few, if any, ever doubted their validity. Illustrations will readily occur by which I could multiply these cases. And so it is as to granting immunities to some which are denied to others. Exempting farmers, merchants, manufacturers, mining companies, and other corporations from liability in case an employé is injured by another employé's negligence, and holding a railroad liable, well illustrates the whole proposition.

Classifications can be made, providing they are not arbitrarily made. If the Iowa statute provided that a railroad company were liable, in the case above stated, where an employé was injured in building a bridge, cutting timber, or at work in the shops, all the courts would have held the law invalid. But the Legislature provided for a recovery only when the injury occurred in the hazards arising from the use and operation of the road. If these statutes in question are otherwise valid, then it is not an arbitrary classification, because they apply to a business peculiar in itself.

All will agree that there must be rules and regulations applicable to insurance companies not applicable to other corporations. There must be some officer, with the powers of an Insurance Commissioner, to govern and direct and control them. The Iowa Supreme Court has upheld so many statutes in principle like this that the question now being discussed seems very clear to me. The following statutes have been held valid: (1) Innumerable curative and legalizing acts; (2) statutes making railway companies liable for double damages for stock killed; (3) allowing a defendant a continuance, as of course, when in the military service; (4) classifying railroads as to charges for carrying freights and passengers; (5) taxes need not operate upon all persons alike; (6) taxing railroads by one set of officers, and indi-

viduals by another; (7) exempting property from water taxes; (8) taxing foreign insurance companies on their business; (9) exempting certain property from municipal taxes, and compelling others to pay such taxes; (10) taxing transient merchants; (11) assessing stock of state bank differently from that of a national bank; (12) a special law authorizing the building of a particular railroad. No doubt there are others that have been upheld.

Counsel for complainant seem to have forgotten that special legislation in all cases is not prohibited. Special legislation is prohibited as to six enumerated subjects: (1) Assessment and collection of taxes; (2) for laying out highways; (3) for changing the names of persons; (4) for incorporating cities and towns; (5) for vacating roads, streets, and town plats; (6) for locating or changing county seats.

But as no one of the above referred to provisions of the Constitution is applicable to this case, it is necessary to see what other special legislation is prohibited. The Constitution then recites: "In all cases above numerated, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." It is too apparent to admit of discussion that there are hundreds of subjects upon which the state, through its Legislature, should speak: "Where a general law cannot be made applicable, and where it cannot be of uniform operation throughout the state." And insurance is one of these subjects. In my judgment, the statutes in question are not prohibited by either of the state constitutional provisions.

Chapter 4, tit. 9, of the Iowa Code, which chapter includes the statutes now under consideration, affirmatively makes two among other things appear: (1) That it is the policy of this state to invite solvent and reliable foreign insurance companies to come into this state, particularly for the purpose of giving the people the benefit of competition, and partly for the purpose of obtaining revenue for the state treasury; and both purposes are subserved. (2) That it is the duty of the state auditor to license such companies to do business in the state, if upon investigation he finds them solvent and financially worthy. Such being the policy of the state, and such being the duty of the Auditor, he cannot deny the foreign companies, of the kind as above described, from receiving the proper certificate and from doing an Iowa business. Should he undertake to keep such a company out, the proper court will by mandamus compel him to grant the authority, and admit such company. This being so, he cannot put them out, after they are once lawfully and rightfully in, excepting by virtue of the power lodged with him under a valid and constitutional statute.

What was said by the Chief Justice in the case of R. R. v. State, 31 N. J. Law, 531, 543, although in a tax case, is pertinent:

"It is not denied that the corporate existence of a company is recognized, not by right, but by grace, in foreign jurisdiction, nor that each government has the competence to refuse to recognize such existence, except on its own conditions. The principle is universally acknowledged. Hence laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions as a prerequisite to their admission in an incorporated capacity into the state. Such laws, when rightfully made, are evidently mere

police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground their legality cannot be drawn in question. But a tax law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or company on whom the tax falls as such government may deem necessary for its public wants. The act of taking the property, therefore, must, of necessity, be an acknowledgment of the legal status of the person or company whose property is taken. To assert that the company whose property is thus taken has no rights but such as the government taking it chooses to confer is to assert that such company has no title to its property but such as may be conceded to it by the taxing power. It seems to be utterly inconsistent with legal principles which have always been deemed axiomatic to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would, obviously, offer the entire property of foreign corporations as a prize to the rapacity of any state in whose territories it might be, or over which it might happen to be carried. It is readily to be admitted that a law imposing certain terms upon all foreign corporations as conditions to their acquisition in this state of the right to act in the unity of their corporate existence would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation. But can it be maintained that such a law would have the further effect of leaving the property of the company as a spoil of the first taker?"

These companies having the requisite capital, being solvent, having paid their taxes and license fees, and having done all the things required of them by the laws of Iowa and the exactions of the Auditor, having been invited to do business in the state, and being now rightfully here, they for the time being, and until the policy of the state is changed, have the rights, neither more nor less, than the Iowa companies enjoy, and illegal exactions cannot be made upon them. In Insurance Company v. Morse, 20 Wall. 445, 22 L. Ed. 365, the Supreme Court held a statute to be void which required a foreign company to agree not to remove a case to the federal courts. But in Doyle v. Insurance Co., 94 U. S. 535, 24 L. Ed. 148, the Supreme Court recognized the right of a state to oust the company if it did remove its cases to the federal courts. It so held, not because such removals were a good reason for ousting the companies, but because the state had the right to exclude them without reference to the reason.

But that is not the question now being considered. It is not a question of keeping a foreign company out. The question is, shall all companies, foreign and domestic, now rightfully in the state, be compelled to submit to the exactions of an invalid and unconstitutional statute? It is quite certain that an Iowa corporation cannot by any legislation be ousted or dissolved by reason of invoking the federal Constitution. And if the Iowa Legislature should ever be persuaded that the better way to prevent monopolies as between foreign companies is to create a monopoly by giving all the business to Iowa companies it can easily be done. Let there be a legislative declaration to the effect that the local companies may do as they see fit if they stay inside the Constitution, but that foreign companies must quit the state if they hold up the federal Constitution as their shield. It is scarcely possible that such a position will ever be taken. But Wiscon-

sin once did; and, if Iowa ever does, then, and not until then, will the Doyle Case become binding as to Iowa legislation.

The distinct policy of Iowa for many years has been to invite foreign insurance companies into the state. They have been imposed with some burdens not imposed upon home companies, and that this is allowable no one denies. That they can be wholly excluded no one denies. But for the obvious reasons of competition for the benefit of people needing insurance, and for moneys for the state treasury, the state for years has said that they may come and may remain in; and yet the Attorney General now contends that, in the face of such policy, this court, by construction and implication, shall say that such foreign companies shall be punished for seeking the benefits of the federal Constitution.

It must be kept in mind that the statutes in question do not apply alone to foreign companies. Those laws, if valid, apply to all companies. This bill in equity is filed by the complainants for the use and benefit of all companies.

It is not at all necessary in this case to make allegations of diverse citizenship. There are such allegations, but they are unnecessary allegations in this case. Home companies could be joined as plaintiffs in this action. Not only one question, but the principal controversy herein, is a federal question. The court takes jurisdiction because of that question, regardless of citizenship, and will retain jurisdiction over all questions in the case, including questions that are not federal, regardless of the citizenship of the parties. See Opinion of Judge Brewer in Omaha Company v. Cable Company (C. C.) 32 Fed. 727, and cases cited.

But it is argued that there is a remedy at law. A court of equity has the power, and it is likewise its duty, to enjoin the enforcement of an unconstitutional statute when such enforcement would subject the party to innumerable prosecutions, and particularly when such prosecutions would, pending litigation, work great hardships and wrongs and damages.

The recent decision of the Circuit Court of Appeals for this circuit in the case of City of Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333, is an authority, and of binding force upon this court. It puts at rest the question as to the jurisdictional amount involved. It also puts at rest the duty and the power of a court of equity to enjoin the enforcement of an invalid law when prosecutions would be followed with loss of business, expense, and hardships. And it also holds the fact that the party could resist the enforcement of such invalid law by a defense to proceedings in the state court does not prevent a court of equity, state or federal, from taking jurisdiction. A state statute can neither enlarge nor curtail the equity jurisdiction of this court. And it will not do to say that because a law is unconstitutional, and because all are conclusively presumed to know the law, there need be no fear that the officer who is commanded to act under the statute will attempt to enforce it. It is the duty of the state Auditor to enforce the statute, if it is a valid statute, and he no doubt feels that it is not incumbent upon him to pass upon its validity, but will recognize it as of force until it is otherwise held by the courts. And it is alleged in

the bill before me that the state Auditor will enforce the statute if not restrained by the process of a court. In the light of such declarations, and the presumptions that he will attempt to enforce the statute, the case of Osborne v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204, must be regarded as an authority. And the reasons given by Chief Justice Marshall in the opinion in that case as to why Osborne, the state Auditor of Ohio, should not be allowed to enforce a statute of that state, are equally applicable to Mr. Carroll, the Auditor of Iowa, if the statute in question is invalid. In the Doyle Case, 94 U. S. 535, 24 L. Ed. 148, the statute of Wisconsin specifically provided that, if any foreign company should remove a case to the federal court, the state officer should, under an imperative duty, recall and revoke the license of such foreign company to do business in the state.

But in the case at bar foreign and domestic companies are placed on an exact equality. And the statute does not say that, if the foreign companies shall invoke the federal Constitution, such a wrong has thereby been done that the state Auditor can punish it by removing it from the state. But in the case at bar the statute if applicable, and if enforced, will be made to read, in effect, that any insurance company, domestic as well as foreign, shall not dare to look further than the Iowa laws, and that they shall not, at the peril of their existence in this state, dare to claim any right under "the supreme law of the land." This, to me, is not comity between the states, but subordinates the nation to a petty position that it has not occupied for many years.

The statute in question provides that two or more companies shall not do any of the following things: (a) Make or enter into any combination or agreement relating to the rates to be charged for insurance; (b) agree as to the amount of commissions to be allowed agents for procuring the same; (c) agree as to the manner of transacting the fire insurance business in the state.

The first I shall not discuss; but as to the second and third propositions I have no doubt but that the statute is beyond the power of legislation, and will give my reasons: As was held in Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, and cases cited, insurance is not commerce. Therefore the many cases cited by the Attorney General, arising under the "commerce clause," are not in point. They are irrelevant, and do not have the slightest application. The commerce cases were so decided because all parts of the Constitution applicable must be construed together. And so the Supreme Court has within the last few years in the Addystone Pipe Case, 20 Sup. Ct. 96, and Traffic Association Cases, 19 Sup. Ct. 25, and the Circuit Judges in the Northern Securities Case, 120 Fed. 721, made it plain to every one that, if the question is one of commerce between the states, then the right and liberty of contract must in a measure yield. That is to say, Congress shall have the right to regulate commerce between the states, even though the freedom of contract is curtailed. If this were not so, then the commerce clause would be subordinated to other provisions of the Constitution. The two provisions of the Constitution must be construed together.

There is another class of cases, numerous in number, sound in principle, but which, in my judgment, have no application to the question

now being considered. I refer to cases arising under the police power of the states. Such a case is that of Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. The state statute inhibited the employment of a person for more than eight hours a day in underground mines. The Supreme Court held the statute a valid exercise of the police powers, as protecting the life and health of individuals, and that the same could not be contracted away. No one denies that insurance is a legitimate business, and one that is necessary to the welfare of all people who cannot afford to carry their property without such guaranty against loss. To carry on the business calls for the services of men of affairs and experience. Men must be employed, and that requires contracts. Reinsurance is often required, and that calls for contracts between two or more companies. Adjusters are necessary, and one such person must, or often does, act for several companies. One risk oftentimes must be apportioned between several companies. Companies must charge reasonable rates, and in some states can be compelled to pay the face of the policy. What are reasonable rates, and how are such rates determined? No doubt, partly from the history and statistics of the business, and partly from current experience. One risk is more hazardous than another, and rates must vary. Telephone wiring may or may not increase the risk. Electric lighting, with or without "cut-offs" or "step-downs," may or may not increase the risk. Experiments and experience and statistics may show or differences of opinion may exist. Some risks are greater in the summer and others in the winter. The salary of officers is one item of the costs. The commissions of the solicitors have much to do with it. In short, the business cannot be carried on for a day without making contracts, not alone with the insured, but with other companies, and with persons employed by other companies.

The Attorney General, seeking to avoid the force and weight of the authorities, leaves but little for argument when he concedes in his two briefs as follows:

"It is urged that the act of the Legislature is unconstitutional because it takes from the fire insurance companies doing business within the state the right of contract, which is one of the liberties guarantied by the fourteenth amendment. The conclusive answer to this contention is that the statute does not take away from any insurance company transacting business within the state the right to contract with any person or corporation desiring to enter into any lawful contract with such company, nor does it in any manner abridge the right to make such lawful contract. The sole purpose of the statute, and the end sought to be accomplished by its enactment, is to prevent fire insurance companies from entering into a contract or combination whereby their rights to enter into lawful contracts with those desiring fire insurance is abridged and restrained. It is conceded at the outset that any act of the Legislature which restricts or abridges the liberty of contract guarantied by section 1 of the fourteenth amendment to the federal constitution is void."

That the authorities cannot be reconciled is known by all. For instance, statutes quite identical in language, meaning, and purpose were before the courts in Holden v. Hardy, supra, and in Ex parte Morgan (Colo. Sup.) 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269, and the one decision is squarely against the other. Practically nothing is left to be said on either side, after reading the two opinions. But in those cases the contracts inhibited were by reason of

statutes to protect the health of individuals for whose benefit the laws were enacted.

Then, again, the subject is exhaustively treated by Mr. F. N. Judson in a paper, "Liberty of Contract under the Police Power," before the American Bar Association in 1891. See Reports Am. Bar Ass'n for that year, vol. 14, p. 231.

There are three recent cases which cover the entire question, and which come so near citing all the authorities that one need look but little further for the authorities upon the subject. People v. Orange County Road Const. Co. (N. Y.) 67 N. E. 129; Republic Co. v. State (Ind. Sup.) 66 N. E. 1006; State v. Kreutzberg (Wis.) 90 N. W. 1098. These cases are not cited as involving inhibited contracts, like the ones prohibited by the Iowa statutes, but they are cited as being in principle much the same, and because of the exhaustive discussion of the question. And the fact that the law assailed is what is known as an "Anti-Trust Law" does not take it out from under the federal Constitution. In re Grice (C. C.) 79 Fed. 627; Connolly v. Sewer Pipe, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. As against those cases, see State v. Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464; Cleland v. Anderson (Neb.) 92 N. W. 306.

But it becomes academic, and mere common place, to undertake to write what this court or that court has said on the question. Law is not an exact science, as is illustrated by the cases arising under the fourteenth amendment, perhaps more than by any of the other debatable legal questions. The "liberty" of the Constitution has been defined, and it will continue to be defined, by some as the right of an individual to keep out of prison, excepting for crime committed. Others will define "liberty" as also including the right to earn a livelihood, acquire property, perform services for another, employ others, make contracts not tainted with an illegal or immoral consideration, and those not injurious to the health or welfare of people. I prefer the latter definition.

Within the meaning of the constitution, as has been held many times by the Supreme Court, "corporation" is a "person." A corporation has the same rights to agree or contract within the scope of its powers as has a person. Can it be possible that legislation like that now presented to the court is valid? If it is valid, then what becomes of the provision, "No man shall be deprived of equal protection of the law," or of that other provision, "No man shall be deprived of life, liberty, or property without due process of law?" Justice Field once said: "The right to pursue them without let or hindrance is a distinguished privilege of the citizens of the United States, and an essential element of that freedom which is their birthright." Another Justice of the United States Supreme Court said: "Yet the power does not and cannot extend to prohibiting a citizen from making contracts, and this is institutional law in England as well as America." Another great Justice has said: "Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts." And I dare say that there is not an appellate court in this Union but has given a like definition of liberty: "The right to make and enforce contracts."

When the right of contract ceases, the right to do business is at an end. The right to purchase, hold, or sell property must depend upon contract, and without contracts business affairs cannot be carried on for a single day. And the slightest knowledge of insurance will persuade any one that companies, both home and foreign, must have some arrangements and must make some contracts with other companies. Farmers, merchants, laboring men, railway companies, and all other classes of both men and associations must do the same, and both the laws and Constitution permit it. And to single out insurance companies, and say they shall not, is not logical, and, in my judgment, not allowable, under the fourteenth amendment.

Employers of labor agree what they will pay, and laboring men agree for what sum they will work. Buyers and vendors of live stock, grain, groceries, clothing, anything and everything, make their agreements. Farmers will and do agree as to the price for which they will sell, and what they will pay for labor; but this statute says that insurance companies shall agree as to none of these things.

Of course, I do not hold that insurance companies can combine, and thereby enter into a conspiracy to accomplish any desired purpose. But no such question is involved in this case. I am only holding that insurance companies may make the usual contracts that all other persons and corporations may make, which the statute seeks to take from them, and which will be taken from them if the statute in question is upheld. My conclusions are that the statute in question is invalid for the reasons stated, and that the state Auditor cannot enforce its provisions.

The demurrer will be overruled, and the defendant allowed to file a plea or answer, as he may deem best.

THE DELMAR et al.

(District Court, E. D. Virginia. August 8, 1903.)

1. COLLISION—STEAM AND SAILING VESSELS—PRESUMPTION OF FAULT.
   In case of a collision between a sailing vessel and a barge in tow of a tug, on which rested the duty of keeping out of the way, all the presumptions are in favor of the sailing vessel.
2. SAME—EVIDENCE CONSIDERED.
   A collision occurred at night in Chesapeake Bay between a schooner coming into Hampton Roads, and a barge 342 feet long, loaded with freight cars, which was passing out in tow of a tug on a hawser 300 feet long. There was a strong wind, and the vessels were admittedly on parallel courses until shortly before the collision, the tug passing to windward of the schooner. Each vessel claimed that she made no change in her course, and the testimony from each supported her contention. There was plenty of sea room, and the tug could have given the schooner a wider berth than she admittedly did. *Held* that, under the evidence, she must be charged with the sole fault for the collision.

In Admiralty. Suit for collision.

Hughes & Little, for libelant.

T. H. Willcox and Floyd Hughes, for respondents.

WADDILL, District Judge. The collision in this case occurred in Chesapeake Bay, near the mouth of Hampton Roads, on the evening of the 1st of March, 1903, about 7:45, at a point about halfway between Old Point Comfort and Thimble Light, between the R. M. Graham, a three-masted schooner, and barge No. 5 of the New York, Philadelphia & Norfolk Railroad Company, then in tow of said railroad company's steam tug Delmar. The night was dark, tide ebb, and wind blowing a strong breeze from the north. The course of the Graham was west by south half south, and of the tug northeast by east. The schooner, loaded with lumber, was coming into Hampton Roads for anchorage, and the barge, loaded with cars, was being towed to Cape Charles, on her regular trip between Norfolk and that place; the vessels, respectively, making between six and seven miles an hour. The faults assigned by the parties, respectively, one against the other, are such as that each places the responsibility for the collision entirely upon the other; the schooner, in effect, charging that she was proceeding on her regular course, with the red lights of the tug exhibited to her, and the red lights of the schooner exhibited to the tug, until within a short distance of the tug, and when too late to avoid the collision by any movement on her part, the tug suddenly starboarded, and ran across the schooner's bow, bringing the barge into collision with the schooner, whereby she sustained damage to the extent of $9,084; whereas the respondent's account of the collision is as follows:

"After passing Old Point, the wind was blowing heavily from the north northeast. The night was very dark. The tug and barge were on their proper and usual course to pass to the west of the Thimble, the tug towing the barge on a hawser of about fifty fathoms in length. While thus running, making between six and seven miles an hour, the lights of three sailing vessels were sighted ahead, seemingly on schooners bound in, two of them showing their red lights on her port bow, and one, which afterwards turned out to be the schooner Graham, showing her green light to the tug and barge; the green light on the tug and barge being also visible to her. The schooners were apparently bound in for Hampton Roads, while the tug and barge were bound out, and the courses in which they were moving at that time were practically parallel, and there was nothing to suggest any danger or risk of collision. The vessels continued to move in this direction. The green light of the Graham broadened on the starboard bow of the tug until the tug had passed the schooner to port, and was about abeam of the Graham, when the Graham, for what purpose respondent is unable to say, rapidly changed her course by porting her helm, causing her to luff, and come into the barge, striking her starboard bow on the starboard of the barge, aft of amidships, and receiving the injury complained of."

The respective contentions of the parties are supported by the crews of the vessels in collision, and the evidence is irreconcilably conflicting as to just how the accident happened, as it is evident, if the vessels approached each other, each exhibiting the same lights,—that is, green to green, or red to red,—as they insist they did, no collision could have occurred, unless there was a change of course on the part of one or other of the vessels. This conflict, in the view taken by the court of the law governing the case, need not necessarily be determined to ascertain the liability, though the court strongly inclines to adopt the schooner's version as to the circumstances of the collision, and as to the lights that were exhibited by one vessel to the other at

the time. It is highly improbable that the Graham, on whom was imposed the burden of keeping on her course, would have made the change contended for at the time it is claimed it was made; and the circumstances strongly favor the contention that the navigators of the tug, in their endeavor to keep their usual course, so as to pass through the swash channel on the west of Thimble Light, and avoid passing round the light, in the existing condition of the weather, took greater chances than otherwise would or should have been taken. Certain it is, they make no claim of having changed their course in the slightest respect in the conditions surrounding them, and insist that none was necessary. It will not be readily assumed that a vessel charged with the duty of keeping her course would, if in the position claimed by respondent, have purposely made such a maneuver as inevitably to bring her into collision with another vessel, and impose upon her the responsibility for so doing. It is far more probable that the collision occurred by reason of the tug's master, upon whom was imposed the burden of keeping out of the way, making a mistake in the navigation of his vessel, when he found himself in a position of dangerous proximity to the Graham. Haney v. Baltimore S. P. Co., 23 How. 287, 291, 16 L. Ed. 562. The collision being between a sailing vessel and a steam vessel and tow, the law imposed upon the latter certain obligations, one of which was to keep out of the way of the sailing vessel, and in the collision between them the presumptions are all in favor of the sailing vessel. Spencer on Marine Collision, 212, 213; The Belgenland (D. C.) 5 Fed. 89; The Richmond (D. C.) 114 Fed. 208, 210; The Ardanrose (D. C.) 115 Fed. 1010, 1012.

The respondent's evidence is to the effect that the schooner's green light was seen as far as a mile or more away, and that the two vessels exhibited their green lights one to the other, and proceeded on their respective courses, until the tug was about abeam of the schooner, and about 200 yards away, when the schooner suddenly changed her course, luffed, and run across the course of, and into, the barge. This was a chance of collision that should not have been taken by the tug, and for which there was no excuse. It was not enough that the tug should have avoided a collision, but she should have avoided the risk of collision; and to proceed so closely on the course of the Graham, under the circumstances of this case, at the speed the vessels were respectively going, and in the then condition of the weather, on a dark night, having in tow an ocean-going barge 342 feet in length, 46 feet beam, and a hawser 300 feet in length, loaded with freight cars, as to involve probable danger of collision, when there was no reason for so doing, was a risk that it assumed, and must bear the consequences thereof. The Carroll, 8 Wall. 302, 19 L. Ed. 392; The Falcon, 19 Wall. 75, 22 L. Ed. 98; The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; The Luckenbach, 93 Fed. 841, 842, 35 C. C. A. 628; Wilders S. S. Co. v. Low, 112 Fed. 161, 166, 171, 50 C. C. A. 473; Hughes Ad. 291.

The tug's navigators evidently failed to take into account, and make proper allowance for, the effect of the then prevailing wind on a barge of the kind and length this was. There was ample searoom for the tug to have made any maneuver she saw proper, and there was noth-

ing in the condition of the weather that prevented her navigators from avoiding the collision, by the proper exercise of care and forethought on their part, whether the Graham was proceeding with her red lights showing, as claimed by her, or proceeding with the green lights showing, as contended by the respondent. If the Graham was exhibiting her green light, and the same was seen at the distance admitted by the respondent, then there was no reason, from the tug's standpoint, why she should not have starboarded, and gone to windward, so as to give safe fairway to the Graham, as the tug admits that the other two sailing vessels coming in and ahead of the Graham were a mile or more away to the windward; whereas, if the Graham was showing her red light, as she contends she was, so as to throw all three schooners to the windward of the tug, then there was not the slightest reason why the tug should not have ported, and gone to leeward, thereby passing under the Graham's stern, and en route on her course. Assuming the Graham did make a wrong maneuver, as claimed by respondent, and improperly changed her course, thereby bringing about the accident, her conduct, under the circumstances of this case, and in the emergency in which she was placed, should be treated as an error in extremis, and not avail to relieve the respondent from liability, since the collision resulted from the dangerous navigation of the steam vessel. The Lucille, 15 Wall. 676, 21 L. Ed. 247; The Luckenbach, 93 Fed. 843, 35 C. C. A. 628.

In the view taken by the court of the evidence in this case, the collision resulted solely from the fault of the tug, and a decree may accordingly be entered, so ascertaining the liability.

THE DELTA.

(District Court, W. D. New York. September 1, 1903.)

1. TOWAGE—LOSS OF TOW—NEGLIGENCE OF TUG.

Libelant's scow, which was equipped with a suction pump, was lashed to the side of a stranded tug, being engaged to pump out the water and keep it down while the tug was towed into port. The tug Delta was employed to pull the stranded tug from the reef, after which the towing was to be done by another tug. Immediately after the tow was drawn from the reef, the scow's suction pipe burst, and those on board the tow shouted to the Delta, stating the fact, and asked her to go ahead, and take them to a place of safety, and to hurry up. She then started ahead at an increased speed, the result being the swamping and sinking of the scow, which was low, and being towed stern foremost. *Held*, that libelant, who was on board the tow, must be deemed to have assented to the towing being done by the Delta, but that she was legally bound, in doing it, to exercise ordinary care to proceed only at such rate of speed as was reasonably safe for the scow, and was in fault for exceeding such speed, it not appearing that the situation was such as to require it in order to save the injured tug, and the danger to the scow therefrom being obvious. *Held*, further, that the scow was also in fault for participating in the hails, from which the Delta assumed that the tug in tow was in great danger.

2. SAME—ACTION FOR DAMAGES—DEFENSES.

A tug libeled for loss of a tow cannot avoid liability for any part of the damages on the ground that a third vessel contributed to the injury, unless she files a petition and brings such vessel in, as provided by admiralty rule 59.

In Admiralty. Suit in rem against tug to recover for loss of tow.

Frederick G. Mitchell (George Clinton, of counsel), for libelant.
Crangle & Burke, for respondent.

HAZEL, District Judge. This is a proceeding in rem against the steam harbor tug Delta for damages sustained on account of the sinking of libelant's scow Mayflower on October 11, 1902, near Horseshoe Reef, at the mouth of the Niagara river. At the time of the disaster the scow was lashed abreast and stern foremost to the starboard side of the tug Bellinger, while the steam yacht Corsair was made fast to her port side. On the day before the accident the Bellinger was stranded upon Horseshoe Reef. Thereupon the scow Mayflower was employed to pump her out, assisted by the steam yacht Corsair. The respondent was employed on the day of the accident to pull the disabled Bellinger off the rocks, whereupon the Oneida, a slower and less powerful tug, was to tow the wreck ashore. After the Bellinger was freed of water by the use of the Mayflower's suction pump, a 5-inch towline about 300 feet in length, from the Delta, was made fast to the Bellinger's towing post astern, preparatory to releasing her. Before and at the time of the sinking of the scow the master of the Bellinger and engineer were on board the wreck to render such assistance as might be necessary. Upon receiving a prearranged signal from the master of the Bellinger, the Delta easily released the wreck, which slid into deep water, the scow remaining lashed to her starboard side. Almost immediately after the wreck was released, and while still in use, the suction pump of the scow burst. Thereupon the steam yacht Corsair, which had on board a syphon pump, made fast to the Bellinger's port side, intending to render assistance in keeping her free of water. Fearing a recurrence of a like calamity, or that the injured tug would sink in deep water, those on board the Bellinger and assisting craft became alarmed, hailed the Delta, apprising her of the occurrence and the imminence of danger, and admonished her to hasten with them in tow to a place of safety. The evidence is conflicting as to whether the master of the Bellinger hailed the Delta to quicken her speed. He testifies to an impression (which, however, is denied) that libelant joined in the outcry. Keenan, an employé upon the scow and witness for libelant, testifies on his direct examination that all hands except himself were hailing the Delta to go ahead. It does not specifically appear by the evidence who shouted to the Delta to hurry, but I am quite convinced from the evidence on this point that the hail to the towing tug to quicken her speed because of the supposed danger to the tow had the approval of the master of the Bellinger and the acquiescence of the libelant. Reilly, witness for respondent, corroborates the master of the Delta, and says, "Everybody hollered that the suction pump had burst, and to hurry up and get her inside; that she was sinking." Repeated hails of that nature were heard on board the Delta by her master and engineer. It is true that libelant, who was in personal charge of the scow, with two employés was engaged in arranging the pumping apparatus of the Corsair, then alongside the Bellinger, with a view to its immediate use. The com-

motion caused by breaking the suction pipe, and the alarming admonitions to the Delta, establish beyond serious doubt that the libelant was aware of the shouting, knew that the Mayflower was being towed by the Delta instead of the Oneida, as was originally contemplated, and assented to such arrangement. It appears by the evidence that instantly upon the release of the tug the towline, which had been properly made fast to the Bellinger's stern post in order to expedite her release, was transferred by her master to her bow, according to custom and usages in towing and the changed position of the tug. Thus secured, the Bellinger, Mayflower, and Oneida were towed a short distance, approximately 1,500 feet, when suddenly the scow lurched forward and was sunk, dragging the Bellinger down with her before the speed of the tug could be effectively lessened and the mishap averted. Two signals in quick succession to check the speed of the Delta were given by the Corsair upon the request of the libelant, who became apprehensive because of water coming over the front of the scow. These signals were instantly obeyed by the Delta, although the accident was then inevitable. The disputed point as to whether the Oneida was to tow the wreck and scow is unimportant in view of the above implied towage engagement entered into immediately after the wreck was released.

It is contended by libelant that the sinking of the scow was wholly due to the negligent navigation of the towing tug. It is asserted that the towing speed was unsafe, and practically resulted in drawing the forward end of the scow (which had a freeboard only of two feet and six inches) underneath the water, and her consequent foundering. It is contended on the part of the respondent that the bursting of the suction pipe of the pumping apparatus was the primary cause of the accident; that the scow was negligent in not being properly fastened to the Bellinger; hence the bursting of the pipe when the wreck was pulled into deep water endangered the safety of the tug, and justified the Delta, when admonished of the mishap, in quickening her speed. These grounds of negligence by the scow Mayflower, which was well secured and properly lashed to the starboard side of the wreck, are without foundation or merit. No substantial reason exists for attributing fault to her on account of her failure to part from the wreck. On the contrary, the nature of her employment necessitated her continued presence alongside the imperiled tug. The respondent further charges that the loss was occasioned wholly by the unseaworthy condition of the scow in having a hole or opening in her stern, causing her to rapidly fill with water when towed stern foremost. If this be true—that is, if the scow leaked in the manner claimed while being towed with reasonable care—the responsibility for the damage caused would be determinable without difficulty. The evidence, however, on this point does not impress me as being entitled to much weight. Furthermore, I think the scow was reasonably seaworthy, and that the alleged hole did not contribute to the disaster. She was sufficiently staunch for the particular use to which she was employed, and her condition was not such as to render her employment in calm weather perilous. A different question might be presented for decision had the weather conditions been unfavorable. Giving consideration,

therefore, to the evidence as a whole, I am satisfied that the sinking of the scow was solely because of the excessive speed of the towing tug. From this standpoint the responsibility of the respondent will be considered. It was the duty of the Delta, as a towing steam tug, to exercise ordinary care, diligence, and skill in her navigation, and to use such rate of speed only as might be safely employed to tow a scow of the construction and dimensions of the Mayflower. The Mosher, 4 Biss. 274, Fed. Cas. No. 9,874; The Niagara (D. C.) 20 Fed. 152. Counsel for libelant maintained that, irrespective of the apparent exigencies of the situation in the absence of specific waiver by the Mayflower of a positive legal duty to use ordinary care and diligence, the Delta must be held in fault for going at a rate of speed which manifestly was hazardous to the safety of the scow. In other words, that fault is imputable to the towing tug because of her excessive speed, irrespective of any imminent danger to the Bellinger and those on board of her. To support this argument the court is cited to The Chickasaw (D. C.) 38 Fed. 358; Sherman v. Mott, Fed. Cas. No. 12,767; The Clara, Fed. Cas. No. 2,788. This question, however, need not, in view of the facts found, be discussed or decided. It is not controverted that the owner of the Mayflower had nothing to do with the navigation of the tow. Neither was the libelant specially concerned with the movements of the scow while lashed alongside the wreck. The duty of the libelant, besides supplying the necessary pumping apparatus, was to perform manual labor only in pumping out the wreck. The Mayflower must be presumed to have assented to all reasonable directions concerning the movements of the tow given by the master of the Bellinger to the Delta, as such directions had relation only to the purpose for which she was employed. It quite clearly appears by the evidence that the shoutings of alarm and admonition to hasten ashore by those on board the tow, to which reference has already been made, induced the Delta to increase her speed, which obviously endangered the safety of the scow. Although the occasion required the exercise of prudence and foresight, the gravity of the situation nevertheless was not such as entirely justified the course adopted. The conditions simply demanded the exercise of reasonable caution in a moment of possible difficulty and danger such as navigators not infrequently confront. Despite the cries of alarm the occasion was not specially dangerous or hazardous, for almost instantly after hailing the Delta signals were given to check her speed. As I am of the opinion that the sinking of the scow could have been avoided by the Delta through the use of slower speed, the suggestion on argument that the disaster was inevitable lacks force. A defense of inevitable accident may only be interposed where it appears that the accident happened because of some act beyond the control of the person or ship charged with the commission of the negligent act, which could have been avoided by the exercise of such care as the law required. 16 Am. & Eng. Ency. of Law (2d Ed.) 242. Neither the highest skill nor the greatest care is required of a towing tug, but, as already remarked, reasonable skill, care, and foresight must be exercised by those intrusted in handling a tow. The Niagara, supra. The respondent tug was legally bound to proceed through the water at

such rate of speed only as was reasonably safe to the Mayflower. Her excessive speed is not justified by asserting a situation requiring increased speed to save the Bellinger from loss, thereby sacrificing the scow. The Delta, although induced in the first instance to increase her speed, was not justified in a long-continued increase of such speed when the ordinary observation from a towing vessel would have demonstrated that such excessive speed would result in the destruction of the Mayflower. Because of the absence of that degree of care, therefore, which the towing tug was bound to exercise, she must be held in fault. The Mayflower was also to blame. She is in fault for participating in the hails by which the Delta assumed that there was great danger to the safety of the Bellinger.

Another point is made by respondent. By the testimony of Keenan, libelant's witness, it appears that for the period of about one or two minutes the Oneida, which closely followed the scow astern while being towed by the Delta, shoved her forward through the water. Obviously, such an act by the Oneida would have contributed to the disaster, but it does not appear that the libelant had knowledge thereof, or assented to it in any way, otherwise it might with propriety be considered a fault for which the scow would be responsible. Even assuming the Oneida to have contributed to the accident, no cross-libel, as provided by admiralty rule 59, having been filed by respondent, this court cannot decree against her. The Atlas, 93 U. S. 317, 23 L. Ed. 863; The New York, 175 U. S. 209, 20 Sup. Ct. 67, 44 L. Ed. 126.

For the reasons stated the tug Delta and the scow Mayflower are held to be in equal fault, and therefore the damage sustained must be equally apportioned between them. A decree containing an order of reference to compute the damages may be entered accordingly.

ACTIESELSKABET BARFOD v. HILTON & DODGE LUMBER CO.

(District Court, S. D. Georgia, E. D. July 13, 1903.)

1. SHIPPING—LIABILITY OF CHARTERER FOR DEMURRAGE—DELAY DUE TO STRIKE. A charter party required the charterer to dock and load the vessel, and do the harbor towage and the towage to sea, and specified the lay days for loading. It mutually excepted "the act of God, * * * strikes, combinations or any extraordinary occurrence beyond the control of either party, * * * dangers and accidents of the seas, rivers and navigation," and also contained a specific clause that "in the computation of the days allowed for delivering the cargo to the ship at port of loading shall be excluded any time lost by reason of strikes." On arrival at the port of loading a strike was in progress among the longshoremen and stevedore's men, and many vessels were waiting to load, making it impossible to load for a number of days, and delaying the work after it was commenced. *Held*, the delay beyond the time allowed for loading being entirely attributable to the strike, that the charterer was not liable for demurrage on that account, but that for a delay in towing the vessel out to sea, after the weather was such as to permit, it was liable for demurrage.

¶ 1. Demurrage, see notes to Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

In Admiralty. Suit against charterer for demurrage.

Walter G. Charlton, for libelant.

William Garrard and Peter W. Meldrim, for respondent.

SPEER, District Judge. The libel of the Actieselskabet Barfod, a Norwegian maritime corporation, is brought to recover a claim for damages in the nature of demurrage against the Hilton & Dodge Lumber Company, a corporation of this district.

It appears from the charter party in evidence that the bark Barfod was chartered by the respondent for a voyage in ballast to Sapelo, Ga., and thence with a cargo of pitch pine timber, etc. From the charter party it also appears that the respondent was under contract to dock and load the vessel at the port of Sapelo, to do the harbor towage, and the towage to sea. It was further stipulated that the shipper should give the charterer written notice three clear working days before cargo was required. Twenty-one weather working days were to be allowed in which to deliver cargo to the ship, and if through any fault of the respondent the ship was longer detained demurrage was fixed at the rate of £14, or $70, for each day of such detention. It is charged in the libel that the bark was delayed contrary to the terms of the charter party for 37 days, and that thereby the libelant became entitled to demand from the respondent demurrage in the sum of $2,590, and for this sum a decree is sought.

Respondent by its answer admits the detention and delay, but defends the claim for demurrage upon the ground that it was ascribable to a general strike among the longshoremen, stevedore's men, and laborers working in the port of Sapelo. The respondent specially sets out the terms of the charter party which it is claimed avoid liability for delays thus occasioned. This contract, as usual, imposes a liability upon the respondent for demurrage, but contains the explicit exceptions following:

"The act of God, restraints of princes and rulers, the queen's enemies, fire, floods, frost, droughts, strikes, combinations, or any extraordinary occurrence beyond control of either party, and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever during the said voyage, always mutually excepted."

It appears from the evidence that the bark Barfod arrived at Sapelo on the 7th, and was entered at the custom house on the 9th of July, 1900. It is indisputable that at this time there was a general strike in progress among the longshoremen, stevedore's men, and laborers engaged in loading vessels at that port. This strike was directed by an organization termed the "American Federation of Labor," and had been active since the 23d day of the previous month. A large number of vessels were in port at that time, some at the docks of respondent and other merchants on Julington river, others at the ballast grounds, and still others lying at anchor in the roads awaiting their turn to discharge ballast and proceed to the loading wharves. It was with great difficulty that any work could be conducted. Laborers insufficient in number, and wholly inexperienced, had been brought in by the stevedores from neighboring points and from Savannah.

These were terrorized by the striking laborers. Although kept under heavy guard at Julington, the hostility toward them was so great that they were attacked by the strikers and several of them were wounded. A large number of them quit work, and returned to Savannah. These conditions continued until practically all the shipping was out of the port, and this was not until October, 1900.

With these conditions prevailing at the Julington docks the bark Barfod from July 7th to the 24th lay at anchor in the sound about five miles distant. At the latter date she was berthed at No. 3 dock of the respondent, taking the place of the "Telefone," which had been transferred to St. Simons, a neighboring port. It is evident that the Barfod was placed in this berth in her turn, and in view of all the facts, as soon as practicable.

By the terms of the charter, the charterer was entitled to notice three clear working days before it was required to deliver cargo. The requisite notice was given on July 29th, but ballast was not completely removed and the ship ready for cargo until 6 p. m., July 30th. This appears from the testimony of the master. Since notice given at this hour would have reached the charterer on the following day, lay days for the delivery of cargo would have begun August 4th, and on that day one-third of the cargo was actually delivered to the bark. The stowing, however, did not begin until August 10th. On August 30th all of the cargo had been delivered alongside, and on September 3d all had been stowed. Excluding Sundays, the 11th and 13th, which were stormy, and a legal holiday, the cargo was delivered and stowed within 23 weather working days. Since by the terms of the charter it must have been stowed in 21 days there were only 2 days of delay in this respect. This also is plainly ascribable to the strike. Indeed, the master testified, "I suppose the vessel was loaded as rapidly as the stevedore could considering the delay in lack of men and cutting and trimming timber;" and the stevedore testifies that this "cutting and trimming" is necessary with all cargoes of lumber.

The bark cleared on September 5th. On the 10th she was dropped down into the sound by the tug Passport, and on the 13th was carried across the bar and to sea by the tug Iris. The strike did not involve the tugboats, and the delay in getting to sea is ascribed by the respondent to the prevalence of stormy weather.

There can be no doubt that most of the delay experienced by the Barfod was ascribable to the strike. In addition to the passage from the charter party already quoted, by which it is plain it was agreed that a strike would avoid damages for detention occasioned thereby, paragraph 6 provides: "In the computation of the days allowed for delivering the cargo to the ship at port of loading shall be excluded any time lost by reason of strikes." Since the charterer was under obligation not only to deliver the cargo which at Sapelo is done afloat and alongside by means of rafts guided by towboats, but to stow it also, delivery, in the sense of the charter party, must be construed to import delivery stowed. It is contended by the learned proctor for the libelant that this clause does not exonerate the respondent, for that it does not relate to delay in berthing the ship. This is by no means clear. The exonerating language seems to relate to the entire voyage

for which the Barfod was chartered, but if it were otherwise the delay in placing the vessel in her berth would have been damnum absque injuria, for it would have been wholly idle to berth the vessel when on account of the strike the charterer could not have begun to deliver or stow the cargo. So the Barfod would have been in no better plight at the wharf than she was when lying at anchorage. In either case there would have been a delay of 15 or 17 days directly chargeable to the strike.

The loading having been completed, the master of the Barfod signed the bills of lading, accepted the customary gratuity from the shipper, and cleared at the custom house on the 5th of September. It was now the duty of the respondent to tow the Barfod to sea at the earliest practicable hour. This was especially true in view of the long, but as we have seen unavoidable, delay occasioned by the strike. The bark was, however, not carried across Julington bar until the 10th of September, and not until the 13th was she towed over the outer bar. Stormy weather and heavy winds, it is alleged, occasioned this delay. It is unquestionably true that the weather which usually prevails on the Atlantic coast of the Southern states at this season is not favorable to sailing vessels in similar plight with the Barfod. It is the season of violent storms, sometimes termed the "equinoctial." One witness, a pilot, testified that there was bad weather from the 1st to the 10th of September, and that it was dangerous to take a vessel out. From the logbook of one of the tugs the following entries were abstracted:

"September 4th. Wind blowing hard from E. N. E. At 5 p. m. we hove our anchor up, and run up to Julington for a harbor. Wind blowing strong from the E. N. E. Barometer 29.9."

"September 5th. At 8 p. m. the wind began to increase, and the barometer fell one-tenth."

"September 6th. Wind blowing very strong from east, and the barometer falling, we taken the large hawser from below and made it fast to the piling ashore and hove taut on it to help anchor. Received word from the Dandy (another tug) that storm signals were up. Made everything secure. Barometer 29.6."

The log of the Barfod also shows that on the 5th there was a gale. From the 5th to the 8th of September the testimony of the pilot and the logbook of the Timmons show that it would have been dangerous to have attempted to carry the Barfod, a vessel drawing 21 feet, across the bars. But on the 8th the weather seems to have moderated, and there appears to have been no reason for further delay in carrying the Barfod to sea and in starting her on her homeward voyage. Sapelo is an arm of the ocean, and its bar one of the best on the Atlantic coast, having 24 feet of water at high tide. It takes two days in that port to carry a vessel of the draught of the Barfod over both bars and to sea. She could easily have been given her offing on the 9th, and we think, therefore, that the Actieselskabet Barfod is entitled to a decree for damages in the nature of demurrage from that date until the 13th, when she was carried to sea, namely, four days, which at the stipulated rate will amount to $280.

While we have some doubt as to the apportionment of costs, since all the witnesses for the respondent are employés of the Hilton & Dodge Lumber Company or officially connected with it, and since the

Norwegian sailors who have their all invested in their one ship, the Barfod, were in no sense responsible for the strike, and yet if charged with any part of the cost would receive no compensation whatever for the great hardship and loss they have actually experienced, and since there was but one witness sworn for the libelant and many witnesses for the respondent, whose claims can be readily adjusted by the respondent company at a minimum of outlay, it is believed on the whole, in accordance with the sounder principles of justice, to charge the respondent with the entire costs.

Decree will be taken in accordance with these views.

FERGUSON v. PROVIDENCE WASHINGTON INS. CO.

(District Court, S. D. New York. October 2, 1903.)

1. MARINE INSURANCE—CONSTRUCTION OF POLICY—INSURANCE AGAINST LIABILITY OF TUG FOR COLLISION OR STRANDING.

A marine policy insured the owner of a tug against "loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel or vessels * * * for which said steamer or its owners may be legally liable." The tug found a scow adrift in the harbor in the night, and towed her to a slip, where she soon after sank at her mooring place. The master of the tug, although having knowledge of the sinking, took no steps to mark the place, and the scow was struck by other vessels entering the slip, and injured so that she became a total loss, and the tug was subjected to liability therefor. *Held*, that it was immaterial to the liability of the insurer under the policy whether the loss or damage to which the tug was subjected arose out of a towage or a salvage service, or that it was occasioned by the negligence of the master after the service had terminated, since the tug was adjudged liable therefor, and that the loss was within the terms of the policy.

In Admiralty. Action on policy of marine insurance.

Wing, Putnam & Burlingham, for libelant.

James J. Macklin, for respondent.

HOLT, District Judge. This is an action on a policy of marine insurance. The Providence Washington Insurance Company, the respondent, by a policy dated May 19, 1894, insured William E. Ferguson, the libelant, the owner of the tug Governor, in the sum of $5,000, for one year, against "such loss or damage as the tug Governor may become legally liable for from any accident caused by collision or stranding." The policy, in a later section, stated the contract more particularly as follows:

"This insurance is to fully indemnify the assured for loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel or vessels, * * * for which said steamer or its owners may be legally liable."

On a night in February, 1895, the tug Governor found the scow Peerless adrift in the harbor, and towed her to a slip between Seventeenth and Eighteenth streets, and moored her there. The scow shortly after sunk at her mooring place, and the master of the Governor,

knowing that she was sunk, placed no buoy over her, and did nothing to give any notice to other vessels that she was sunk there. Thereafter other vessels coming into the slip ran upon the sunken scow, and injured her so badly that she was a total loss. The owner of the scow sued the tug Governor in this court, and recovered judgment against her for damages on the ground that the master of the Governor was bound, after having towed her to the place where she sunk, to take reasonable measures to give notice of her situation, so as to prevent her from being injured by other vessels while submerged, until her owners could have notice and take proper steps to save her. Serviss v. Ferguson, 28 C. C. A. 327, 84 Fed. 202. The libelant, as owner of the tug Governor, having paid the judgment, brings this suit for reimbursement.

The substantial defense urged in this case is that this was an insurance against collisions or accidents occurring while engaged in the business of towage; that the service rendered by the tug to the scow was a salvage service; that the service, whether towage or salvage, terminated before the collision; and that the negligence of the master of the tug, for which the tug was held liable, was negligence of the master after the tug's service had ended. The application for this policy of insurance described the policy wanted as one covering a tower's liability, and the policy confined the insurance to the tug while engaged in the waters of New York Harbor and its vicinity; but the policy issued is the instrument which fixes the terms of the contract, and there is nothing in the policy which confines the indemnity to a collision or accident occurring while the tug was engaged in strictly towage service. Towage service is often distinguished from salvage service by the fact that the former is aid rendered in the movement of vessels not in distress, while salvage service is confined to aid rendered to those in distress; but I think that no such distinction was intended by the parties to the contract contained in the policy. It was the intention of Ferguson, the owner of the tug, to obtain, and of the insurance company to confer, by insurance, indemnity against any liability to which the tug might be subjected by reason of any collison or accident to any other vessel, and I do not think the liability is affected at all by the question whether the tug was engaged in towage or salvage service. If there were any ambiguity in the policy, it would be the duty of the court, in construing it, to adopt the interpretation most favorable to the assured. Indemnity Co. v. Dorgan, 7 C. C. A. 581, 58 Fed. 956; National Bank v. Ins. Co., 95 U. S. 673, 24 L. Ed. 563; Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; American S. S. Co. v. Indemnity Co. (D. C.) 108 Fed. 421. But I do not see any ambiguity in this policy. It insures against "all loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel." Nor do I think that there is anything in the point that the master's negligence was his individual negligence, after the tug's service was finished. The fact that the court held the tug liable for the master's negligence in not placing a buoy over the sunken scow shows that the court considered that the negligence was negligence of the master for which the tug was liable. A tugboat's responsibility

does not end with the actual towing. There are various cases holding that a tug is responsible for injuries to a tow after it has been left by the tug, if left in an unsafe place. Connolly v. Ross (D. C.) 11 Fed. 342; Cokeley v. The Snap (D. C.) 24 Fed. 504; The Thomas Purcell, Jr., 34 C. C. A. 419, 92 Fed. 406.

My conclusion is that there should be a decree for the libelant for the amount demanded in the libel, unless the respondent desires to contest the amount due, in which case the usual reference will be ordered.

EASTERN MILLING & EXPORT CO. OF NEW JERSEY v. EASTERN MILLING & EXPORT CO. OF PENNSYLVANIA.

(Circuit Court, E. D. Pennsylvania. September 21, 1903.)

No. 37.

1. MORTGAGES—RIGHT OF MORTGAGEE TO INSURANCE.
A mortgagee is entitled to the proceeds of insurance effected by the mortgagor, where a contractual obligation exists requiring the mortgagor to insure for the mortgagee's benefit.

John Stokes Adams, for petitioner.
Burr, Brown & Lloyd, for respondent.

DALLAS, Circuit Judge. The answer of the receivers to the petition of the Union Trust Company, filed September 10, 1903, in substance admits that the insurance in question was effected for the purpose set up in the petition, and that an obligation of a contractual nature existed requiring said insurance to be made for the benefit of the petitioner. Upon these facts I am of opinion that the petitioner is entitled to the relief prayed (Farmers' Loan & Trust Co. v. Penn Plate Glass Co., 186 U. S. 444, 22 Sup. Ct. 842, 46 L. Ed. 1234), and accordingly an order may be prepared and submitted granting the prayer of the petition.

In re LEWIS.

(District Court, E. D. Pennsylvania. October 5, 1903.)

No. 1,567.

1. SALES—RESCISSION BY SELLER—FALSE REPRESENTATIONS.
It is the settled law in Pennsylvania that the insolvency of a purchaser of goods, and his knowledge of it when he made the purchase, not communicated to the seller, are not alone sufficient to invalidate the sale or to entitle the seller to rescind after delivery of the goods, but, to avoid the sale, there must have been, in addition, conduct which reasonably involves a false representation. Under such rule, a promise by the insolvent purchaser to pay cash for the goods on completion of delivery, and a breach of such promise, does not entitle the seller to rescind. Such a promise is implied in every sale, unless other terms of payment are agreed upon, and expressing it in words does not so change the transaction as to render it fraudulent.

In Bankruptcy. On certificate of referee upon petition of William S. Driver.

Robert J. Byron, for trustee.
Isaac D. Yocum, for creditor.

J. B. McPHERSON, District Judge. Whatever may be the rule in other jurisdictions, it has for 50 years been settled law in Pennsylvania that "the intention of the buyer of goods, at the time of purchasing them, not to pay, together with his insolvency at the time, and his knowledge of it, not communicated to the seller, will not avoid the sale after the delivery of the property sold. To avoid the sale, there must be artifice intended and fitted to deceive, practiced upon the vendor in procuring the property." This was decided in Smith v. Smith, 21 Pa. 367, and, while the ruling was criticised and regretted in Bughman v. Bank, 159 Pa. 94, 28 Atl. 209, it was expressly followed, on the ground that it would not be wise to unsettle the law by another change. The court said:

"We will therefore stand on the authority of Smith v. Smith and its kindred cases, but we will not go a step beyond what they require. Any additional circumstance, which tends to show trick, artifice, false representation, or, in the language of Smith v. Smith itself, 'conduct which reasonably involves a false representation,' will be sufficient to take the case out of the rule of these authorities."

And in the somewhat later case of Cincinnati Cooperage Co. v. Gaul, 170 Pa. 545, 32 Atl. 1093, the court pronounced as follows:

"It is well settled in Pennsylvania that the insolvency of the purchaser, and his knowledge of it when he made the purchase, are not alone sufficient to invalidate the sale, or to support an action by the seller in rescission of it. But they are evidence to go to the jury, with other facts, to show the intended fraud. Rodman v. Thalheimer, 75 Pa. 232. It is essential to the impeachment of the sale as fraudulent, that there should be artifice, trick, and false pretense intended and fitted to deceive the vendor, and operative in obtaining from him possession of his property (citing cases). But the insolvency of the purchaser, and his knowledge of it, coupled with a representation of solvency, which induced the seller to part with the possession of his property, will have that effect, and enable the latter to recover possession of it by a suit in rescission of the sale."

See, also, Diller v. Nelson, 10 Pa. Super. Ct. 449.

This being the law of Pennsylvania, the remaining inquiry is whether any additional circumstance, of the character above described, appears in the present case. The facts are, briefly, these: The bankrupt, who was certainly insolvent at the time when he purchased the petitioner's goods, and as certainly had knowledge of it, promised to pay cash upon completion of the order; that is, upon delivery of all the goods that he was buying. There was no representation of solvency, and, indeed, no representation of any kind; merely the promise to pay cash on completion of the order. The petitioner stopped delivering the goods before the order was completed, and it is argued that the default of the bankrupt has not been shown, for the time of payment under the contract has not yet arrived. But, even if the argument is valid, I prefer not to put the decision upon that ground. It should rather rest, I think, upon the proposition that a promise by an insolvent man to pay cash upon delivery of goods does not make the rule of Smith v. Smith inapplicable, and the breach of the promise

does not entitle the seller to rescind the contract and recover the goods. Such a promise is made no stronger by being expressed. It is implied in every sale, unless different terms of payment are agreed upon; and, therefore, merely to speak aloud or to write the same words that the law would otherwise make part of the contract cannot, as it seems to me, so change the transaction as to make it fraudulent. It is conceded that, if the promise had not been spoken, the purchase would have been within the rule of Smith v. Smith, and, in my opinion, speaking the promise did not change its character. It remained a promise, and did not become a false representation, such as is referred to in Bughman v. Bank. Even an insolvent man might, under some circumstances, reasonably expect to be able to fulfill such a promise when the time should arrive, and it would be very difficult in any case where the promise might be made to pronounce with confidence that the words amounted to "trick, artifice, false representation, or conduct which reasonably involved a false representation."

The decision of the referee is affirmed.

THE KAISERINE MARIA THERESIA.

(District Court, S. D. New York. October 5, 1903.)

1. COLLISION—SCHOONER OVERTAKEN BY STEAMSHIP—FAILURE TO EXHIBIT STERN LIGHT.

Article 10 of the international navigation rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2866]), which requires a vessel which is being overtaken by another to show from her stern a white light or flare-up light, applies to a schooner which is being overtaken by a steam vessel, and she is in fault for a collision resulting from her failure to observe it.

2. SAME—REMOVAL OF LOOKOUTS FROM STATIONS—DUTY TO REDUCE SPEED.

It was the duty of a steamship which was compelled, by the coldness of the weather and the freezing of the spray, to remove her lookouts from their proper places forward to the bridge, to reduce speed so that she could reverse in time to avoid collision with a vessel ahead after such vessel could be seen; and where she continued at full speed she was in fault for a collision with a schooner which she overtook, although the latter was primarily in fault for exhibiting no stern light, where she could have been seen in time to have avoided the collision if the lookouts had not been removed from their proper stations.

In Admiralty. Suit for collision.

Carver & Blodgett and Convers & Kirlin, for libellants.
Shipman, Larocque & Choate, for claimant.

ADAMS, District Judge. This is a libel which was filed by the officers and crew of the British schooner Pavia, to recover the damages caused by a collision with the steamship Kaiserine Maria Theresia, on the Atlantic Ocean in the early morning of the 4th of January, 1901. The schooner was proceeding from Port Morion, Cape Breton, to Boston, loaded with frozen fish, and the steamship from Cherbourg, France, to New York, with passengers and a general cargo. There was a strong wind prevailing, practically a gale, from the north-west. The weather was clear but extremely cold. The schooner was headed

about west, south-west and the steamship about west ¾ north. The schooner's side lights were set and burning but could not be seen from the steamship, which was approaching from astern.

The schooner contends that the steamship was solely in fault for the collision because she had no lookouts properly stationed, and the steamship contends that the schooner was solely in fault because she did not exhibit a light as required by article 10, International Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2866]), which provides:

"A vessel which is being overtaken by another shall show from her stern to such last mentioned vessel a white light or a flare-up light."

The steamship's contention against the schooner must be sustained. The schooner had no white light set astern, and failed to properly exhibit a flare-up light. She had a torch aboard but it was not in condition for use for lack of oil, so that when it was lighted and attempts made, on two occasions, to exhibit it to the steamship it quickly went out and, in effect, she exhibited no light astern.

The real question in the case is whether the steamship should also be held. Her lookouts were stationed on the bridge instead of forward or in the crow's nest on the foremast. The testimony shows that the coldness of the weather had caused the spray, which flew aboard the steamship, to freeze on the forward part of the vessel including the foremast, so that the removal of the lookouts to the bridge was justified by the circumstances, but it remains to be determined whether the continuance of the steamship at full speed of from 15 to 17 knots was excusable. I do not consider that it was. The upper parts of the schooner's masts could be seen above the horizon without regard to a light astern and were seen by the officers and men stationed on the bridge but not until the vessels were in such close proximity that it was deemed best on the steamship not to stop but to endeavor to avoid the schooner by use of the helm and one of the engines. If the steamship had been proceeding at a slower rate of speed, the collision could doubtless have been avoided by the reversal of her engines. The removal of the lookouts from the best positions for seeing ahead imposed a duty upon the steamship to slacken her speed, so that she would be under command and could reverse in time to avoid a collision with a sailing vessel ahead of her, which could be seen without a light exhibited astern. Full speed under the circumstances was inconsistent with the duty of the steamship to stop if there should be danger and there was danger here, which doubtless could have been seen in time to avoid if the lookouts had not been removed from their proper stations. Their removal necessitated the precaution of reducing speed. The Java, 14 Blatch. 524, 530, Fed. Cas. No. 7,233. The conclusion reached is based upon the steamship's testimony; therefore this case does not fall within The Iberia (D. C.) 117 Fed. 718; Id. (C. C. A.) 123 Fed. 865.

Decree for the libellants for half damages, with an order of reference.

McCULLOCH v. MURPHY et al.

(Circuit Court, D. Nevada. September 26, 1903.)

No. 751.

1. MINING CLAIMS—LOCATION BY AGENT—VALIDITY.
There is no provision of law prohibiting the location of a mining claim or the doing of any of the acts required to complete the appropriation by an agent, and the fact that the locator acted by agent in such matters does not invalidate the location.

2. SAME—ASSESSMENT WORK—EVIDENCE.
The object of the statutory provision requiring annual assessment work on mining claims is to give substantial evidence of the locator's good faith, and the law should be liberally construed with that end in view; a compliance with the statute may be proved by any evidence which establishes that the work done and improvements made are reasonably worth the sum of $100.

3. SAME—EFFECT OF RECORDING STATUTE.
The Nevada statute (St. 1887, p. 136, c. 143), providing for the recording of evidence of the doing of the annual assessment work on mining claims, is designed merely to preserve such evidence, and the failure to record the prescribed affidavit does not preclude the owner of a claim from making the necessary proof of work by any other evidence; nor is the record proof, if made, conclusive.

4. SAME—FORFEITURE—BURDEN AND MEASURE OF PROOF.
The burden of proving an abandonment of a mining claim, or that the required annual assessment work has not been done, so as to render it subject to relocation, rests on the party asserting it, and the proof must be clear and convincing to establish a forfeiture.

5. SAME—ASSESSMENT WORK—EVIDENCE CONSIDERED.
Evidence considered, and *held* to establish by a preponderance of proof the validity of a mining location by defendants, and that the required assessment work was done in a certain year, which rendered void a relocation of the claim by plaintiff in the following year.

Suit to Quiet Title to Mining Claim.

Samuel Platt, for plaintiff.
J. F. Dennis, for defendants.

HAWLEY, District Judge (orally). Plaintiff, claiming to be the owner of the Copper King mine, in the Battle Mountain mining district, in Lander county, Nev., commenced this suit, and obtained an injunction against defendants enjoining them from entering into or upon any portion of said mining claim, or taking any ores or minerals therefrom, and prayed to have the title to said mine quieted by a decree. The answer denies the material allegations of the complaint, and alleges ownership and title in themselves to the ground in controversy. A mass of testimony was introduced, which covered a wide range over minor details, and upon these points there was more or less conflict, and much confusion in the testimony, especially upon the part of some of the witnesses introduced by the defendants.

The real and controlling question in the case is whether or not at the time that plaintiff made his relocation of the ground in controversy it was vacant, unoccupied mineral land, open to location and occupancy as such. The plaintiff in his testimony made out a clear case in his favor. He testified that in the year 1882 he was engaged in prospect-

ing in the Battle Mountain mining district as a miner; that he located the ground in dispute and worked upon the same within the boundaries of the ground now known as the "Copper King Mine"; that he, and others in his employ, dug a cut 53 feet long, ran an incline, and dug other cuts; that he then left the ground, and abandoned it; that in September, 1902, he returned to said mining district, and visited the ground in dispute, with a view of locating the ground upon which he had worked 20 years before; that he examined the place, and found but little work in addition to what he had done thereon in 1882; that he made inquiries and examined the mining records of the district, and became satisfied that the ground had been abandoned, and was vacant, and that the locations made thereon had been forfeited from lack of discovery and assessment work; that he located the ground on the 22d of September, 1902, as the Copper King mining claim. His notice of location, which contained a description of the ground by metes and bounds, was recorded in the mining records of the district December 4, 1902. His testimony showed that under this location he had taken all the steps required by law by posting his notice, building monuments, and performing discovery and assessment work thereon, etc. He introduced in evidence a certificate of the district recorder, which reads as follows:

"The Copper Glance mining claim was located on the 19th day of September, 1900. Recorded on 23rd day of October, 1900. The record does not show assessment work for the year 1901 on the Copper Glance mining claim. I hereby certify that the above is correct and true.

"C. F. Mellander, District Recorder."

W. W. Coleman, a surveyor and mining engineer, was introduced, and produced a map of the ground, designating the lines and boundaries thereof, and the places where excavations, drifts, tunnels, inclines, and cuts had been made, and giving in detail the character and dimensions thereof, and was permitted as an expert to give his opinion as to the age of such excavations, and gave it "at about ten years." Among other points, he testified to the existence of an open cut 53 feet long, "from the entry or where it commences at the slope of the hill to the face of the cut or the entry of the tunnel. * * * The tunnel is twenty feet six inches long from the entry to the face, approximately six feet in height, four feet in width at the base. * * * The physical condition of the cut is apparently the same as the other workings I have described. The tunnel itself seems to be of recent construction, and the cut has caved somewhat on the sides above the rock through which the cut has been excavated. There is disintegrated material that has caved down in, and there are bushes growing up through the waste material that has been thrown out apparently in running this cut. They have dug a trench, and thrown the waste material out, and the bushes have grown out from that as they have through the other workings described." He further testified that the age of the cut would be about 10 years; that there is a strong contrast between the ages of the tunnel proper and the cut—a decided difference. The cut is apparently much older than the tunnel itself.

The defendants claim title to the ground under locations made by or for them (1) to the Copper Glance, located by Cornelius Murphy on

the 19th day of September, 1900, and notice of location thereof recorded October 13, 1900; (2) to a relocation of the ground under the name of Defender, made by H. R. Lemaire on August 9, 1901, and recorded November 22, 1901.

It is admitted by plaintiff that the boundary lines of the Copper King and the Copper Glance are substantially identical. It is suggested by plaintiff that the Copper Glance claim was never properly located, and that there is a variance between the allegations of the complaint and the proofs in this: that it appears from the complaint that the location was made by one Cornelius Murphy, and the proofs show that M. J. Murphy was the original discoverer of the lode, and that the location was made by Cornelius Murphy as an agent. The testimony of defendants upon this point is to the effect that it was agreed by the parties interested in the location what their interests should be, and that the claim should be located for them by Cornelius Murphy. There is nothing in the mining laws that prohibits one from initiating a location of a mining claim by an agent. It is not necessary that a party should personally act in taking up a mining claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation. The suggestions made by counsel do not, in any manner, affect the validity of the Copper Glance claim. 1 Lindley on Mines (2d Ed.) § 331, and authorities there cited.

The object of the law in requiring annual assessment work to the extent of $100 on the claim is that the owner shall give substantial evidence of his good faith. A liberal construction must be given to the requirements of the law. The labor and improvements, within the meaning of the statute, should be deemed to be done when the labor is performed or improvements made, for the purpose of working, prospecting or developing the mining ground embraced in the location, or for the purpose of facilitating the extraction or removal of the ore therefrom. St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 655, 26 L. Ed. 875; Book v. Justice M. Co. (C. C.) 58 Fed. 106, 117, and authorities there cited.

The method of proof usually required to establish the fact that the amount of labor for the annual assessment has been done is not uniform. Mere proof of the expenditure of $100 is not, of itself, sufficient, but it furnishes an element tending strongly to establish the good faith of the owner. One of the main tests of determining this question is not what was paid for it, or the contract price, but whether or not the labor, work, and improvements "were reasonably worth the said sum of one hundred dollars." In addition to cases before cited, see Mattingly v. Lewisohn, 13 Mont. 508, 520, 35 Pac. 111; Penn v. Oldhauber, 24 Mont. 287, 291, 61 Pac. 649; Quimby v. Boyd, 8 Colo. 194, 208, 6 Pac. 462; Wright v. Killian, 132 Cal. 56, 64 Pac. 98.

The testimony concerning the amount of labor performed furnished a wide field of controversy, and an opportunity for a broad difference of opinion as to the value of the work. There is always a conflict as to the actual or reasonable value of the labor. It has been said—and a wide experience in such cases has convinced the court of its truth—that every relocator is interested in depreciating the value of

the work performed by the original locator, and the latter in saving his claim from forfeiture is interested in extolling his work. The case in hand certainly forms no exception to this general rule. In cases of a conflict upon this point, it is always proper to consider whether there has been a bona fide attempt to comply with the law. The certificate of the district mining recorder that the records do not show assessment work for the year 1901 on the Copper Glance mining claim is at best only prima facie evidence of the fact, subject to be rebutted by oral or other testimony. No penalty is attached to the failure of having the record show that the work was done. There is no provision in any of the statutes bearing upon this subject which declares that such a failure to have the proper certificate recorded will work a forfeiture of the claim.

In Book v. Justice M. Co., supra, the court, referring to the statute of Nevada (St. 1887, p. 136, c. 143), said:

"The object of this act was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be, in many cases, more accessible. In all mining communities there is liable to be some difficulty in finding the men who actually performed the labor or made the improvements, and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining laws in this respect. The act was passed, as expressed in the title, 'for the better preservation of titles to mining claims.' Locators of mining claims would doubtless often save much time and trouble, as well as hardship, inconvenience, and expense, by complying with the provisions of this act; but the act does not prevent, and was not intended to prohibit, the owner of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit. It simply makes the record prima facie evidence of the facts therein stated."

It is perhaps safe to say that if the defendants in the present case had filed their affidavits in the district recorder's office, as required by the statute of this state, no relocation would have been made by the plaintiff.

The law does not favor forfeitures. The penalty for failure to comply with the law is thus expressed in section 2324, Rev. St. [U. S. Comp. St. 1901, p. 1426]: "Upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." The word "forfeiture" is not used in the statute, although it is a comprehensive word to express results which flow from a failure to comply with the law. The rule is well settled that the forfeiture cannot be established except upon clear and convincing proof of the failure of the original locator to have work performed or improvements made to the amount required by law. The burden of proof to establish a forfeiture rests upon him who asserts it. Hammer v. Garfield M. & M. Co., 130 U. S. 291, 301, 9 Sup. Ct. 548, 32 L. Ed. 964; Book v. Justice M. Co., supra; Justice M. Co. v. Barclay (C. C.) 82 Fed. 554, 559; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036; Axion M. Co. v. White, 10 S. D. 198, 201, 72 N. W. 462. The law is well settled that actual possession of a mining claim is not essential to the validity of a title obtained by a valid location; that until such location is terminated by abandonment or forfeiture

no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof. Belk v. Meagher, 104 U. S. 279, 283, 284, 26 L. Ed. 735.

The legal principles herein announced are elementary, and I have not deemed it necessary to elaborate them, or take the pains to cite all the authorities. They are abundant. Keeping in mind the settled rules of law as to posting notices, the placing of stakes, building monuments, replacing or moving them, the discovery of mineral, and the liberality of the construction to be given to these acts of the miner, as announced in Book v. Justice M. Co., supra, and supplemented by the authorities cited upon these subjects in Walton v. Wild Goose M. & T. Co. (C. C. A.) 123 Fed. 209, 218, I have no hesitation in saying that the Copper Glance was a valid location, and that all the steps required by law to be performed thereon were complied with in the year 1900. The whole case resolves itself into the question whether the annual assessment work was done by the defendants during the year 1901. It is argued by plaintiff that the testimony on behalf of the defendants was given in such a manner as to raise a doubt and uncertainty touching the main question, and that as given it is entitled to but little, if any, weight. The confusion of the principal witness upon the part of the defendants on this point suggests the only doubt that arises in the case. He was possessed of ordinary intelligence, and seemed capable of giving his testimony in a proper manner, but he became embarrassed, bewildered, and could not be confined by the court or counsel to a mere statement of the facts as they occurred. He was disturbed by questions asking him to explain his testimony by the map made on behalf of plaintiff of the ground, which he did not understand, and made mistakes in answering them, much to the chagrin of his counsel, and at times lost his bearings upon many of the essential points. It was a case of dumb confusion worse confounded by the surroundings of the trial. It seemed to be impossible for him to make any connected statement concerning any particular subject without wandering off upon irrelevant matters. The court at divers times attempted to assist the witness, and get him to state the facts in his own way, and confine himself to his own knowledge of what actually occurred; but all efforts in this direction for a day or two, at least, proved as fruitless as the efforts made in that direction by counsel. A reference to one statement made by the court, as shown by the record, as to where the stakes and monuments were placed, illustrates the whole difficulty which arose from his testimony upon all the points involved at the trial, namely: "We are having difficulty apparently in getting at the facts all around. The witness is not specific enough; he jumps from one corner to the other, and in a way that is difficult to understand." After vain efforts to testify from the map, he produced a little timebook, wherein he had kept the time of himself and employés, from which he testified that, in 1901, he, his brother Con, Fred Barnes, and one Uren performed 60 days' labor upon the Copper Glance mine in cleaning out an open cut and running a tunnel. There was some conflict as to whether the open cut was the same as that testified to by plaintiff as having been made by him in 1882, some of the witnesses for defendants stating that it was not; but, for the

purpose of this opinion, it will be conceded that it was; but there was no pretense that the tunnel part was constructed by the plaintiff. This tunnel, as testified to by defendants' witnesses, was 24 feet in length from the open face, 4 feet wide, and 6 feet deep. The witness Murphy testified that the ground was in hard rock, and that a man might drive 6 or 8 inches of the tunnel in a day, and in some places might make a foot per day; that the men worked 8 hours a day, and the employés were paid regular miners' wages. In justice to this witness, whose testimony I have criticised, it is proper to state that he impressed me as desiring to tell the truth, and was always willing to explain his testimony, and admitted that he had not understood the questions, and had made mistakes or was misunderstood by the court and counsel. His greatest fault was in not confining himself specifically to the questions asked as to the month and year when, and place where, the annual assessment work was done. For this reason I have confined myself to a general statement gleaned from his whole testimony, and have confined myself to the year 1901. During the course of his testimony he testified that the Defender and Copper Glance run parallel:

"Q. Now, Mr. Murphy, is this work upon the Copper King mine, designated by the red figures 1, 2, 3, 4, 5, 6, 7, and 8 upon plaintiff's map, is not that work performed substantially upon the Copper Glance mining claim? A. Yes, sir. Q. Is it not all within the boundaries of what you claim to be the Copper Glance mining claim? A. Yes, sir. Q. Is there any portion of the work performed and represented upon that map upon the Defender mining claim? A. No, sir. Q. Who performed the location work upon the Copper Glance mining claim in the year 1900? A. I did. Q. You did personally? A. Mr. Holcomb and Mr. Barnes and I; I employed Mr. Barnes."

His attention was then called to plaintiff's map, and he was asked where the work was performed at the incline:

"A. Twenty-four or twenty-five feet from the top of this incline there is a cut running east and west. * * * Q. Upon the incline? A. Yes, sir; in the incline. Q. In the incline you made a cut? A. Yes, sir. Q. How long was that cut? A. The west cut is about five or six feet, and the other probably about four feet—four or five feet. Q. Now, Mr. Murphy, you testified in direct examination that in the year 1900 you and a company of others were upon the claim known as the Copper Glance mining claim, and cleaned out all the inclines, tunnels, cuts, and workings which had been performed by somebody else? * * * Your testimony shows that you did that in the year 1900. A. Yes, sir. * * * And also this work I described in the incline. Q. That was all done in the year 1900? A. Yes; I done all this work in the year 1900. * * * Q. I wish you would state when you began to do your assessment work for the year 1901 on the Copper Glance? A. In 1901 I commenced on the 7th day of October. Q. What did you do toward the performance of the assessment work? * * * A. We still continued the cut; the object was to tap this shaft. * * * Q. The assessment work that you did was a continuation of that cut that you have just been talking about? A. Yes, sir; and the tunnel. * * * Q. How much of the cut which you say that you dug as a continuation of the original cut of eighty feet long, how much of that did you complete in the year 1901? A. Well, it would be I think * * * about eighty feet, must have about sixty feet of tunnel and open cut, and there is a portion of that work that was done in the year 1902—this four feet that we speak of added to it. Q. You now testify that sixty feet of that work was the assessment work upon the Copper Glance? A. There was five or six men working, * * * all worked in this cut. Q. When you testified, Mr. Murphy, that Mr. McCulloch was correct when he

stated that the cuts and the inclines were built about ten years ago, what did you mean? A. I mean those that surrounded the incline; that is, 1, 2, and 3."

The attention of the witness was then called to his previous testimony, that the 80-foot cut was at the point marked "7" on plaintiff's map:

"Q. I point out to you upon the map the red number 7, which you testified positively was the cut upon which that work was performed. A. I testified positively to this work on my map, known as the eighty-foot cut. Q. Then when you testified that you performed that work—that assessment work—upon the cut marked upon plaintiff's map as No. 7, * * * you were mistaken? A. I testified positively I worked here (pointing to his own map). I don't go on that map. I told you I didn't understand that map, and the judge allowed me to use this map, and I confined myself to this map. I superintended and oversaw all of that work from the time the first pick was stuck until the year 1902. Q. How much work did you do on the Defender—how much assessment work? A. Ran an open cut on the Defender, running about twenty feet; it is twenty feet from the cut which Mr. McCulloch put in, and it is about twenty-three feet, with a little over ten foot face in solid ore. Q. When did you commence that work? A. In the year 1901. Mr. Barnes worked with me on that, too; Mr. Barnes, I think, worked on that claim about fifteen days. * * * I worked with him myself. Q. How long a cut did you dig? A. About twenty-three feet long."

The testimony of this witness was corroborated by other witnesses on several of the essential points. Notwithstanding the confusion of the principal witness for the defendants, and the conflict raised as to the amount of assessment work done on the Copper Glance in 1901, there is nothing in the evidence justifying the inference that there was any intention on the part of the defendants to evade the law or come short of its requirements. It is no doubt true that the provision of the law as to assessment work is often evaded, and locators must be made to understand that the conditions imposed by the act of Congress and by the statutes of Nevada are wise and salutary, are not onerous, and must be complied with.

As was said in Sisson v. Sommers, 24 Nev. 379, 387:

"To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply, not only with the laws of Congress, but with the valid laws of the state and valid rules established by the miners, in force in the district where the claim is situated upon which such right depends."

With reference to the amount of assessment work done by the defendants in the year 1901 upon the Copper Glance, which is the controlling question in this case, my conclusion is that there is a preponderance of evidence in favor of defendants that the work was done in the manner and to the extent required by law, and that the labor performed by them was reasonably worth the sum of $100. It therefore necessarily follows that the defendants had the entire year of 1902 to do the assessment work for that year, and no lawful relocation could be made by others until January 1, 1903. At the time plaintiff made the relocation of the ground under the name of the Copper King the owners of the Copper Glance claim had the exclusive right to the possession and enjoyment of the mining ground embraced in that location. A relocation on lands actually covered at the time by a valid and sub-

sisting location is void, because the law does not allow such a thing to be done. Belk v. Meagher, supra; Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. 1110, 29 L. Ed. 348; Manuel v. Wulff, 152 U. S. 505, 511, 14 Sup. Ct. 651, 38 L. Ed. 532; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 78, 18 Sup. Ct. 895, 43 L. Ed. 72.

Judgment must be entered herein in favor of defendants for their costs.

In re SNELL et al.

(District Court, N. D. California. September 29, 1903.)

No. 4,294.

1. BANKRUPTCY—LIENS—RIGHT TO ENFORCE VALID ATTACHMENT.
   A creditor who obtained a valid lien by attachment on property of a bankrupt more than four months prior to the bankruptcy is entitled to prosecute the action to judgment, and a sale of the attached property thereafter.

Edmund Tauszky, for the motion.
Haven & Haven, for bankrupt.

DE HAVEN, District Judge. This is a motion made by Albert Hirschfeld for a modification of the order heretofore made staying proceedings in an action pending in the superior court of the county of Nevada, state of California, entitled "Albert Hirschfeld, Plaintiff, vs. B. F. Snell and J. D. Fleming, Partners under the Firm Name of Snell & Fleming, Defendants." It appears from the affidavit filed in support of the motion (and the fact is not disputed) that the moving party, who is plaintiff in the action referred to, obtained a valid attachment upon certain property of the bankrupts more than four months prior to the commencement of the bankruptcy proceedings. Upon the authority of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and In re Beaver Coal Co., 113 Fed. 889, 51 C. C. A. 519, it must be held that the lien of this attachment, having been obtained more than four months prior thereto, was not affected by the bankruptcy proceedings; and from this it follows the plaintiff in the action referred to should be permitted to prosecute it to judgment, and satisfy the same by an execution sale of the attached property. See, also, in support of this conclusion, Brandenburg on Bankruptcy (3d Ed.) § 1114.

Motion granted.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 331.

WEAVER v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, D. Montana. August 17, 1903.)

No. 658.

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.
An action in which the petition charges concurrent acts of negligence against each of two defendants does not present a separable controversy.

2. SAME—MOTION TO REMAND—ISSUE AS TO JURISDICTIONAL FACTS.
A statement of jurisdictional facts, such as the citizenship of the parties, in a petition for removal, is sufficient, prima facie, to establish such facts for the purpose of removal; but such statements may be traversed by the plaintiff by a pleading in the nature of a plea in abatement, in which case the court may receive evidence on the issue. A cause will not be remanded, however, merely on the filing of an affidavit by plaintiff controverting such statements.

On Motion to Remand to State Court.

Walsh & Newman, W. C. Jones, and Robertson, Miller & Rosenhaupt, for plaintiff.

William Wallace, Jr., for defendant Northern Pac. Ry. Co.

KNOWLES, District Judge. The questions presented for consideration in this case arise upon a motion to remand the same to the state court, from which it was removed into this court upon a petition, made under oath, alleging (1) that the plaintiff is a resident and citizen of the state of Washington, and that Charles Gibson, one of the defendants, is a resident and citizen of the state of Montana, and that the other defendant, the Northern Pacific Railway Company, is a corporation organized under the laws of the state of Wisconsin, and a citizen of said state; (2) that there is a separable controversy presented in said suit between plaintiff and the defendant Northern Pacific Railway Company, which can be wholly determined between it and said plaintiff, and in which said defendant Gibson is not in any manner interested. Upon this last ground the court is able to determine, from an inspection of the complaint, as to what it contains. Upon such examination, the court finds that this is a case where concurrent acts of negligence are charged against both defendants. Such an action presents no separable controversy. Cuddy v. Horn (Mich.) 10 N. W. 32, 41 Am. Rep. 178; Masterson v. N. Y. Central, etc., R. R., 84 N. Y. 247, 38 Am. Rep. 510; Hoye v. Great Northern Ry. Co. et al. (C. C.) 120 Fed. 712; Teal v. American Mining Co., et al. (Minn.) 87 N. W. 837; Moon v. N. P. R. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; 2 Wood's Railway Law, 1341.

As to the other questions, the complaint does not specify the citizenship of the plaintiff or the defendant Gibson. The petition for removal, however, does. Judge Dillon, in his work on Removal of Causes from State Courts to the Federal Courts, lays down the rule

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.

that a petition and affidavit are sufficient to bring the case, in the first instance, before the federal court, and furnish presumptive evidence of the necessary jurisdictional facts. But of course this first showing will not be considered conclusive, and the plaintiff may traverse the facts set forth in the petition or affidavit for removal, and an investigation be had as to the truth thereof. Short v. C., M. & St. P. Ry. Co. (C. C.) 34 Fed. 225; Malone v. Railway Co. (C. C.) 35 Fed. 625. Although the above-cited authorities apply to cases of removal on the ground of local prejudice, etc., they also apply to the practice to be observed in cases like the one at bar. Where the petition for removal states jurisdictional facts, such as citizenship, etc., which are not true, the plaintiff may traverse these facts by allegations in the nature of a plea in abatement, and the court can receive evidence to determine the same. Dillon's Removal of Causes, § 158, note 4. As stated, plaintiff did not do this, but sought, by an affidavit made by one of his counsel, to have the case remanded. This is not the correct practice, and, as the case now stands, the motion to remand must be overruled.

UNITED STATES v. BALDWIN.

(Circuit Court, S. D. New York. May 9, 1899.)

No. 2,479.

1. CUSTOMS DUTIES—CLASSIFICATION—SHOTGUN BARRELS.
Certain gun barrels, made under the Whitworth patent process, and shown to have been subjected to a hammering process, are held to be "forged," and to be free of duty as "shotgun barrels, forged, rough bored," under Tariff Act Aug. 28, 1894, c. 11, § 2, Free List, par. 614, 28 Stat. 544.

Appeal by the United States from a decision of the Board of General Appraisers, which reversed the classification of the collector of customs at the port of New York on importations by Baldwin Bros. & Co.

Henry C. Platt, Asst. U. S. Atty.
Stephen G. Clarke, for importers.

TOWNSEND, District Judge. The articles in question are gun barrels, assessed at 35 per cent. ad valorem, under Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule C, par. 177, 28 Stat. 520, as "manufactured articles or wares, not specially provided for, * * * composed * * * of metal." The importers claim that the merchandise is free, under paragraph 614 of said act (section 2, Free List, 28 Stat. 544), as "shotgun barrels, forged, rough bored." It appears that they are made under the Whitworth patent process, whereby it is claimed that steel ingots are compressed into shape by rolls, in order to eliminate blowholes, and to produce a better quality of steel. The steel, after having been subjected to this process, is capable of being adapted to various purposes other than gun barrels.

Counsel for the United States contends that these barrels are not forged, because hammering is essential to forging, and that it does not appear that these barrels are hammered either by hand or machine.

There is a conflict of testimony as to whether hammering is essential to forging. Some of the witnesses say that forging may be done by squeezing the barrels, or passing them through rolls. There is also a conflict of testimony as to whether or not these barrels have been hammered, but it is practically admitted that they could not have been produced in their present shape without hammering, and the preponderance of evidence indicates that they have been wholly or in part subjected to a hammering process. Irrespective of this fact, however, the Board of General Appraisers has found, on trustworthy and sufficient evidence, that the barrels are forged, and their decision, therefore, is affirmed.

DILLARD'S ADM'R v. CENTRAL VIRGINIA IRON CO. et al.

(Circuit Court, W. D. Virginia. October 3, 1903.)

1. ABATEMENT—DEATH OF PLAINTIFF—PROCEDURE BY DEFENDANT.
   The failure to revive a suit which has abated by the death of plaintiff is not ground for a motion by defendant to dismiss for want of prosecution, but he may, on proper notice, obtain an order requiring the suit to be revived within a time fixed, or to be dismissed.
2. SAME—EQUITY—PROCEDURE FOR REVIVAL.
   One entitled to revive a suit in equity which has abated by the death of a party is not authorized to proceed therefor by motion, but must follow the procedure prescribed by equity rule 56, by filing a bill of revivor or a bill in the nature of a bill of revivor.

In Equity. On motion by defendant to dismiss for want of prosecution, and by the successor in office of the deceased plaintiff for revival of the suit.

Caskie & Coleman and O. L. Evans, for plaintiff.
Lewis & Lewis, for defendants.

McDOWELL, District Judge. This equity suit was instituted in the state court. In 1896 it was removed to this court. In 1900 a motion to remand was overruled. A demurrer to the bill was thereafter argued before Judge Paul, but, on account of his illness and subsequent death, no decision was ever made on the demurrer. On March 13, 1902, an order was entered suggesting the death of the plaintiff. The record does not show who made this suggestion, but it was in fact made by the defendants. No order has been made and no step taken in the cause since that date. On October 2, 1903, the defendants moved that the cause be dismissed for want of prosecution. Counsel for the successor in office of the deceased plaintiff resisted said motion, and moved that the cause be revived in his name. The defendants opposed this motion.

The motion of the defendants should, I think, be overruled. In 2 Bates, Fed. Eq. Proc. § 655, it is said, in treating of the defendant's right to compel the plaintiff to revive or have an order of dismissal, that the defendant may, upon application to the court, obtain an order

¶ 2. See Abatement and Revival, vol. 1, Cent. Dig. § 447.

that the plaintiff's representative shall revive the cause within a time to be limited in the order, or that the bill be dismissed; citing 3 Dan. Ch. (1st London Ed.) 207, 208.

In 1 Foster, Fed. Pr. (3d Ed.) § 294, it is said:

"Dismissal for failure to perfect or revive a suit. When a suit has abated or become otherwise defective before a decree, the party or parties against whom it can be continued may, upon notice served upon the person or persons entitled to revive or supply the defect in the same, move for and obtain an order, directing that these revive or supply the defect within a certain limited time to be fixed by the court, or that else the bill be dismissed. If the suit abate by the death of one of several coplaintiffs, the order may be obtained against the survivors; and it seems that the objection that there is no personal representative of the deceased plaintiff will not prevent the court from granting such an order. It is irregular in such cases to move to dismiss a bill for want of prosecution, and an order to that effect, if obtained, will be discharged for irregularity. A bill may be dismissed at a defendant's motion for the plaintiff's failure to serve with process another defendant named in the bill, who is a necessary party to the suit."

To same effect, see 1 Dan. Ch. Pr. (4th Am. Ed.) 812–814; 2 Dan. Ch. Pr. 1539.

It is intimated in Simmons v. Morris (C. C.) 109 Fed. 709, that laches in filing a bill of revivor sufficient to defeat an original bill would be sufficient to defeat the bill of revivor; but we have no such state of facts in the case at bar. The defendants have all the time had the simple remedy pointed out by the above authorities to bring the delay to an end, and there is consequently very little force in their complaint.

The motion of the new administrator raises a question of some interest: Is a bill of revivor, or a bill in the nature of such bill, the only method of revival in a case such as we have here? Upon such examination of the authorities as I have been able to make, it seems that such is the better opinion. It is true that in Griswold v. Hill, 1 Paine, 483, Fed. Cas. No. 5,834 (an equity case), a defendant was allowed to come in on motion. But in this case no question seems to have been made as to the necessity for a bill of revivor. This is supposed to be the only case in which such procedure has been allowed. 1 Foster (3d Ed.) p. 398. In Allen v. Fairbanks (C. C.) 40 Fed. 188, on the death of a defendant in equity, the plaintiff had issued scire facias to revive. In this case no point was made as to the propriety of this method. These are the only two federal equity cases I have found in which the revivor was not by bill.

Mr. Foster says:

"The only methods of reviving a suit in equity in the federal courts seem to be a bill of revivor, a bill in the nature of a bill of revivor, a bill of revivor and supplement, and a supplemental bill in the nature of a bill of revivor." 1 Foster, § 179, p. 398.

Mr. Bates seems to be of the same opinion. See 2 Bates, Fed. Eq. Proc. § 634 et seq.

In Kennedy v. Georgia Bank, 8 How. 610, 12 L. Ed. 1209, it is said, in passing: "When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor." This, however, was not a case in which there had been an effort to revive by motion or scire facias.

Equity rule 56 provides a procedure to fit the case we have here, and the ordinary rules of construction lead to the belief that the expression "may be revived by," etc., should be read "must be," or "shall be," etc. But if this is not intended as the only method, I doubt the authority of this court, without a rule of court authorizing the simpler method of revivor on motion, to inaugurate such a practice. While I confess to a personal predilection for simple, speedy, and inexpensive methods of procedure, yet as to this question, aside from the want of authority, a seemingly sufficient reason against allowing revivor by mere motion is found in this consideration: The defendant may desire to contest the right or title of the proposing new plaintiff, and many complex questions of law or fact, or both, may be raised. If the procedure be a mere motion, the absence of regular pleadings, such as would be filed were a bill of revivor used, is liable to lead to confusion and error. If we consider section 955, Rev. St. U. S. (U. S. Comp. St. 1901, p. 697), as intended to apply to equity suits—as to which there is room for some doubt (Clarke v. Mathewson, 12 Pet. 171, 9 L. Ed. 1041; Ex parte Connaway, 178 U. S. 435, 20 Sup. Ct. 956, 44 L. Ed. 1134)—it does not seem to me to authorize revival on mere motion, at the original instance of the successor of a deceased party. If the living party had had issued scire facias against the administrator of his deceased adversary, probably the order of revival would be made on motion merely of the administrator. In such case both parties seek the same end. But if, as here, the living party seeks a dismissal of the suit, and is not in the position of desiring the administrator to revive, I find no warrant in this section for the party seeking to revive to do so, otherwise than by the regular method pointed out in equity rule 56. While section 955, if applicable to a chancery suit, seems to recognize the right of the living party to have scire facias issued against the representative of his deceased opponent, the statute does not make such procedure obligatory.

The motion in behalf of the proposing new plaintiff must be overruled.

In the case at bar, if the defendants (assuming that they are satisfied that their motion to dismiss is properly denied) do not desire to contest the right of the proposing plaintiff to revive, no reason suggests itself why the expense and delay incident to a bill of revivor may not be avoided by a consent order of revival.

In re WORRELL.

(District Court, E. D. Pennsylvania. October 19, 1903.)

No. 1,619.

1. BANKRUPTCY—EXAMINATION OF BANKRUPT'S WIFE—SCOPE OF INQUIRY.
Under Bankr. Act 1898, § 21a (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), as amended by Act Feb. 5, 1903, c. 487 (32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 413]), which authorizes the examination of a bankrupt's wife, but only "touching business transacted by her, or to which she is a party, and to determine the fact whether she had transacted or been a party to any business of the bankrupt," a cer-

tain latitude must be permitted in her examination; and, where there is reasonable ground therefor, she may be examined, to determine whether a business conducted in her name is in fact hers or the bankrupt's, and may be asked such questions as are pertinent to that inquiry.

In Bankruptcy. On certificate from referee and petition to extend time for filing objections to discharge.

William A. Hayes, for bankrupt.

Franz Ehrlich, Jr., and Simpson & Brown, for objecting creditor.

J. B. McPHERSON, District Judge. The amendment of 1903 to the bankrupt act (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 413]) enlarges clause "a," § 21, Bankr. Act July 1, 1898, c. 541 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), so as to make the wife of a bankrupt a competent and compellable witness in any inquiry concerning his acts, conduct, or property. But even in such an inquiry she cannot be examined generally. The proviso to the clause specially confines the examination to "business transacted by her, or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt." Her own separate business is, of course, not the subject of inquiry at all, but it is at this point, precisely, that questions are most likely to arise. Is the particular business her own, or is it her husband's? Obviously, she cannot be allowed to determine that question for herself, and the result is that a certain degree of latitude in her examination must, of necessity, be permitted, in order that the court may be sure that she has not been, and is not now, transacting business as a mere cover for the bankrupt, or in aid of a scheme to injure his creditors. If the course of inquiry should reveal matters that in the end turn out to concern herself alone, such a result is to be regretted; but this cannot always be obviated, and it is certainly better than to allow her to decide conclusively that the business is hers by making a bare assertion to that effect.

In the present case, the adjudication was made on April 15, 1903. On the next day, the wife of the bankrupt bought the lease of a theater, and soon afterwards employed him to manage it; she herself having had no previous professional experience, while he had been managing another theater for some time. Under such circumstances, I have no doubt that the wife may be properly examined, to discover what she paid for the lease, and where the money came from, and may be asked any other questions that bear upon the point whether this enterprise is really hers, or is being carried on by the bankrupt in her name. The lease itself need not be produced until it fairly appears from the testimony that the business is not hers, but her husband's. The referee's second and third rulings were correct. The first ruling, concerning the production of the lease, is covered by what I have just said.

The time for filing objections to the bankrupt's discharge is extended until December 15, 1903.

CHRISTIE GRAIN & STOCK CO. et al. v. BOARD OF TRADE OF CITY OF CHICAGO (two cases).

(Circuit Court of Appeals, Eighth Circuit. October 8, 1903.)

Nos. 1,805, 1,911.

1. EXCHANGES—PROPERTY RIGHT IN QUOTATIONS—PROTECTION IN EQUITY.
The Board of Trade of Chicago is not entitled to invoke the aid of a court of equity to protect its claimed property right in the quotations made on the transactions of its exchange, under proof which shows that at least 85 per cent. of such transactions are deals in which it is not intended to make a future delivery of the article nominally dealt in, but which are to be settled by the payment of money only according to the fluctuations of the market, and that for a specified price it furnishes such quotations to telegraph companies for distribution as a means of encouraging speculation in futures, and for the purpose of bringing such business to its members; both the permitting of such transactions, and the sending out of such quotations for the purpose stated, being in violation of the statutes of the state, as construed by its Supreme Court.

Appeals from the Circuit Court of the United States for the Western District of Missouri.

For opinions below, see 116 Fed. 944, and 121 Fed. 608.

James H. Harkless, John O'Grady, Charles S. Crysler, W. H. Rossington, Charles Blood Smith, and Clifford Histed, for appellants.

Henry S. Robbins, for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. On the 18th day of April, 1901, the Board of Trade of the city of Chicago filed in the Circuit Court of the United States for the Western District of Missouri a bill in equity against the Christie Grain & Stock Company, a corporation created under the laws of the state of Missouri, C. C. Christie, the Western Union Telegraph Company, the Postal Telegraph Cable Company, and the Gold & Stock Telegraph Company, the three companies last named being corporations created under the laws of the state of New York; the relief prayed for in the bill being the granting an injunction restraining the Christie Grain & Stock Company and C. C. Christie from receiving or surreptitiously acquiring from the telegraph companies certain market quotations representing the dealings had on the Board of Trade in the city of Chicago, and restraining the telegraph companies from entering into any contracts with the Christie Company or C. C. Christie for the delivery to them of the quotations furnished the telegraph companies by the complainant.

As grounds for asking the relief prayed for, it is averred in the bill that the complainant is a corporation created by a special charter granted by the Legislature of the state of Illinois on the 18th of February, 1859, with authority "to maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and disseminate valuable commercial and economic information and

generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits"; that there are about 1,800 members of the Board of Trade; that the corporation has provided in the city of Chicago an exchange building, which cost upwards of $1,000,000; that there is provided within this building, for the exclusive use of the members, an exchange hall, where many of its members meet every business day to buy and sell for themselves, or as brokers for their customers, for present and future delivery, all kinds of grain and hog products, the value of said transactions aggregating many million bushels of grain and many million pounds of hog products annually, and having become so large that said exchange is one of the great grain and provision markets in the United States; that such transactions are permitted only during market hours, and by open, viva voce bidding; that the knowledge of the prices thus made on said transactions during market hours upon the exchange has become a species of property of large value, for which the telegraph companies are willing to pay large sums to the Board of Trade, in order that they may secure the same promptly, with the privilege of selling the same to their customers; that on the 15th of April, 1901, the complainant entered into a written contract with the Western Union and Postal Telegraph Companies, whereby it agreed to furnish to the telegraph companies complete and continuous quotations of prices made in transactions between members of said Board of Trade in its exchange hall, the telegraph companies agreeing to pay a certain price therefor, and also agreeing that they would not knowingly furnish or sell, directly or indirectly, the continuous quotations furnished them to any person, firm, or corporation conducting a bucket shop or other similar place where such quotations are used as a basis for bets or other illegal contracts, based upon the fluctuations of the prices of commodities dealt in on said Board of Trade, there being set forth in the written contract a form of application which the persons desiring to receive from the telegraph companies the quotations furnished by the Board of Trade were required to sign as a prerequisite to obtaining the same; that the Christie Grain & Stock Company and C. C. Christie, doing business at Kansas City, Mo., have not signed any such applications, and have not entitled themselves to rightfully receive and use the designated quotations, but without right and surreptitiously have obtained and used these quotations to the great injury of the complainant, and have demanded of the telegraph companies that they shall furnish the quotations to the said Christie Company without the latter signing the application prepared by the complainant or agreeing to its terms.

To this bill the Christie Company and C. C. Christie filed an answer and an amended answer, in which it is, in substance, claimed that the business transacted in the exchange hall of the Board of Trade is of a public nature, and that the Christie Company and all other parties engaged in dealing in grain and hog products are entitled to the knowledge and use of these quotations; that the Western Union Telegraph Company is a public corporation engaged in business as a common carrier, and as such is under obligation to furnish these quotations, when sent over its wires, to any party desiring the

same, upon payment of the proper cost thereof; that the effort of the Board of Trade and of the telegraph company to limit the delivery of the quotations is in restraint of trade, and is a violation of the act of Congress known as the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); that the quotations sent out by the telegraph company are not the private property of the Board of Trade, in such sense that the Board of Trade can rightfully confine the knowledge thereof to such persons as will subject themselves to the terms of the application contracts; that such attempted restriction in the use of these quotations tends to create a monopoly in the articles dealt with on the Board of Trade, and that the Board of Trade is not entitled to the aid of a court of equity in securing to itself the pecuniary benefit derived from the sale of the quotations, because the same represent or grow out of transactions had in the exchange hall of the Board of Trade, which are in violation of the statutes of the state of Illinois and of the state of Missouri, prohibiting any person or corporation keeping or causing to be kept any bucket shop, office, or place wherein is permitted the pretended buying or selling of cotton, grain, provisions, and other articles without any intention of receiving and paying for the property so bought, or of delivering the property so sold, or wherein is permitted the buying or selling of any such property on margins, it being further therein enacted that any corporation, association, copartnership, or person who shall communicate, receive, exhibit, or display in any manner any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transactions, as aforesaid, shall be deemed an accessory, and be liable to be fined and punished as provided for in the act.

The telegraph companies did not answer the bill, and the questions at issue are those presented by the bill and the answers of the Christie Company and C. C. Christie.

A large amount of testimony was taken, and the case was finally submitted to the Circuit Court upon the pleadings and proofs, which court found in favor of the complainant, granting it a decree as prayed for; the opinion of the court being reported in 116 Fed. 944.

From the finding and decree of the circuit court the Christie Company and C. C. Christie have appealed to this court, and counsel for the adversary parties have submitted the case upon full and elaborate briefs.

We deem it advisable to first consider the question whether the quotations of prices, which it is the purpose of the bill to prevent being delivered or furnished by the Western Union Telegraph Company to the Christie Company, grow out of transactions had in the exchange hall of the Board of Trade, of such a nature that they come within the condemnation of the statute of Illinois quoted in defendants' answer, the first and second sections of which are as follows:

"That it shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept within this state, any bucket shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or

petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins; or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. And any corporation or person, whether acting individually or as a member or as an officer, agent or employé of any corporation, association or co-partnership, who shall be guilty of violating this section shall, upon conviction thereof, be fined in any sum not less than $200 and not more than $500; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above described, shall, upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter. And the continuance of such establishment after first conviction shall be deemed a second offense."

"It shall not be necessary, in order to commit the offense defined in section 1 of this act, that both the buyer and the seller shall agree to do any of the acts therein prohibited, but the said crime shall be complete against any corporation, association, co-partnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person who shall communicate, receive, exhibit or display, in any manner, any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall be deemed an accessory, and, upon conviction thereof, shall be fined and punished the same as the principal, and as provided in section one of this act."

In Soby v. People, 134 Ill. 66, 25 N. E. 109, the Supreme Court of Illinois, in construing this statute, held as follows:

"In construing a statute the primary consideration is to ascertain and give effect to the legislative intention. In order to accomplish this object the court should look at the whole act, and seek to ascertain such intention by an examination and comparison of its various provisions. Mason v. Finch, 2 Scam. 223; People v. Commissioners, 3 Scam. 153; Perteet v. People, 65 Ill. 230. The court may also consider other and prior acts relating to the same general subject, and thus ascertain what mischiefs the later legislation was designed to remedy, and the true spirit and import of such legislation. Stribling v. Prettyman, 57 Ill. 371. By the Revised Criminal Code of 1874 (Rev. St. 1874, p. 372, c. 38, §§ 130, 131) it was made a criminal offense to contract to have or give the option to sell or buy, at a future time, any grain or other commodity, etc., and it was provided that all contracts made in violation of such law should be considered gambling contracts, and should be void. It was held under that statute that, even though a contract purported upon its face to be an absolute contract for the sale or purchase of grain or other commodity for future delivery, yet the transaction would be a gambling contract, within the prohibition of the statute, if the real intention of both parties at the time of making the contract was to deal only in options, and make future settlements upon the basis of the difference in the market price, without the actual delivery of the grain or other commodity sold or purchased. But it was also held, under the same statute, in numerous cases, that, if either party contracted in good faith, the contract was a valid and binding contract, no matter what might have been the secret intention of the other party. It is manifest that the object of the statute was to suppress and prevent gambling in grain and other commodities. But so great was the difficulty of establishing the unlawful intent of the parties making illegal contracts, so many were the shifts and devices resorted to for the purpose of concealing the true character of the gambling transactions entered into, that the statute was found to be ineffectual to accomplish the purpose for which it was enacted. It is a matter of common notoriety that, notwithstanding the highly penal character of the statute of 1874, the evil it was aimed at continued to increase with wonderful rapidity throughout the state, until in almost every city or town of any considerable importance commission houses, offices, or

agencies were established, in which the great bulk of the business transacted was the making of contracts which, while legitimate upon their face, were in fact mere gambling transactions, which were never allowed to mature, but were uniformly adjusted before maturity upon differences in market price, and without any actual delivery of the articles which were the subject-matters of such pretended contract. To remedy the mischief, the Legislature, satisfied with the futility of attempting to suppress gambling in grain and other commodities by striking merely at the gambling contracts themselves, and the parties entering into such contracts, has sought, by the statute of 1887 (Laws 1887, p. 96), to suppress all bucket shops, offices, stores, or other places wherein gambling in grain or other commodities is conducted or permitted, and to do this by punishing, by fine, imprisonment, or forfeiture of charter, any person, co-partnership, association, or corporation that keeps or causes to be kept a place of that character within the state, and also punishing by fine of not less than $500, nor more than $1,000, the owner of any building who knowingly permits on his premises any of the illegal acts denounced by the statute. It would seem clear from the evidence that the plaintiff in error kept an office or place wherein was 'conducted or permitted' the buying or selling of grain or other produce on margins, 'without any intention of receiving and paying for the property so bought, or of delivering the property so sold,' and wherein was 'conducted or permitted the pretended buying or selling of such property on margins,' and where the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold.

"A consideration of the act will, as before indicated, show that it is directed against the keeping of any office or place, etc., first, wherein is conducted or permitted the pretended buying or selling of grain or other produce on margins, or otherwise, without any intention of receiving the property bought, or delivering it if sold. Under this clause of the first section the offense consists in keeping the place, etc., where such buying or selling is conducted or permitted. That plaintiff in error kept the place or office is conceded; and that buying or selling upon margins, without any intention on the part of the customer to receive the thing bought, or to deliver the thing sold, was permitted in such office or place so kept by the plaintiff in error, is also substantially conceded, and, if it were not, is abundantly proved. Under this provision of the act the keeper of such office, or place, etc., cannot shield himself from criminal responsibility behind the fact that he made no inquiry of his customers. The statute is preventive in its character, and is aimed at the keeping of places where gambling in grain is permitted. The keeper must know that the transaction is not gambling, or in good faith have just reason to believe that the buying or selling is not within the intended prohibition of the statute. But if this were not so, there is abundant evidence in this record to show that the plaintiff in error knew that his customers did not contemplate an actual delivery of the commodity bought or sold. Again, the second clause makes it an offense to keep a place, etc., wherein is conducted or permitted the pretended buying or selling of such produce on margins. It is scarcely contended that the customer did not in fact intend only to purchase options, and to make money in the rise and fall of the markets, without any expectation of receiving or delivering grain. In other words, it is too plain for argument that the buying and selling of grain was a mere pretense, at least so far as the customer was concerned. Again, the third clause creates the offense where the party buying such produce, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold. Here the proof established beyond question that purchases were made without any intention of receiving the commodity purchased. The only object was to make money on the fluctuations of the market by the pretended purchase of the grain on margins. * * * Nor can the fact that Lindbloom & Co. may have gone into the Board of Trade, and made like contracts of purchase or sale, avail plaintiff in error. As before said, the act is intended to prevent the keeping of places where gambling in grain is conducted or permitted. If the employers of plaintiff in error, in order to protect themselves, made, even in good faith, purchases or sales of like amounts of grain or produce, it would not change the nature of the trans-

action which had transpired between plaintiff in error and his customer, so as to free it from the taint of gambling, since, in respect of such customer, it would still be a mere gambling on margins—a mere speculating on the rise and fall of the market. It is apparent from the whole act, from the title to the concluding sentence, that the purpose and object of the Legislature was to suppress the evil of gambling in produce. Primarily, it was intended to reach and suppress the bucket shop and bucket-shopping, from which much of the evil sought to be corrected necessarily flows. But it is manifest that, probably owing to the difficulty of securing conviction where all the elements to constitute a bucket shop, or the practices of bucket-shopping, as the same have been defined in the decisions of the courts, are required to be established, the Legislature saw proper to strike a fatal blow at both bucket shops and bucket-shopping, by prohibiting the keeping of all offices, places, etc., where gambling in grain and other produce is carried on or permitted. There can be no question but that the evil of gambling in futures was present in the business carried on by plaintiff in error. There is in the evidence even just ground for the conclusion that it was present, to all intents and purposes, as fully as if his office had been denominated, a 'bucket shop,' instead of an 'agency' or a 'commission house.' The shifts and devices so easily and frequently resorted to for the purpose of giving to transactions tainted with gambling the semblance of legitimate deals were sufficient considerations, in the legislative judgment, to require, as a matter of public policy, that all places wherein is conducted or permitted the pretended buying or selling of property, such as is specified in the act, on margins or otherwise, shall be prohibited. If two firms, members of the Board of Trade, could be found, who were willing to enter into such a scheme, it is manifest that one firm representing agencies in half of the commercial centers in the state, and the other representing the other half, could buy or sell to fill the orders of their respective agents, from each other receive the margins, and 'wring out their deals' without a bushel of grain or pound of any other commodity changing hands. Yet, if either demanded the grain or other product of the other, the contract would be so drawn as to be a valid sale and purchase of the produce itself; and they could, without legal perjury, testify that it was to be delivered if desired by the party entitled to it under the contract. By such means the state would still be subject to all the evils of the bucket shop and bucket-shopping.

"We are not permitted, by the rules of construction, to extend the body of the act by reference to its title, which is, 'An act to suppress bucket-shops, and gambling in stocks, bonds, petroleum, cotton, grain, provisions, and other produce,' but we may consider it for the purpose of determining what was within legislative contemplation. Perry Co. v. Jefferson Co., 94 Ill. 214. The Legislature by the fourth section, as we have seen, declares that it is the intention of this act to prevent, punish, and prohibit within this state the business now engaged in and conducted in places commonly known and designated as 'bucket shops,' and also to include the practice now commonly known as 'bucket-shopping,' etc. To accomplish this purpose the Legislature has prohibited the keeping of the places where what is commonly known as 'bucket-shopping' is carried on. They have not in the body of the act prohibited the keeping of bucket shops, or the practice of bucket-shopping, only, but have included the keeping of every place wherein is conducted or permitted the gambling in grain or other produce, and have expressly provided that it shall not be necessary, in order to commit the offense, that both the buyer and seller shall agree to do any of the acts therein prohibited. By the act the mere offer of the corporation or person keeping such place to make such pretended sale or purchase, whether the offer to sell or buy is accepted or not, renders the offense complete against such corporation or person. Such corporation or person is also prohibited from communicating, receiving, exhibiting, or displaying in any manner any such offer to buy or sell, or any statement or quotation of the prices of such property, with a view of any transaction of the kind prohibited. Moreover, as we have already seen, the person who knowingly permitted any of the acts prohibited by the statute in any house or place owned by him is subjected to heavy penalty. It is apparent, we think, that the Legislature, for the purpose of carrying into effect their

expressed intention of preventing the evils resulting from bucket shops and bucket-shopping, and to suppress the vice of gambling in grain and other produce, so detrimental to the interests and welfare of the people, have determined to close, suppress, and prohibit the keeping of places where the practice of bucket-shopping or gambling in such commodities is permitted. No other construction of the act would be consistent either with its letter or spirit. We are of opinion that it is no longer possible, in this state, under any shift or device, however specious, to keep an office or other place where parties may, under the pretense of buying or selling grain or other produce, engage in speculation in futures, and gamble upon the rise and fall of the market. * * *"

In Clews v. Jamieson, 182 U. S. 461, 494, 21 Sup. Ct. 845, 858, 45 L. Ed. 1183, the Supreme Court of the United States, after a review of the ruling of the Supreme Court of Illinois in the cases of Pickering v. Cease, 79 Ill. 328; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Tenney v. Foote, 95 Ill. 99; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164; and Soby v. People, 134 Ill. 66, 25 N. E. 109—held that:

"These cases hold these various propositions: (1) That 'option contracts' to sell or deliver grain or other commodity, or railroad or other stock, which contracts are intended to be settled by payment of differences at the settling date, are invalid. 79, 83, 113, and 125 Ill., supra. (2) A contract to have or give to himself an option to sell or buy at a future time any grain, etc., subjects the party to fine or imprisonment, and all contracts made in violation of the statute are gambling contracts, and void, under section 130, Cr. Code (Rev. St. 1874, p. 372, c. 38), and all notes or securities, part of the consideration of which is money, etc., won by wager upon an unknown or contingent event, as described in section 131 of the Code, are also void. 95 and 113 Illinois, supra. (3) An 'option contract' to sell or buy at a future time grain or other commodity or stock, etc., is void, under the Illinois statute, even though a settlement by differences was not contemplated. 130 Ill., supra. (4) The keeper of a shop or office where dealing is carried on in stock, etc., on margins, without any intention of delivering articles bought or sold, is guilty of an offense under the Illinois act of 1887 [Laws 1887, p. 96]. 134 Ill., supra."

The construction thus placed upon the state statute by the Supreme Court of Illinois is binding upon this court, not only as a construction of the statute of the state, but also as declaratory of the public policy of the state with respect to the character of the business that may be lawfully carried on within the borders of the state by the Chicago Board of Trade and other kindred organizations. Wade v. Travis Co., 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060; Hartford Fire Ins. Co. v. Railway Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

It is thus authoritatively settled that, under the statutes of the state of Illinois, it is unlawful for any person or corporation to keep or furnish an office or place wherein persons may, under the pretense of buying or selling grain or other produce, engage in speculating in futures and in gambling upon the rise or fall of the market, and every person and corporation is prohibited from communicating or receiving any statement or quotation of prices with a view to aiding in the carrying on of the prohibited gambling transactions.

Of the nature of the business carried on by the members of the Board of Trade there can be no question under the evidence sub-

mitted in this case. The testimony of the president of the board, William S. Warren, and of a large number of the members of the board was taken for the purpose of showing the character of the transactions had upon the floor of the exchange hall; and there is absolute unanimity in their evidence to the effect that much the larger part of these transactions were deals wherein it was not expected or understood that there would be any delivery of the article nominally dealt in, but the same were carried through and settled by methods clearly devised to avoid the need of actual delivery. The estimates of the witnesses vary as to the percentage of the transactions in which actual delivery was contemplated or had, running from 1 to 15 per cent., thus proving that at least 85 and more probably 95 per cent. of the transactions would come under the condemnation of the Illinois statute. We do not deem it necessary to set forth the details of this testimony, which can be found in the opinion of Judge Thompson in the case of The Board of Trade of the City of Chicago v. O'Dell Commission Co. (C. C.) 115 Fed. 574. In that case, and in Board of Trade v. Donovan Commission Co. (C. C.) 121 Fed. 1012, upon consideration of substantially the same evidence submitted in this case, the conclusion was reached that over 90 per cent. of the transactions had on the floor of the exchange hall maintained by the Chicago Board of Trade were purely gambling transactions.

It is thus proven beyond all reasonable question that the Chicago Board of Trade maintains in the building owned by it in the city of Chicago a place known as the "Exchange Hall," wherein the members of the board, acting for themselves, and also as brokers for outside parties, engage in making and carrying through deals in grain and provisions, in which it is not intended to make a future delivery of the article nominally dealt in, but which are to be settled by the payment of money only according to the fluctuations of the market and which are in all essentials gambling transactions. It further appears that the continuous quotations sent out by the Board of Trade are quotations of the prices bid and paid in connection with these speculative transactions had on the floor of the exchange. It further appears that the Board of Trade, for a specified price paid to it, furnishes these quotations to the telegraph companies, and authorizes them to send the same over their wires for delivery to all persons who will agree to take them under the terms fixed by the Board of Trade; these quotations being thus furnished by the Board of Trade and sent out over the lines of the telegraph companies as a means of encouraging speculation in futures and in gambling upon the rise and fall of the market, and for the purpose of bringing to the members of the Board of Trade as large a part of this speculative business as can be possibly secured. As already shown, the statute of Illinois, as construed by the Supreme Court of that state, absolutely forbids any person or corporation from keeping an office or place wherein gambling in grain or other produce is permitted, or from communicating or receiving any quotations of prices of such property with a view to encourage or aiding in gambling transactions in such property. The evidence clearly establishes the fact that the Chicago Board of Trade maintains in its exchange hall a place where-

in transactions coming within the inhibition of the statute are permitted and carried on, and the preparation and sending out of the continuous quotations of prices, based upon these forbidden transactions, are intended to aid its members, as well as outsiders, in engaging in speculative gambling on the rise and fall of the market, and therefore in both these particulars the Board of Trade violates the plain provisions of the statute.

The purpose of the bill filed in this case is to invoke the aid of the court, as a court of equity, in securing to the Board of Trade the pecuniary benefit derived from the communication and sale of quotations derived from transactions conducted by it in open violation of the statutes of the state in which it maintains its place of business, and to which state it owes its corporate existence. The powers of a court of equity cannot be successfully invoked for such a purpose. It will not lend its aid to the furtherance of transactions expressly forbidden by the statute, and thus declared to be contrary to the public policy of the state wherein the transactions are had. In seeking the aid of the court, under the circumstances developed in the evidence introduced in this case, the Board of Trade does not come with clean hands, nor for a lawful purpose, and for these reasons its prayer for aid must be denied. The conclusion thus announced relieves the court from the need of considering the other questions arising on the record, and which have been very fully presented in the briefs of counsel.

The decree appealed from is reversed, and the case is remanded to the Circuit Court, with instructions to dismiss the bill upon the merits at cost of the appellee.

In re RODGERS.*

(Circuit Court of Appeals, Seventh Circuit. April 22, 1903.)

1. BANKRUPTCY—JURISDICTION OF COURT—DISTRIBUTION OF FUND.
   Where a receiver appointed by a court of bankruptcy obtained peaceable possession of property from the bankrupt, although a warehouse company claimed to be in the actual possession, and had issued receipts therefor to the bankrupt, who had transferred the same, and such property was afterward sold by order of the court, to which the holders of the warehouse receipts agreed by stipulation, the property and its proceeds passed into the custody of the court, which had jurisdiction to determine the ownership of the fund.

2. WAREHOUSEMEN—VALIDITY OF RECEIPTS—PROPERTY NOT IN POSSESSION OF WAREHOUSEMAN.
   A bankrupt was a dealer in seeds, occupying premises for which he paid a large rental, where he maintained his office and transacted his business, and in which he also stored the grain and seeds purchased by him, largely on credit. He made a contract with a storage company by which he gave it a lease of the premises without consideration, and the company issued to him warehouse receipts for the seeds therein, which he hypothecated as security for loans. The bankrupt continued to occupy the building as before. No sign was placed thereon showing possession by the storage company, which had no key thereto, and the only thing done to give notice of its possession of the seeds for which it

* Rehearing denied October 6, 1903.

had given receipts was to place small and inconspicuous signs in the rooms and small tags on the piles of bags containing such seeds. The bankrupt continued to treat the property as his own, cleaning the seeds, and in some cases selling them, and substituting other seeds for those covered by the receipts, although it did not appear that the storage company knew of such action. *Held*, that there was no such delivery or change of possession as to constitute in fact a warehousing of the property, but that under the law of Illinois, by which secret liens are invalid, the transaction was constructively fraudulent and voidable by creditors of the bankrupt.

3. PLEDGES—VALIDITY—DELIVERY OF WAREHOUSE RECEIPTS.
To constitute a valid pledge of property by the transfer of warehouse receipts therefor as security, such receipts must have been issued by one having the actual possession of the property, so that their transfer amounts to a constructive delivery.

4. BANKRUPTCY—EFFECT OF PROCEEDINGS—RIGHTS VESTING IN TRUSTEE.
The filing of a petition in bankruptcy is not merely an appropriation by the bankrupt of his property to the payment of his debts, but the trustee appointed thereunder is vested not only with title to the property and all the rights of the bankrupt therein, but also with the rights of action of creditors with respect to property which has been fraudulently transferred or incumbered by him.

5. SAME.
The filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by the law which is equal in rank to seizure on attachment or execution, and with respect to the right to attack transfers or incumbrances by the bankrupt as either actually or constructively fraudulent the trustee stands in the same position as an attachment or execution creditor.

Appeal from the District Court of the United States for the Northern District of Illinois.

Alexander Rodgers was adjudged a bankrupt on May 8, 1901, and on that day the Chicago Title & Trust Company was appointed receiver, and subsequently trustee, of the property and estate of the bankrupt, and took possession of the estate, including the property hereinafter mentioned. The bankrupt was a dealer in seeds, having his place of business upon the premises Nos. 220 to 230 Johnson street, in the city of Chicago. These premises, consisting of the south half of the basement, the north half of the south half of the second, third, fourth, fifth, and sixth floors, with the right of way to the south elevator from the railroad platform by way of the east door on platform, and by way of entrance on alley, and the right of way to go upon the elevator, and the right to ship in and out by wagons by the front door, by chute, and by the rear entrance, as described, were leased by him from one Hascall from January 10, 1899, to April 30, 1902, at a monthly rental of $200. On November 28, 1899, he also leased until April 30, 1902, the south one-fourth of the fifth and sixth floors, at an additional rental of $50 per month. So that after that date he had the whole of the south half of the fifth and sixth floors, the north half of the south half of the second, third, and fourth floors, and the whole of the south half of the basement; the first floor being vacant, and used as a passageway. A wooden partition separated the south half from the north half of the floors of the building, the latter being occupied by another tenant. The entrance was from the west front of the building on Johnson street to the main floor, and thence stairways at the south end of the building ran from each floor to the floor above and to the basement. The front of the south half of the second floor was partitioned into an office, and was occupied by the bankrupt. There were also machinery and appliances and a freight elevator for the handling of seed, and on certain floors were bins with cleaning machinery for cleaning and grading seed. The seed was usually received from railroad cars into the basement; thence ele-

¶ 4. See Bankruptcy, vol. 6, Cent. Dig. §§ 222, 273.

vated to the top floor, if to be dumped or cleaned; and was usually received and shipped in bags, most of the business being in car-load lots of about 250 bags, and when stored on any floor was usually in car-load lots. The usual pile or lot was made up in two tiers of bags lying horizontally, the ends of the bags of one tier abutting the ends of the bags of another, with five or six bags piled up in front against the two tiers. These piles were about 16 feet long and 6 to 7 feet high. The building was known as "mill construction"; that is, the timbers were exposed posts supported by joists and girders. The various floors were known as divisions from the sixth down, A, B, C, D, E, and F; the latter being the basement. Depending from the ceiling girders or joists were wooden signs on which were painted "Div.," with the letters "A" "B," etc., indicating the floor, and "Sec.," with a number thereafter, as 1, 2, 3, etc., to indicate a section, so called, of the floor. The floors were large open floors, 50 by 90 or 60 by 100 feet, and had no bins for the separate storage of seed, and had no partitions dividing the floor space. The boundary lines of "sections" were imaginary lines, the signs being put up by Rodgers upon his leasing the premises; and there was no division of sections on the second floor, where a large part of the seed now in controversy was located.

The National Storage Company is a corporation, incorporated under the laws of the state of Illinois on December 29, 1886. It was authorized to carry on a general warehouse business, to receive for safe-keeping or storage general merchandise, grain, etc.; to take charge of and perform the duty of paying freight charges, duties, etc., on bonding, receiving, landing, hauling, and delivering such property deposited, or intended to be deposited with such corporation; to issue receipts or certificates for goods and personal property to the owner or owners thereof when such goods and personal property "have been received, are on the premises, or under the control of the said corporation at the time of issuing such receipts or certificates."

On August 25, 1900, the National Storage Company and the bankrupt entered into the following written agreement:

"Proposal for Warehousing.

"Office of National Storage Company,

"Chicago, Ills., August 25th, 1900.

"Mr. Alexander Rodgers,

"#220 Johnson Street, Chicago, Illinois.

"Dear Sir: 1. The National Storage Company hereby proposes to issue its storage warrants to the order of yourself or to such order as the acceptor hereof may hereafter direct, upon personal property consisting in part of Field Seeds to be stored in the premises known as #220-#230, Johnson Street, Chicago, Illinois.

"2. All of the above named premises, or such portions thereof as may from time to time be required, shall as and when required be leased to the National Storage Company. Said premises are to be designated as National Storage Company's Warehouse Premises Number 281.

"3. Rates, Terms and Conditions which shall govern the storage of property or issue warrants under this proposal are as follows:

"On property valued at $10,000 or less, the charge for the first calendar month or fraction will be $7.50, for each succeeding month or fraction $7.50, and for each additional $1,000 or fraction, the rate will be $.75 per month.

"All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal, and all costs of placing property in store, such as measuring, weighing, tallying, surveying, platting or drafting, etc., will be added to above charges. A certified memorandum must be rendered, showing market value of the property placed in store on which storage charges are to be based.

"4. Substantial fences, gates, partitions, doors or other forms of enclosure, for enclosing or protecting property, for which warrants of this Company have been or may hereafter be issued, shall be constructed and kept in repair by acceptor hereof, and if not so constructed or repaired upon request, this Company is hereby authorized to forthwith construct or repair same, and place any cost therefor as a charge against the property enclosed or protected thereby.

"5. Any and every lease executed in pursuance of this proposal shall, upon written notice delivered to the National Storage Company by the acceptor hereof, be duly cancelled and the premises surrendered only when and after all warrants issued under, upon or by reason of any and every application executed by such acceptor, shall have been delivered to this Company under terms and conditions of this proposal and said warrants.

"6. It is understood unless otherwise provided in writing, that this proposition under its terms contemplates, that the quantity of grain which may be received for storage, shall be determined by a measured bushel standard. Grain will be received by weight and so accounted for, charges for weighing by this Company's representative to be paid by acceptor hereof.

"7. Storage charges are due and payable as elected by this Company, at time of delivery, monthly, or at close of each calendar quarter. It is provided, that if for any cause delivery of property be made on which storage charges have not been paid, the remaining property will be held liable for same and all other charges which may have accrued. The costs for delivery of property when attended by superintendence of this Company are not rated as storage charges. Such cost and other contingent expenses will form basis for additional charge. Surrender of warrants and payment of charges to date of such surrender will not cease or terminate storage charges until property has been accepted, and Release Permits have been signed by party authorized to receive the property surrendered, and permits have been received at office of this Company.

"8. Should increased cost, or additional services, or risk, in reference to said property or warrants, be incurred by reason of the sale or pledge of the warrants, and the property, covered thereby, then the rates on each warrant, shall be such as shall be fixed by this Company, not exceeding the rates named therein.

"9. The services of a capable person satisfactory to this Company must be provided to represent its interests, such person shall also be acceptable to any surety company from whom indemnity bond may be asked in adequate amount, and commensurate with value of property received by this company and covered by its warrants. To defray cost of bond and services of such custodian a charge against the property will be made, unless otherwise adjusted.

"10. This Company reserves the right to recall and issue new warrant, for remainder of any warrant having three or more endorsements thereon of property delivered therefrom, also to recall and issue new warrant for remainder of any warrant, at expiration of one year from its date, having one or more endorsements thereon of property delivered therefrom, provided that in either case the guarantee afforded by endorsers is not affected thereby.

"11. It is understood that while the identity of each respective lot of property received by this Company, shall always be maintained, any surplus remaining after the delivery of any certain lot or lots may be retained by the Storage Company, until all charges are paid, and all warrants issued in pursuance of this proposal shall have been surrendered and satisfied.

"12. It is to be understood also, that should this Company at any time hereafter, for any reason deem the premises furnished for its occupancy insecure for its purposes, or, for any cause be interfered with in the possession or removal of property covered by its warrants, or be dispossessed of the storage premises, which are now or may hereafter be leased to it, that it is hereby authorized, without notice to holders of warrants upon all or any part of the property stored in such premises, to provide other suitable storage premises, move the property thereto, and cause policies of insurance to issue thereon to its own order in trust for amount of value shown by said valuation memorandum, or more at its discretion. All costs or expenses accruing by means of such removal, interference or dispossession, including insurance premiums, and increased rental paid by this Company, for space occupied by such property, shall be chargeable against the property in addition to the storage rate above specified. And if the same or any other charges are and remain unpaid for ninety days or more, this Company is hereby authorized to sell the property in the manner, legally provided for enforcing warehousemen's lien, and shall apply the proceeds of such sale:"

"First: To the payment of all costs and expenses of such sale.

"Second: To the payment of all sums due this Company under, upon or by reason of this proposal, and the overplus if any, shall be held for and upon demand paid to the party or parties legally entitled thereto. When this Company shall have given the legal notice and sold the property as provided thereunder; then all warrants affected thereby shall be null and void as against the National Storage Company.

"13. The Property delivered for purposes of storage must remain undisturbed until warrants covering same are surrendered, received at office of this Company in Chicago and 'Release Permits' duly received and countersigned by Custodian in charge and receipt signed for property by party authorized to receipt for same.

"14. The acceptance hereof shall empower The National Storage Company to place its signs and marks upon the property and enclosure to such an extent as shall fully protect possession in compliance with laws regarding same, which signs and marks must at all times remain undisturbed and unobscured.

"15. Upon conclusion and settlement of all business under this proposal, all copies of original and duplicate papers, shall, upon request of this Company be cancelled and returned to it.

"Very respectfully, National Storage Co.,

"Accepted. By Walter Tod, Treasurer.

"Alex. Rodgers."

And thereupon the bankrupt executed a lease to the National Storage Company as follows:

"This Agreement, Made this thirty-first day of August, in the year of our Lord one thousand nine hundred ——— between Alexander Rodgers, of Chicago, County of Cook, and State of Illinois, party of the first part, and National Storage Company, a corporation organized and existing under the laws of the State of Illinois, party of the second part,

"Witnesseth: That the said party of the first part for and in consideration of the covenants and agreements hereinafter mentioned and contained, to be kept and performed by the said party of the second part, its successors and assigns, hereby does demise, lease, and let unto the said party of the second part the following described premises, situated in the City of Chicago, County of Cook and State of Illinois, to wit:

"All of the basement and second floor, the North Half (N. ½) of the third (3) and fourth (4th) floors and all of the fifth (5th) and sixth (6th) floors of the six (6) story and basement Brick Building situated at and known as #220 #222 #224 #226 #228 and #230 Johnson Street, for and during the term of three years from and after the date of this Agreement (and so long thereafter as property remains thereon for which warrants of said Storage Company have been issued and are in force and effect) for a yearly rental of One Dollar, and other good and valuable considerations, the receipt of which in advance, is hereby acknowledged by the party of the first part.

"This lease is made upon the express conditions following, to wit:

"First. That the said leased premises shall be used and occupied exclusively for the storage of Personal Property, and for the transaction of such other business as may be connected therewith, or incident thereto, in pursuit of any rights claimed in performance of duties of said Storage Company as Warehousemen.

"Second. That the said second party will not receive upon premises above described any property for purposes of storage, after due notice in writing has been received by said Storage Company, from said first party, that termination of this lease is desired.

"Third. Said party of the second part its agent or agents shall, for the purpose of inspection or removal of any property which may be located in premises herein leased, be permitted easy and convenient passage at any and all times; through any part of the abutting premises that is or may hereafter be occupied or controlled by said party of the first part.

"Fourth. Said party of the second part shall, for the convenient moving of property to or from the above described premises, have free from cost of

operation the use of elevators, tracks, cars, scales, scale house and any other fixtures or appliances that party of first part now has or may acquire during term of this lease, and shall be privileged to place any marks, signs or other evidences of possession which it may deem necessary or desirable.

"Fifth. It is understood and agreed to by and between the parties hereto that the 'moving of property' shall include the complete delivery of same on cars, wagons, or other means of transfer should party of the second part so elect.

"In Witness Whereof, the parties to these presents have hereunto set their hands and seals the day and the year first above written.

"[L. S.] Alexander Rodgers [Seal.]
"[L. S.] National Storage Company [Seal.]
"By Walter Tod."

Upon the execution of the lease the National Storage Company tacked on the walls of the several floors notices in white letters upon dark blue enameled tin 3x7 inches, there being eight of the signs, which were distributed to the several floors of the building. These signs read: "This property controlled by the National Storage Company as a public warehouse. Warehouse premises No. 281." These signs were placed seven or eight feet from the floor on the side of the building and on the partitions between the premises in question and the north half of the building; but no signs were placed on the exterior of the building. When the bankrupt desired a storage warrant, he made application upon a blank form to the National Storage Company as follows:

"Application for Storage Warrant.

"Chicago, Ill.

"To the National Storage Company,
"Chicago.

"For the purpose of obtaining your Storage Warrants the subscriber has placed in your Warehouse premises No. 281, located at Nos. 220-230 Johnson St. Chicago, Ill. the following property, to wit:"

"It is hereby certified that this property belongs to the undersigned, is in good mercantile condition and free from lien or encumbrance. Said Storage Warrants to be issued to order of Alex Rodgers, in accordance with proposal for Warehousing Contract dated Aug. 25, 1900, of which this Application and the Valuation Memorandum bearing same Warrant Numbers and of even date herewith is hereby made a part", accompanying the same with a valuation memorandum as follows:

"Valuation Memorandum.

"Chicago.

"National Storage Company.

"Room 217, First Nat'l Bank Bldg., Chicago.

"To Alex Rodgers,
"#220 #230 Johnson St., Chicago.

Numbers Lot.	Description of Property.	Date	Market Values		Warrant Number.
			Value of each item.	Values covered by each warrant.	

"The property specified on the above memorandum which for purposes of warehousing has this day been placed in the possession of the National Storage Company, by the subscriber, is the same as that entered on Application for Storage warrant of corresponding warrant number, and even date herewith, and the undersigned hereby guarantees that the responsibility of

the Storage Company, in event of loss of any property covered by warrants enumerated, shall not exceed the values given above, unless, before such loss occurs, notice of change in value shall have been given to and acknowledged by said Storage Company."

Thereupon, an employé of the company would inspect the property specified in the application and valuation memorandum, and place upon the pile a pasteboard tag of the form following:

"No disturbance permitted while this card is posted.
"Warehouse card, National Storage Company, dated .....
Warrant No. ..... Lot No. ..... Section No. ..... Pile No. ....."

The Storage Company would then issue to the bankrupt a warehouse warrant or receipt in the form following:

"Warrant No. ..... Lot No. ..... National Storage Company, Office 217 First National Bank Building, Chicago, hereby acknowledges to have received ..... to weigh ..... pounds, contained in Div. ..... Sec. ..... floor at its warehouse premises No. 281, located at 220 to 230 Johnson Street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office, Chicago, duly endorsed.

"It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

"Record Book ..... page ..... Storage and charges as per contract on file with this company.

"Chicago ....."

These warrants the bankrupt would place at banks and with others as collateral to loans made to him. When it was desired to remove seed for which warehouse receipts had been obtained, application was made on a formal printed blank, the warehouse receipt returned and canceled, and a release issued by the storage company to the bankrupt.

The storage company had no warehouse of its own, only such as was leased, as was the one in question here. It had no keys to this building. The bankrupt alone had the keys, and access thereto was obtainable only through him. The signs placed upon the walls of the building were obscured, and not readily observable by reason of the fact that the piles of seed were higher than the signs. After the lease he continued as before to carry on his ordinary business upon the premises, maintaining an office with sundry clerks and workmen upon the premises. He bought and shipped seed, cleaned the same, and occasionally cleaned seed on which receipts were issued, taking it out of the bags, cleaning it, and restoring and adding a sufficient amount of other seed to equalize the loss in the cleaning. Also, in some instances, the bankrupt shipped out the property before the receipts were canceled; but the storage company did not know of it. The bankrupt also, from time to time, as the exigencies of his business prompted, brought seed to the warehouse, and substituted it for seed on which receipts had been issued, removing the seed on which receipts had been issued, and replacing the tags on the bags substituted. This was done in many instances, and sometimes several times with the property covered by one receipt. Whether the storage company knew of this custom of business is left somewhat doubtful by the evidence. The storage company, however, had notice of the custom of the bankrupt to clean the seed so placed in storage. The inspector of the storage company called at the premises from one to five times a week. Once or twice a week he would check over the goods stored, and see that the tags were on the bags and that the stock was all right. The bankrupt hypothecated some of these receipts with the First National Bank of Chicago to secure loans to the amount of $12,000, and some of them with H. W. Rogers & Bro. to secure a loan of $5,000, and he sold some of the receipts to other parties, receiving the full value of the seed.

Upon the adjudication of bankruptcy, the receiver, at the request of the general creditors of the bankrupt, applied for an order for the immediate sale of the seed in the warehouse; whereupon the First National Bank of Chicago appeared and pleaded that the bankruptcy court was without jurisdiction to decree a sale of a certain part of the property, alleging, in support of its plea, that it held warehouse receipts issued by the storage company upon certain specified parts of the property, which were duly indorsed by the bankrupt, and delivered and pledged to the bank for moneys in good faith loaned and advanced to the bankrupt; and claiming that the property was in the full possession and control of the National Storage Company, and was not in the rightful possession of the receiver. A similar plea was filed by H. W. Rogers & Bro., who held warehouse receipts on certain other part of the property to secure a loan of $5,000. The National Storage Company also appeared, denying the jurisdiction of the court to order any sale of the property, setting forth the property which at the time of the bankruptcy was stored in the premises upon which it had issued warehouse receipts, and claiming that it was in the actual possession of the property, and that its receipts entitled the holders thereof, upon presentation to it, to possession of the property.

The matter was referred to a referee, who reported August 5, 1901, that the bankrupt, by reason of the facts stated, was not, at the date of filing the petition or at the date of adjudication, in possession of the property mentioned in the answers, and that the receiver had not possession or right of possession of the property; that the receipts of the National Storage Company were valid under the law of the state of Illinois, and were transferable by indorsement; and that the indorsement of the receipts held by the several parties answering constituted valid transfers to them of the property represented by such receipts; and recommending that the petition be dismissed as respects all property covered by the warehouse receipts. On the same day the court entered an interlocutory decree which held that the receiver receive and take possession from the bankrupt, peaceably, the property in question, namely, the several lots of seed, set forth in the answers of the First National Bank, H. W. Rogers & Bro., and the National Storage Company, in the warehouse; and that the court had jurisdiction and possession of that property in this cause; that the court sustained the objections and exceptions to the report as to the jurisdiction and possession of the court; and, it being deemed most advantageous to sell the seed in question at that time, and the bank stipulating that it would sell and hold the funds derived from the sale of the seed subject to the further order of the court, it was ordered that the First National Bank sell the seed at once, and report its acts and doings in the premises to the court. The sale was had, and on September 23, 1901, the court confirmed the sale, and the bank and Rogers & Bro. filed their petitions, claiming preference and liens on the proceeds of the sale reported by the bank, and the court ordered the trustee of the bankrupt and any parties in interest to answer such petition. The trustee and James A. Patten, creditor, thereupon answered such petitions, upon which proof was taken, and on October 29, 1902, the court entered a final decree confirming the report of the referee, except so far as the same found that the bankruptcy court was without jurisdiction, decreed that the receiver had not the right of possession to the property mentioned, but that the National Storage Company had, and was entitled to the same; and, reciting the sale of the property by the First National Bank under the interlocutory order or decree, the proceeds of which were in possession of the First National Bank, distributed the proceeds to that bank and to H. W. Rogers & Bro., according to their respective claims. From which decree the trustee and James A. Patten, a creditor to the amount of $34,000, appeal to this court.

Newton Wyeth and Joseph E. Paden, for appellant.

Orville Peckham, Samuel Kerr, and Wallace Hickman, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating facts as above). The court below properly ruled that it had jurisdiction of the subject-matter.

Its officers acquired possession of the property in dispute from the bankrupt. It is, indeed, claimed by the storage company that the writings and the facts embodied in the statement of the case show that it, and not the bankrupt, had possession prior to the bankruptcy; but the receiver had in fact acquired peaceable possession of the property, and subsequent proceedings in the bankruptcy court upon petition of the present objectors to the jurisdiction, by which the property was sold by the bank under stipulation that it should hold the fund subject to the order of the court, placed the property and its proceeds in custodia legis, and the court had the right to determine the ownership of the fund in its possession. Haven & Geddes Company v. Pierek, Trustee (C. C. A.) 120 Fed. 244; In re Antigo Screen Door Company, herewith decided, 123 Fed. 249. The policy of the law of the state of Illinois denounces all secret liens upon property. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the one having the ostensible possession. Ketchum v. Watson, 24 Ill. 591; McCormick v. Hadden, 37 Ill. 370; Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Peoria Manufacturing Company v. Lyons, 153 Ill. 435, 38 N. E. 661. And so property held upon conditional sale is subject to attack, and may be held against the vendor by creditors of the possessor; and this upon the ground that to suffer, without notice to the world, the real ownership to be in one person and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. It is said in The Union Trust Company v. Trumbull, 137 Ill. 146, 180, 27 N. E. 33:

"There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property, retaining its possession, can give another a lien upon it that can be enforced as against creditors and subsequent purchasers."

Although the rule is otherwise in other states with respect to conditional sales (Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285), we are in duty bound to defer to the law of the state in respect of property within that state. Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 672, 23 L. Ed. 1003; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457. The transaction is not changed by the form of the agreement under which it is cloaked. We are to look to the real purpose of the contract, and not to the form or the name given it by the parties. Murch v. Wright, supra; Hervey v. Rhode Island Locomotive Works, supra.

We are thus brought to the consideration of the real character and purpose of the transaction between the bankrupt and the storage company. We are to ascertain the real intention of the contracting parties from the whole agreement read in the light of the surrounding circumstances. The bankrupt was largely engaged in purchasing seed upon credit, storing the property purchased in his warehouse. He occupied the premises as a place of business, maintaining an office there, with clerks to assist in the management of the business, and with porters to handle the seed. The premises were subject to a

rental of $250 a month. He arranged with the storage company, which had no warehouse of its own, that it would issue warehouse warrants or receipts to the bankrupt for property upon the bankrupt's premises for a certain small charge per month upon the value of the property covered by the receipts. He executed a lease of the premises to the storage company, to continue so long as the bankrupt should desire, and so long as property remained thereon for which warrants or receipts had been issued; and this without any payment of rent by the storage company, the rental in fact being paid by the bankrupt. The storage company neither required, nor was it given, any key to the premises. The bankrupt remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated this property as his own, at times going through the forms prescribed by the storage company, and, whenever he found it necessary, ignoring them. We do not find that the storage company had knowledge of this action of the bankrupt, but it certainly knew that it was possible under the circumstances for the bankrupt to do with the property as he would, since it was left within his control.

It is difficult for us to look upon this transaction as a warehousing of property. The storage company assumed no liability to the bankrupt, and assumed only such responsibility as the law imposes upon it with respect to those advancing money upon the faith of its warehouse warrants or receipts. The name of the company is in itself, under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The bankrupt stored the property. The bankrupt paid the rental of the premises. It is true that an agent of the storage company occasionally visited the premises and inspected the property in a sort of a way, but exercised no supervision or control that would prevent the bankrupt from doing with it as his will might dictate or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control. The written agreement indicates this. It is somewhat startling to learn that a warehouse company should store goods of this character for another upon the premises of that other, taking compensation as for storage, not related to the cost of storage, or to the expense of receiving and delivering the property, not according to the space occupied by the property,

but according to the value of the property. The fact here is patent that the storage company assumed to the bankrupt no liability, and that the sole purpose was to issue warehouse warrants or receipts, making such inspection only as, in its judgment, would protect it from liability to third persons by reason of the issue of its warrants. To uphold such a scheme would permit every merchant in the state, notwithstanding the declared policy of the state to the contrary, to have possession of large stocks, thereby inducing credit, and to cover them with secret liens, thereby deceiving creditors. It would, in effect, permit such merchant to pledge his entire stock without change of possession, without record of it, and without notice to the world. Such a scheme is disapproved by the law of the state of Illinois, which in this instance we are bound to uphold, however specious may be the device or however attractive may be the form by which it is cloaked. Such a scheme within the state of Illinois is constructively fraudulent as to creditors, and voidable by creditors.

Nor can we uphold this transaction as a pledge of the property to the bank and to H. W. Rogers & Bro. Actual or symbolical possession of personal property in the pledgee is essential to its pledge. It is true that when the actual delivery is to a carrier or warehouseman, and bill of lading or warehouse receipt is given therefor, the transfer of the instrument and its delivery to the pledgee is regarded in the law as delivery of possession to the pledgee of the property represented by the instrument; but it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself be in the possession of some person other than the pledgor. Two different persons cannot be in the actual adverse possession of the same property or premises at the same time, and, as we find the actual possession and actual control of the property in dispute to have been in the bankrupt, the transfer of these warehouse receipts to bona fide holders for value, even without notice of the fact, cannot constitute a valid pledge of the goods, as the storage company had not possession and control of the goods. Union Trust Company v. Trumbull, supra.

It is true that it is ruled by the Supreme Court of Illinois, in the case last cited, that such transactions, being not in fact, but only constructively, fraudulent, are upheld against general creditors, and are only voidable by judgment or attaching creditors—as in the case of an unrecorded chattel mortgage. In such case the lien of the unrecorded mortgage, and the title in the case of a conditional sale, and so also these storage warrants or receipts in the hands of a bona fide holder for value, would be sustained, except as against execution or attaching creditors. It is also ruled that an assignee, under the insolvent law of the state, takes as a volunteer, and subject to all liens and equities enforceable against his assignor. Union Trust Company v. Trumbull, 137 Ill. 146, 27 N. E. 24; Hoover, Owens & Rentschler Co. v. Burdette, 153 Ill. 672, 39 N. E. 1107; Schwartze v. Messinger, 167 Ill. 474, 47 N. E. 719. The rule in some other states of the Union with respect to the rights of an assignee under the state insolvent law is different, doubtless arising from the difference in the

various insolvent laws. Some of these laws do not prevent suits by creditors; others do. Under some statutes the assignee represents only the assignor, and can assert only the right of the assignor. Under others the assignee represents also the rights of creditors, and can enforce their rights without respect of the right of the assignor.

We are therefore brought to the question whether, under the bankruptcy law, the trustee takes solely in the right of the bankrupt, or whether he also represents the rights which creditors have, and the authority to enforce them; whether the petition in bankruptcy is merely the appropriation by the bankrupt of his property to his creditors, or an assertion in behalf of creditors of rights which they had independently of the bankrupt, and which he himself could not assert. Notwithstanding some loose expressions in the decisions upon this subject, we are satisfied, from a careful scrutiny of the act, that the filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or incumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and incumbrances to the same extent that creditors could have done had no petition been filed. The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment. This has been held by various courts of appeals, in which decisions we fully concur. In re Pekin Plow Company, 50 C. C. A. 257, 112 Fed. 308; In re Garcewich, 53 C. C. A. 510, 115 Fed. 87. It is said by the Supreme Court in Mueller v. Nugent, 184 U. S. 1, 14, 122 Sup. Ct. 275, 46 L. Ed. 405: "It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in fact an attachment and injunction." We have assumed that the bank and H. W. Rogers & Bro. are bona fide holders for value, and without notice, of these warehouse receipts, giving therefor a full consideration. As against the bankrupt they would be entitled to protection, and would be held to have the title to the property; but, the issue of these warrants being constructively fraudulent as to creditors of the bankrupt, their right must be held subject to the claims of the creditors. These warrants are not commercial paper, and are not protected by the law governing that class of instruments.

The decree is reversed, and the cause remanded, with directions to decree for the trustee.

UNITED STATES v. BISHOP.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1903.)

No. 1,877.

1. TRIAL—PEREMPTORY INSTRUCTIONS—REQUEST OF BOTH PARTIES—QUESTIONS OF FACT CONCLUDED.
   Where, at the close of a trial by a jury, each party requests a peremptory instruction in his favor, and the court grants one of the requests, the parties are estopped from claiming that any question should have been submitted to the jury. All disputed questions of fact are conclusively determined in favor of the successful party, and the only questions open to review in the appellate court are, was there any substantial evidence in support of the court's finding of fact? and was there any error in the declaration or application of the law?

2. CUSTOMS DUTIES—CONSIGNEE OF GOODS OWNER FOR PURPOSES OF COLLECTION—RELATION TO CONSIGNOR IMMATERIAL.
   The consignee of imported goods is deemed the owner for the purpose of the collection of the duties thereon, under section 3058, Rev. St., as amended by Act Feb. 23, 1887, c. 221, 24 Stat. 415 [U. S. Comp. St. 1901, p. 2005], and it is no defense to an action against the consignee for such duties that the consignor or any other party who, at the request or with the consent of the consignee, procured the importation, failed to obey the latter's instructions or to comply with the terms of the contract between them.

3. SAME—FORFEITURE FOR UNDERVALUATION—FRAUDULENT INTENT REQUISITE.
   Under section 32 of the tariff law of July 24, 1897, c. 11, 30 Stat. 212 [U. S. Comp. St. 1901, p. 1892], the fraudulent intent of the owner or of his authorized agent in entering the imported merchandise is an indispensable condition of the right of the government to forfeit the goods for undervaluation.

4. SAME—ADDITIONAL DUTIES FOR UNDERVALUATION RECOVERABLE WITHOUT PROOF OF FRAUDULENT INTENT.
   But an action to recover the additional duties accruing upon an undervaluation under this section of the law may be maintained against the consignee without proof of any fraudulent intent by the owner, the consignee, or the agent in making the entry. Good faith and innocence constitute no defense to such an action.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Charles C. Houpt, for the United States.
Francis B. Hart, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is an action by the United States to recover of James H. Bishop, a citizen of the state of Minnesota, the duty upon a car load of calcium carbide, under section 7, c. 407, of the "Act to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, 26 Stat. 134, as amended by the "Act to provide revenue for the government and to encourage the industries of the United States," approved July 24, 1897, c. 11, § 32, 30 Stat. 212 [U. S. Comp. St. 1901, p. 1892]. Section 32 of the tariff

¶ 3. See Customs Duties, vol. 15, Cent. Dig. § 297.

law of 1897 provides that section 7 of the act of June 10, 1890, c. 407, 26 Stat. 134, shall be amended so as to read as follows:

"Sec. 7. That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued."

The title 34 of the Revised Statutes is entitled "Collection of Duties upon Imports." Section 3058 of chapter 10 of that title as amended by the act of February 23, 1887, c. 221, 24 Stat. 415 [U. S. Comp. St. 1901, p. 2005], provides that "all merchandise imported into the United States shall, for the purpose of this title, be deemed and held to be the property of the person to whom the merchandise may be consigned."

In the action before us the United States alleged in its complaint, and the defendant, Bishop, denied in his answer, that the latter imported from St. Catharines, in the province of Canada, into the United States, 300 iron drums or cans, 50 wooden cases, and 32,400 pounds of calcium carbide; that the defendant's agent, Henderson, declared the foreign value of these goods to be $326; that the foreign value was $1,106; that the goods were properly appraised; and that the duty on them, under section 32 of the tariff law of July 24, 1897, c. 11, 30 Stat. 212 [U. S. Comp. St. 1901, p. 1892], which has been quoted

above, amounted to $829.50. Upon these issues the case was tried to a jury, and at the close of the evidence the government requested the court to give to the jury a peremptory instruction to return a verdict in its favor, and the defendant besought the court to peremptorily direct the jury that the plaintiff was not entitled to recover. Thereupon the court instructed the jury to return a verdict for the defendant, and the judgment upon that verdict is challenged by the writ of error in hand.

The requests of both the parties to this action for peremptory instructions in their favor relieve us from the consideration of the question whether or not there was any issue of fact which should have been submitted to the jury, and make the instruction of the court a conclusive finding in favor of the defendant on every question of fact at issue in the case. Where each party requests the court to direct the jury to find a verdict in his favor, he thereby concedes that the case presents no question for the jury, waives his right to their decision of every issue therein, and requests the court to find the facts and declare the law. And when, pursuant to such requests, the court accepts these waivers, and by its peremptory instruction determines the questions of fact and of law in favor of one of the parties, both parties are estopped from assailing or reviewing its finding upon disputed issues of fact, and are limited in the appellate court to a review of the two questions, was there any substantial evidence to sustain the court's finding of facts? and was there any error in its declaration or application of the law? Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; The City of New York, 147 U. S. 72, 77, 13 Sup. Ct. 211, 37 L. Ed. 84; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; King v. Smith, 110 Fed. 95, 97, 49 C. C. A. 46, 48, 54 L. R. A. 708; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Merwin v. Magone, 70 Fed. 776, 777, 17 C. C. A. 361, 362; Magone v. Origet, 70 Fed. 778, 781, 17 C. C. A. 363, 366; Chrystie v. Foster, 61 Fed. 551, 9 C. C. A. 606; Stanford v. McGill (N. D.) 72 N. W. 938, 952; Mayer v. Dean, 115 N. Y. 550, 22 N. E. 261, 5 L. R. A. 540; Provost v. McEncroe, 102 N. Y. 650, 5 N. E. 795.

In this state of the case the first question for consideration is whether or not there was any evidence to support a finding in favor of the defendant upon the issues of fact presented by the pleadings. The act of 1887, 24 Stat. 415 [U. S. Comp. St. 1901, p. 2005], declares that for the purpose of the collection of duties all merchandise imported into the United States shall be deemed to be the property of the person to whom it is consigned, and the act of July 24, 1897, c. 11, § 32, 30 Stat. 212 [U. S. Comp. St. 1901, p. 1892], provides that the owner, consignee, or agent shall pay the duties specified. In view of these provisions of the acts of Congress, there were but two material issues of fact presented by the pleadings in this case, and these were (1) whether or not the defendant, Bishop, was the party to whom the calcium carbide was consigned; and (2) whether or not this calcium carbide was so undervalued that the $829.50 claimed in the complaint was legally chargeable upon it as duties owing to the United States. The testimony upon the second issue was uncontra-

dicted. It was that one Henderson was the cashier of the Michigan Central Railway Company, over whose road the goods in question were directed to be shipped to the defendant; that one of the duties of his office was to enter such goods in the office of the collector of customs at Niagara Falls, and to make the necessary declaration as agent for the consignee; that he had acted as agent for the defendant, Bishop, for this purpose in one or two instances before, when the defendant had been the consignee of merchandise imported from St. Catharines; that he received the bill of lading and inventory of these goods, presented them to the collector of customs, made a declaration as the agent of Bishop, and entered them at the value of $326, while their actual value was $1,106; and that the duties which became due upon them under the provisions of the acts of Congress which have been quoted amounted to $829.50. This evidence disposed of the second issue, and left nothing there for the determination of either court or jury.

Upon the first issue Bishop testified that he did not order the goods described in the complaint which were imported at Niagara Falls on April 28, 1900, to be shipped to the United States, that he did not make a contract to purchase them, that Henderson was not his agent, and that he had no authority to act for him. But Bishop in other parts of his testimony conceded, and the writings in evidence proved, these facts: On April 10, 1900, the defendant sent to one Groves, in St. Catharines, an order to ship him, duty paid, the car load of calcium carbide described in the complaint in this action, and inclosed him funds to pay for it. Pursuant to this order Groves consigned this merchandise to Bishop, at Minneapolis, in the state of Minnesota, and shipped it by way of the Michigan Central Railway. He consigned it to Bishop by reason of the latter's order of June 10, 1900. In the bill of lading and the inventory he described it as 30,000 pounds of coke and lime refuse, and 2,000 pounds of calcium carbide, when the entire car load was composed of calcium carbide. It was this description in the bill of lading and this invoice that misled Henderson at Niagara Falls, caused the entry of the merchandise at the undervalution, and the liability for the duties which the government seeks to recover in this action. There is no other evidence nor is there any other fact in this case material to its determination. The evidence which has been recited is conclusive to the effect that Bishop was the consignee of the goods and that he became such by reason of his order to Groves to ship them to him at Minneapolis. The fact that he was the consignee clearly appears from the writings, and there is no evidence or testimony which tends to deny it. The statute declares that for the purpose of collecting the duties the consignee shall be deemed the owner of the goods imported, and there seems to be no escape from the conclusion that the defendant, Bishop, was liable for these duties.

Counsel for the defendant contends, however, that notwithstanding the fact that Bishop was the consignee, and notwithstanding the provision of the act of Congress that the consignee shall be deemed the owner for the purpose of the collection of the duties, the defendant is not liable in this case, because (1) he was not in fact the owner of the goods when they were imported, and (2) because he

was innocent of any intention to violate the law. In support of his position that the defendant was not the owner of the property at the time of its importation, he calls attention to the fact that one of the terms of his purchase from Groves was that the latter should pay the duty, and that inasmuch as Groves failed to do so the defendant was not obliged to accept and had not accepted the property when it was imported so that the title to it was then in the vendor. There are two answers to this contention. In the first place, whether Groves or Bishop was the owner of the goods when they were imported, as between themselves, is not material in this action, because under the act of Congress the consignee was the owner as between the United States and the consignee, and the defendant was the consignee. It may be and doubtless is true that a stranger cannot by consigning goods to any one who has not in any way authorized or induced him to do so charge such a consignee, even in favor of the United States, with liability for the duties upon the importation. But where the consignment is made, as in this case, at the request or with the consent of the consignee, the latter cannot escape liability to the government for the accruing duties because the consignor has failed to comply with some of his instructions or to perform some of the terms of a contract that may exist between them. The very purpose of section 3058 of the Revised Statutes [U. S. Comp. St. 1901, p. 2005] which declares that the consignee shall be deemed the owner for the purpose of collecting the duties was to relieve the government and the courts in proceedings of this nature from investigating and determining the rights of the respective claimants to the title and ownership of the property as between themselves, and this is its undoubted legal effect. The government in its attempt to collect the duties is interested in the importation only. So far as the importation alone is concerned, Groves, in St. Catharines, was the agent of Bishop, in Minneapolis, who directed him to ship the goods to the United States. The moving cause of the shipment was the order of Bishop to send him the goods. It was this order that induced the action of Groves, and the shipment of the goods to this country, and the other relations of the consignor and the consignee, became unimportant in this proceeding under the statute which has been recited. The consignee of imported goods is deemed the owner under section 3058 of the Revised Statutes as amended by Act Feb. 23, 1887, c. 221, 24 Stat. 415 [U. S. Comp. St. 1901, p. 2005], for the purpose of the collection of duties; and it is no defense to an action for their collection against the consignee that the consignor, or any other party who, at the request or with the consent of the consignee, procured the importation, failed to obey the latter's instructions or to comply with the terms of the contract between them. In the second place, it is by no means clear that Bishop was not the owner of the goods as between himself and Groves at the time of the importation, notwithstanding the fact that the latter had failed to pay the duty. He had shipped the merchandise pursuant to the order of Bishop, and had forwarded the bill of lading by which the goods were consigned to the defendants so that Groves had parted with their possession and their control. Concede that Bishop had

the right to refuse to accept the goods and to renounce the purchase. He had an equal right to accept them, to pay the duty himself, and to recover it from his vendor under his contract. There is a letter in this record written by Bishop after the goods had been seized by the government which strongly indicates that he was inclined to the latter course if he had not actually adopted it. Meanwhile, and until he did renounce the purchase, the possession, control, and title of the property appear to have been in him as against his vendor. The latter could not have recovered them if the defendant had insisted upon holding them.

In support of his second position, that the United States cannot collect the duties of this consignee because neither he nor his agent had any intention to defraud the government, counsel cite U. S. v. 208 Bags of Kainit (D. C.) 37 Fed. 326; 581 Diamonds v. U. S., 119 Fed. 556, 56 C. C. A. 122, 60 L. R. A. 595; and quote from the opinion in the Cargo ex Lady Essex (D. C.) 39 Fed. 765, this sentence: "A forfeiture of goods for a violation of the revenue laws will not be imposed unless the owner or his agent has been guilty of an infraction of such laws."

There is, however, a marked distinction between proceedings to condemn for undervaluation and to forfeit imported goods and actions to collect the duties upon them which fall due by virtue of the undervaluation. The line of demarcation between them is clearly drawn in section 32 of the tariff law of July 24, 1897, c. 11, 30 Stat. 212 [U. S. Comp. St. 1901, p. 1892], and has been carefully observed in the decisions of the courts. The first proviso in that section clearly indicates that a fraudulent intent is indispensable to the maintenance of the action to forfeit the goods. It declares that if the appraised value shall exceed the value declared in the entry by more than 50 per cent., except when arising from a manifest clerical error, the entry shall be deemed to be presumptively fraudulent, that the collector shall seize the merchandise, and that in any legal proceeding resulting from such seizure the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the goods shall be adjudged forfeited unless the claimant shall rebut the presumption of fraudulent intent by sufficient evidence. There is no such provision in the section regarding fraudulent intent in the proceedings for the collection of the additional duties which it imposes. The undervaluation is the sole condition of their accrual and collection. Upon this subject the section provides that if the appraised value of the imported merchandise exceeds the value disclosed in the entry the additional duties shall be levied, collected, and paid, that these duties shall not be construed as penal, and shall not be remitted, nor shall payment thereof in any way be avoided, except in cases arising from a manifest clerical error, nor shall they be refunded, nor shall they be subject to drawback. Neither the guilt nor the innocence nor the intent of the owner or of his agent forms any condition or element of the action to collect these duties. The importation of the merchandise and the undervaluation are the only essential facts which condition the right of the government to recover the duties from the consignee under this section of the statute. The conclusion is irresistible

that under section 32 of the tariff law of July 24, 1897, c. 11, 30 Stat. 212 [U. S. Comp. St. 1901, p. 1892], the fraudulent intent of the owner or of his agent in entering the imported merchandise is an indispensable condition of the right of the government to forfeit the goods for undervaluation. 581 Diamonds v. U. S., 119 Fed. 556, 564, 56 C. C. A. 122, 60 L. R. A. 595; Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743; U. S. v. 1,150½ Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231; U. S. v. 208 Bags of Kainit (D. C.) 37 Fed. 326; The Cargo ex Lady Essex (D. C.) 39 Fed. 365.

But an action to recover the additional duties accruing upon an undervaluation may be maintained against the consignee under this section, and under section 3058, Rev. St., as amended [U. S. Comp. St. 1901, p. 2005], in the absence of any fraudulent intent by the consignee, the owner, or the agent. Good faith and innocence constitute no defense to such an action. U. S. v. 1,621 Pounds of Fur Clippings, 106 Fed. 161, 162, 45 C. C. A. 263, 264; Gray v. U. S., 113 Fed. 213, 216, 51 C. C. A. 170. This case falls under the latter rule.

There was no substantial evidence in support of a finding in favor of the defendant, and the judgment below must be reversed, and the case must be remanded to the court below for a new trial. It is so ordered.

RUTHERFORD et al. v. FOSTER et al.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1903.)

No. 1,892.

1. WRONGFUL DEATH—LORD CAMPBELL'S ACT—BURDEN TO SHOW ACT CAUSING DEATH WRONGFUL.
   In an action for damages resulting from a death caused by the wrongful act of another, under Lord Campbell's act, the burden is on the plaintiff in the first instance to show that the act which caused the death was wrongful.

2. SAME—EVIDENCE.
   But the wrongfulness of the act is not determinable by the opinions of the parties to the action, but by the law applicable to the act and to the facts and circumstances which conditioned its performance. Some acts are wrongful in themselves. The wrongfulness of others results from the circumstances under which they were committed.

3. SAME—PLEADING.
   A denial in a pleading that an act was unlawfully and wrongfully done is futile. Such a denial admits that the act was done, and presents no issue of fact.

4. SAME—PRESUMPTIONS.
   A legal presumption arises, from an assault and battery of a man by another with a deadly weapon, that the act was wrongful; and when such an act is admitted or proved the burden is on the defendant to show by a fair preponderance of evidence facts and circumstances in justification or mitigation of it.

5. SAME.
   A legal presumption arises, from the killing of one human being by another, that the act was wrongful; and when the killing is admitted or proved the burden is on the defendant to establish by a fair preponderance of evidence facts and circumstances in justification or mitigation of it.

5. SAME—EVIDENCE.

At the close of the evidence produced by the plaintiffs in an action under Lord Campbell's act the pleadings admitted and the testimony proved that the deceased was killed by blows upon his head, inflicted by one of the defendants with an axe. The defendants then introduced evidence that these blows were struck to prevent the deceased, who had first assaulted one of the defendants, from killing him or inflicting serious bodily injury upon him. *Held*, the court rightly instructed the jury that the presumption of law from the admitted killing was that the act was wrongful, and that the burden was upon the defendants to establish by a fair preponderance of testimony facts and circumstances constituting a justification of the act.

(Syllabus by the Court.)

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

Dan W. Jones (James W. Butler and Ernest Neill, on the brief), for plaintiffs in error.

W. S. Wright and S. D. Campbell (W. A. Oldfield, Charles F. Cole, and Jos. W. Phillips, on the brief), for defendants in error.

Before SANBORN and VANDEVANTER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is an action by the widow and minor children of James Anderson Foster against George Rutherford and Neill Rutherford to recover damages from them because they assaulted, battered, and killed Foster with an axe near his home in the state of Arkansas in February, 1901. The action is based on Lord Campbell's act (St. 9 & 10 Vict. c. 93) which was enacted in the state of Arkansas in 1883. The portion of it material to the controversy in this case reads:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured and although the death shall have been caused under such circumstances as amount in law to a felony." Mansf. Dig. § 5225.

There was a verdict and judgment for the plaintiffs, and the chief complaint of the trial is that the court instructed the jury that there was a presumption of law that the killing of one man by another with a deadly weapon was wrongful, and that when the killing was admitted the burden of proof rested on those who committed it to establish the facts which they had alleged in justification or mitigation of their act. The portion of the charge assailed was in these words:

"The killing by the defendant Neill Rutherford having been shown, and in fact admitted, by the answer, the presumption of law is that it was wrongful, and the burden is upon the defendants to show by a fair preponderance of the evidence that the assault upon Foster by the defendant in the manner in which it was made appeared to him at the time so urgent and pressing that, in order to prevent his father being killed or receiving great bodily injury, it was necessary to act as he did, and that Foster was the assailant, and that the defendant Neill Rutherford's father had really in good faith endeavored to decline any further contest with the deceased."

A large portion of the briefs of counsel for the defendants is devoted to an argument and to quotations from opinions of courts to establish the proposition that under Lord Campbell's act the plaintiffs cannot recover, unless the act of the defendants which causes the death is wrongful, and that the burden is upon the plaintiffs in the first instance to plead and prove the wrongful character of the act. Their proposition is sound, and presents no question for discussion. But, where the act is proved, its rightfulness or wrongfulness is to be tested by the facts which are established and by the law, and not by the averments or the testimony of the parties to the controversy to the effect that it was either rightful or wrongful. The question whether an act is right or wrong is a question of law, and not of fact. Hence no issue of fact can be raised by an averment in a pleading, on the one hand, that the act is right, or, on the other, that it is wrong. Nor is the testimony of witnesses that a given act is either lawful or unlawful ordinarily admissible to determine that question. An allegation that an act was unlawfully or wrongfully committed adds nothing to the averment that the act was done. A denial that an act was wrongfully or unlawfully done raises no issue of fact. It admits that the act was done, and expresses the opinion of the pleader that he had a right to do it. Allegations and denials in pleadings that acts averred were rightful or wrongful present no issue of fact, have no function, and produce no legal effect. They are the expressions of the opinions of the parties with respect to their legal rights, and their opinions are immaterial and futile in the pleadings or upon the trial of the action. Tyner v. Hays, 37 Ark. 599, 603; Shirk v. Williamson, 50 Ark. 562, 9 S. W. 307; Lambert v. Robinson, 162 Mass. 34, 36, 37 N. E. 753, 44 Am. St. Rep. 326; Bliss on Code Pleading, §§ 327, 332, note 62.

The act which was the foundation of this action was the assault and battery of James Anderson Foster by the defendants. Let us recall here the rule that there can be no recovery for this death unless, under Lord Campbell's act, the plaintiffs established the fact that the act of the defendants which caused the death was wrongful, so that the party injured could have maintained an action if he had survived. But surely no evidence is requisite to establish the wrongful character of an assault and battery with a deadly weapon which produces death. While a defendant is presumed to be innocent until he is proved to be guilty, he is proved to be guilty when it is either admitted or proved that he assaulted and battered the deceased with an axe so that he died. The law never presumes that any man has the right to put his neighbor to death with a deadly weapon. Presumptions of law are derived from the ordinary experience of mankind and from the customary course of human events. They are the statements of general rules deduced from observation and experience. Experience and observation have taught that assaults and batteries with deadly weapons which cause death are generally violations of the moral and of the statute law, and hence the legal presumption has arisen that they are wrongful, and the burden of pleading and proving facts which show that one of them falls within an exception to the general rule—that for some extraordinary reason it is justifiable or excusable, and is not governed by the legal presumption—is rightfully cast upon him who

asserts that his assault was rightful. Ward v. Blackwood, 48 Ark. 396, 405, 3 S. W. 624, 627; St. Louis S. W. Ry. Co. v. Berger, 64 Ark. 613, 620, 44 S. W. 809, 39 L. R. A. 784; Conway v. Reed, 66 Mo. 346, 353, 355, 27 Am. Rep. 354; Castle v. Duryea, *41 N. Y. 169. In Ward v. Blackwood, the Supreme Court of Arkansas said, "Defendant admitted the assault and battery, and thereby necessarily conceded the plaintiff's right to recover." In Conway v. Reed, 66 Mo. 346, 354, the Supreme Court of that state declared that: "Even in a trial for murder, from a proof of the killing with a deadly weapon the law implies an intent to kill, and then it is for the defendant to meet this presumption with evidence showing that it was unintentional or justifiable or excusable. 'From the simple act of killing the law will presume that it was murder in the second degree.' State v. Holme, 54 Mo. 153." This quotation brings us to another proposition that is important, if not decisive of the issue presented in this case. Counsel for the defendants earnestly insist that the same presumptions arise and the same rules govern the trial of this case that would govern the trial of a criminal charge against the defendants for the killing of Foster, except that the plaintiffs are not required to prove their case beyond a reasonable doubt. Their position here is well taken, and the soundness of their proposition is conceded. What, then, is the presumption that arises in criminal cases from the simple proof or admission that the defendant killed the deceased with a deadly weapon? The most learned, exhaustive, and decisive treatment of this question which has come under our observation may be found in the opinion of Chief Justice Shaw in Commonwealth v. York, 9 Metc. (Mass.) 93, 111, 113, 119, 121, 43 Am. Dec. 373. By considerations of public policy, by reason, by logic, by the citation of many authorities, by quotations from many authors, he proves that the law both in England and America had always been, and was when he wrote that opinion, that the presumption of murder arises from proof of voluntary homicide, and that when the killing is admitted or proved the burden of proof is thenceforth upon the defendant to excuse or to justify his act. Among the various quotations from authorities which he makes to establish this proposition, are these: Foster in his Crown Law, at page 255, said: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice until the contrary appeareth. And very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same ground that every other defendant doth. The matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them." At page 290 he added: "I have already premised that whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of his jury. The presumption of law is against him till that presumption is repelled by contrary evidence." And again, at page 313: "For all voluntary felonious homicide without a provocation is undoubtedly murder." In Legg's Case, Kelyng, 27, one John Legg was indicted for the murder of

Robert Wise, and "it was upon the evidence agreed that if one kill another, and no sudden quarrel appeareth, this is murder, as in Mackalley's Case, 9 Co. 67b. And it lieth on the party indicted to prove the sudden quarrel." In 1 Hawk. c. 31, § 32, it is laid down that "wherever it appears that a man killed another, it shall be intended, prima facie, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation," etc. In 4 Bl. Com. 201, it is written: "We may take it for a general rule that all homicide is malicious, and, of course, amounts to murder, unless where justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury." In 1 East, P. C. 224, 340, it is said that, "the fact of killing being first proved, the law presumes it to have been founded in malice, unless the contrary appear; and all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him." In The Queen v. Kirkham, 8 Car. & P. 116, 117, Coleridge, J., says: "As soon as it is ascertained that one individual, in the possession of his reason, has willfully taken away the life of another, the law's first presumption is that the party is guilty of murder." "The law requires from him and will allow him to show that there were some mitigating circumstances which alter the presumed character of the act." Chief Justice Shaw cited many other authorities which demonstrate the fact that the law of England, Massachusetts, New York, and New Jersey was in 1845, when that opinion was written, that "when the fact of voluntary homicide is shown, and this not accompanied with any fact of excuse or extenuation, malice is inferred from the act; that this is a fact which may be controlled by proof, but the proof of it lies on the defendant; and, if not so proved, it cannot be taken into judicial consideration." Commonwealth v. York, 9 Metc. (Mass.) 121, 43 Am. Dec. 373. And this is the general rule in the United States to this day. Allen v. U. S., 164 U. S. 492, 494, 500, 17 Sup. Ct. 154, 41 L. Ed. 528; Silvus v. State, 22 Ohio St. 90, 99–101; Brown v. State, 83 Ala. 33, 35, 3 South. 857; State v. Holme, 54 Mo. 153, 161; State v. Underwood, 57 Mo. 49. The conclusion is irresistible that in criminal prosecutions the simple killing of one man by another with a deadly weapon raises the legal presumption that the killing was wrongful; and the same presumption ought to prevail, and, as counsel for the defendants themselves insist, does prevail, in a civil action involving the same act as in the criminal action. The presumption ought to prevail in the civil action because it is right and reasonable, and because the law has a more tender regard for life and liberty than for property. Conway v. Reed, 66 Mo. 346, 354, 27 Am. Rep. 354; Tucker v. State, 89 Md. 471, 479, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181; Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399; Darling v. Williams, 35 Ohio St. 58, 63.

In opposition to this conclusion counsel for the defendants below cite the case of Nichols v. Winfrey, 79 Mo. 544, and make an argument by analogy to the effect that since, in cases for damages for death caused by neglect, the acts themselves do not establish the negligence,

but the burden is on the plaintiffs to prove it aliunde, so it must be in actions for damages caused by wrongful acts. The argument by analogy, however, fails for this reason: Some acts—for example, the killing or injury of passengers by the operation of railroad trains—are acts of negligence per se, and a legal presumption that the actors were negligent arises from the acts alone, and casts the burden of showing that they were not the result of negligence upon those who committed them; while there are other acts that raise no such presumption, but call upon the plaintiffs for evidence of facts and circumstances surrounding them to establish the fact that they were the result of negligence. In the same way there are acts that are wrongful in themselves, and from which a legal presumption of unlawfulness arises, which throws the burden of proof upon those who commit them, while there are other acts which raise no such presumption, and which leave the burden upon the plaintiffs to prove facts and circumstances which show their wrongfulness. An assault and battery with a deadly weapon which produces the death of the victim is of the former class, of the same class as an injury to a passenger while riding upon a train, and from it the presumption of wrong arises which casts the burden of establishing a justification or an excuse for it upon the perpetrator. Nor is the decision of the Supreme Court of Missouri in Nichols v. Winfrey more persuasive. It is said in the opinion in that case that a general denial of an allegation of a petition that a defendant, "with force and arms, violently, maliciously, unlawfully, and wrongfully, without any just cause, did shoot the said James Steinbeck," without more, sufficiently pleads a justification of the killing to admit evidence that the act was done in defense of the perpetrator and of his home, in which the deceased was assaulting him, and that the shooting and killing of a man raises no legal presumption of wrong. 79 Mo. 549, 550. In other words, the effect of this opinion is that the legal presumption in the state of Missouri is that the shooting and killing of a human being is right and lawful, and the burden is on his victim or his next of kin to prove that it was wrong to kill him. If the rule of pleading announced in this opinion prevails in the state of Missouri, that fact is not material in the action at bar, because this action is governed by the rule which prevails in the state of Arkansas, to the effect that such a denial presents no issue of fact. Tyner v. Hays, 37 Ark. 599, 603; Shirk v. Williamson, 50 Ark. 562, 9 S. W. 307. The extraordinary rule of law that there is no legal presumption that the voluntary killing of a human being with a deadly weapon is wrongful is deduced in the opinion from the illogical rule of practice to which attention has been called, and, as the premise from which the conclusion was drawn does not exist in this case, the conclusion does not follow. Moreover, there are many decisions of the Supreme Court of Missouri which are not in accord with the view of law expressed in Nichols v. Winfrey, and which plainly and repeatedly declare that from the simple act of killing the law presumes wrong; nay, even that it presumes murder in the second degree. State v. Gassert, 65 Mo. 352, 354; State v. Holme, 54 Mo. 153; State v. Hudson, 59 Mo. 137; State v. Foster, 61 Mo. 552; State v. Kring, 64 Mo. 594; State v. Lane, Id. 319. It is true that in the later case of State v. McKinzie,

102 Mo. 620, 628, 15 S. W. 149, the Supreme Court of Missouri overruled that portion of the decisions which have been cited which declares that the law presumes murder in the second degree from the simple act of killing, but it is not held in this later decision that there is no presumption of law in Missouri that the voluntary killing of a human being with a deadly weapon is wrongful. A careful examination of the various decisions of the Supreme Court of that state convinces that the rule stated in Nichols v. Winfrey is not the law of that state; and, if it was, it is so irrational, so subversive of the fundamental principles of a government which was instituted and is maintained primarily to protect the person and the liberty of the citizen, so obnoxious to a wise and fair administration of justice, and so at war with the established and prevailing rule upon this subject in the other states and in the nation, that both reason and authority would compel us to repudiate it.

From the principles and authorities to which reference has now been briefly made the following deductions material to the question involved in this case may be fairly drawn:

The burden is on the plaintiffs in the first instance, in an action under Lord Campbell's act, to plead and prove that the act which caused the death of the person injured was wrongful, or was an act of negligence.

An answer which denies that a given act was wrongfully or unlawfully done admits its performance, and raises no issue of fact for trial.

The legal presumption is that an assault and battery of an individual with a deadly weapon, which causes his death, is wrongful, and the burden is on the defendant to plead and prove matter in justification or mitigation of the deed.

The legal presumption is that the killing of one man by another is wrongful, and the burden is on the defendant to plead and prove matter in justification or mitigation of the act.

The test of the legality of the instruction of the court which is challenged in this case will be found in the correctness of its application of these rules to the facts developed by the pleadings and the evidence in the case. We turn to the record for these facts: In their complaint the plaintiffs alleged that George Rutherford and Neill Rutherford unlawfully made an assault upon Foster, and willfully, maliciously, wrongfully, wantonly, and negligently killed him "by means of the said Neill Rutherford then and there striking him with an axe," "the said George Rutherford then and there being present, aiding, abetting, encouraging, and advising the said Neill Rutherford to do and commit the acts aforesaid." George Rutherford, in his answer, denied that he, with his son, Neill, "unlawfully made an assault" on Foster, "or did willfully, maliciously, wrongfully, wantonly, and negligently kill the said James Anderson Foster by means of the said Neill Rutherford then and there striking the said Foster with an axe," and denied that he was present aiding, abetting, encouraging, and advising his son, Neill, to do and commit the acts complained of, and to strike and kill Foster. He then averred that Foster wrongfully assaulted him, and placed his life in such imminent peril that it became necessary, in order to save his life or to prevent his receiving great

bodily harm, for his son, Neill, to defend him, and for that purpose Neill struck and killed Foster with an axe. Neill Rutherford made a separate answer, but his denials and his plea of justification are in substantially the same form. The only denial in these pleadings in respect of the assault, battery, or killing is a denial that they were willfully, maliciously, wrongfully, wantonly, and negligently done. But a denial that an act is wrongfully or unlawfully done, as we have seen, admits the doing of the act, and raises no issue of fact. Tyner v. Hays, 37 Ark. 599, 603. Hence the answers admitted that the defendants assaulted and killed Foster by means of the strokes of an axe inflicted by Neill Rutherford, and contained no denial of the act which was the foundation of the action. Stripped of their useless verbiage, the averments and denials of the pleadings, so far as they relate to the killing, were (1) an averment in the complaint that the defendant assaulted and killed Foster by the strokes of an axe inflicted by Neill Rutherford; (2) a confession in the answers that the defendants assaulted and killed Foster with an axe; and (3) an averment in the answers that Foster had first assaulted George Rutherford and put his life in such imminent danger that it was necessary for Neill to kill him to prevent the death or serious bodily injury of his father. Where was the burden of proof under these pleadings? Chief Justice Shaw in Powers v. Russell, 13 Pick. 69, 77, said that where the proof on both sides applies to the same issue or proposition of fact, the party whose case requires the establishment of that fact has all along the burden of proof, although the weight in either scale may at times preponderate. "But where the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and distinct proposition, which avoids the effect of it, there the burden of proof shifts and rests upon the party proposing to show the latter fact." The fact which the plaintiffs' case required the establishment of was the assault, battery, and killing. The defendants admitted that fact. Instead of producing proof to negative it, they proposed to show another—a distinct—proposition, which would avoid the effect of it; that is to say, the first assault by Foster. Hence, when the answers had been filed, and the killing admitted, the burden of proof shifted, and rested upon the defendants to establish the dangerous assault which they pleaded in justification of their act.

When the case came on to trial the plaintiffs stood on the admissions of the defendants. They proved simply that Foster died on account of the wounds upon his head, that George Rutherford admitted that he had killed him, and that before his death Foster had provided his family with goods of the value of about $500 a year. Here they rested. No evidence of any justification or excuse for the assault, the battery, or the killing crept into the plaintiffs' case. Thereupon the defendants introduced evidence in support of their defense that Foster had made the first assault, plaintiffs produced rebutting testimony, and the case went to the jury under the instructions of the court. When these instructions were given, therefore, the case stood in this way: The assault, battery, and killing of

Foster by the defendants were admitted; there was a legal presumption that every assault and battery with a deadly weapon which produces death is wrongful, and, when such acts are proved or admitted, the burden is on the perpetrator to prove matter in justification or mitigation by a fair preponderance of the evidence. There was a presumption of law that the killing of one human being by another with a deadly weapon is wrongful, and that the burden is on him who commits the act to prove his justification or excuse by a fair preponderance of evidence. The charge of the court referred to the case before it, and must be read with a due regard to the facts which that case disclosed. It disclosed a case in which an assault, battery, and killing of Foster with a deadly weapon by the defendants had first been admitted, and the defendants had then produced evidence that Foster first assaulted the defendant George Rutherford. The court instructed the jury that the presumption of law was that the killing by the defendant Neill Rutherford was wrongful. The killing to which he referred was the killing with the axe, which had been admitted by the answer and proved by the evidence. The instruction of the court that the law presumed that such a killing was wrongful, and that after it was admitted the burden of proof to establish its justification was upon him who asserted it, was in accord with sound reason and the great weight of authority, and was the statement of a just and salutary rule of law.

The instructions of the court informed the jury that one condition of a justification of the killing was that "Foster was the assailant, and that the defendant Neill Rutherford's father had really in good faith endeavored to decline any further contest with the deceased." This declaration is criticized (a) because it is contended that there was no evidence of a contest between George Rutherford and the deceased, and (b) because it does not contain the rule that, when an assault is so fierce that it is apparently as dangerous for the assailed to retreat as to stand, it is not his duty to retreat, but he may stand his ground, and, if necessary to save his own life or to prevent great bodily injury, may slay his assailant. But there is ample evidence in the record of this case of a contest between George Rutherford and the deceased, and while the rule of law of the omission of which defendants' counsel complain is not found in the paragraph of the charge which they have quoted, and to which they excepted, it was clearly given to the jury in another part of the charge, so that there is no sound reason for any exception to the instructions of the court upon either of these grounds.

There was no error in the trial of this case, and the judgment below is affirmed.

ST. LOUIS COTTON COMPRESS CO. v. AMERICAN COTTON CO.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1903.)

No. 1,913.

1. JUDGMENT OF CIRCUIT COURT—WHEN REVIEWABLE BY SUPREME COURT AND BY CIRCUIT COURT OF APPEALS.
The act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488]) gives to the Supreme Court jurisdiction to directly review a judgment of a Circuit Court which sustains an objection to its jurisdiction and dismisses the suit on that ground, and the Circuit Courts of Appeals have no jurisdiction to review such a judgment.

2. SAME—SERVICE OF SUMMONS.
Such a judgment, founded on the inadequate service of a summons in a suit pending in a state court before the case was removed to the United States Circuit Court is directly reviewable by the Supreme Court, and the Circuit Court of Appeals has no jurisdiction to review it.

3. SAME—APPEAL—REVIEW.
The Supreme Court has jurisdiction under the act creating the Circuit Courts of Appeals to directly review questions involving the jurisdiction of the Circuit or District Courts which are common to all courts (such as the service of a summons) to the same extent and in the same manner as it has jurisdiction to review questions peculiar to the federal courts as such (such as diversity of citizenship and amount in controversy).

4. SAME.
The Supreme Court has jurisdiction to directly review the jurisdiction of the Circuit Court to the same extent and in the same manner in cases in which the jurisdiction of that court as a federal court is based solely on diversity of citizenship that it has in cases in which such jurisdiction is founded on other grounds.

(Syllabus by the Court.)

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

F. N. Judson and Joseph W. Lewis, for plaintiff in error.

Allen C. Orrick (G. A. Finkelnburg, Charles Nagel, and Daniel N. Kirby, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment of the Circuit Court which quashed the return of the service of a summons upon the defendant, the American Cotton Company, and dismissed the action against it on the ground that the Circuit Court had acquired no jurisdiction of the defendant. The plaintiff, the St. Louis Cotton Compress Company, a corporation of the state of Missouri, filed a petition in the circuit court of the city of St. Louis in the state of Missouri to recover $32,379.60 from the defendant below, the American Cotton Company, a corporation of the state of New Jersey. A summons was issued, which was served on H. G. Krake, an employé and agent of the defendant. The case was removed to the United States Circuit Court for the Eastern District of Missouri

¶ 3. Review of jurisdiction of Circuit Courts, see note to Excelsior Wooden-Pipe Co. v. Pacific Bridge Co., 48 C. C. A. 351.

on the ground of diverse citizenship. The defendant appeared specially in that court, and moved to set aside the service of the summons and to dismiss the action for want of jurisdiction of the defendant, because at the time of the service it had no office and was transacting no business in the state of Missouri, and had no officer, agent, or employé in that state authorized to represent it or to transact any business for it there. This motion prevailed, and it is the judgment which granted it and dismissed the action that this writ of error was sued out to reverse.

The plaintiff is met at the threshold of the investigation in this court by a motion to dismiss its writ of error upon the ground that the Circuit Court of Appeals has no jurisdiction to hear or determine the question which it presents. That question is, did the United States Circuit Court acquire jurisdiction of the defendant by virtue of the service of the summons on Krake before this case was removed from the state court?

Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488], which created the Circuit Courts of Appeals, provides in section 5 (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) that "appeals or writs of error may be taken from * * * the existing Circuit Courts directly to the Supreme Court * * * in any case in which the jurisdiction of the court is in issue," and in section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the * * * existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." If, therefore, a writ of error could have been taken from the Supreme Court directly to the Circuit Court to review the question here presented under section 5 in this suit, this is not one of the other cases of which this court is given jurisdiction by section 6. Dudley v. Board of Commissioners of Lake Co., 103 Fed. 209, 43 C. C. A. 184. The rules for the distribution between the Supreme Court and the Circuit Courts of Appeals of the cases involving the jurisdiction of the Circuit Court were formulated by the Supreme Court in U. S. v. Jahn, 155 U. S. 109, 115, 15 Sup. Ct. 39, 39 L. Ed. 87, and were adopted by this court in Evans-Snider-Buel Co. v. McCaskill, 101 Fed. 658, 660, 41 C. C. A. 577, 579. The first of these rules is that the act creating the Circuit Courts of Appeals does not give the Circuit Courts of Appeals jurisdiction to review a judgment of a Circuit Court which sustains an objection to its jurisdiction and dismisses the action on that ground, but the plaintiff should have the question of jurisdiction certified, and take his writ of error or appeal directly to the Supreme Court. Counsel for the plaintiff insist that the case in hand does not fall within this rule. In support of this contention they persuasively argue (1) that it is only when the dismissal in the Circuit Court involves the jurisdiction of that court as a federal court that the Supreme Court has exclusive jurisdiction to review it, and (2) that the Circuit Courts of Appeals have jurisdiction to review a dismissal for lack of jurisdiction in every case in which the jurisdiction of the Circuit Court rests solely on diverse citizenship; and they truly say that this case does not involve the

jurisdiction of the United States Circuit Court as distinguished from the jurisdiction of any other court, and that its jurisdiction of the controversy as a federal court is founded solely on diverse citizenship. The concession must be made that, if either of their premises is sound, their conclusion logically follows.

In support of their first proposition counsel chiefly rely upon the opinions of the Supreme Court in Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783; Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 433, 23 Sup. Ct. 211, 47 L. Ed. 245; and Huntington v. Laidley, 176 U. S. 668, 679, 20 Sup. Ct. 526, 44 L. Ed. 630. Smith v. McKay was a suit in equity. The defendant had moved to dismiss it on the pleadings upon the ground that the complainant had an adequate remedy at law. The court denied this motion, and after a final decree an appeal was taken directly to the Supreme Court, and the question whether or not the complainant had an adequate remedy at law was certified to that court as a jurisdictional question under section 5 of the act of March 3, 1891. The Supreme Court decided that it was not such a question, but that it presented an issue on the merits arising in the progress of the cause, which the Circuit Court had plenary jurisdiction to hear and determine. In Blythe v. Hinckley, 173 U. S. 501, 504, 506, 507, 19 Sup. Ct. 497, 43 L. Ed. 783, a suit in equity was dismissed by the Circuit Court on the grounds (a) that the questions presented by the complainants had been conclusively determined by the state courts, and (b) that the complainants had an adequate remedy at law. An appeal from the decree was taken directly to the Supreme Court, and that appeal was dismissed for the reason that the decision of the Circuit Court was not that it was without jurisdiction of the subject-matter or of the parties to the suit, but was that the facts disclosed by the complainants were insufficient to constitute a cause of action in equity. In Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 432, 23 Sup. Ct. 211, 47 L. Ed. 245, a guardian who was a resident and citizen of the state of Texas, and whose ward was a resident and citizen of the state of Illinois, brought an action in the United States Circuit Court for the District of Texas against the Mexican Central Railway Company, a corporation of the state of Massachusetts, and recovered a judgment. A writ of error was sued out of the Supreme Court to reverse it, and the Circuit Court certified that the jurisdictional question whether the citizenship of the guardian or that of the ward should control had arisen in the case. The Supreme Court took jurisdiction, and decided this question. In Huntington v. Laidley, 176 U. S. 668, 679, 20 Sup. Ct. 526, 44 L. Ed. 630, the Circuit Court dismissed a bill in equity on the ground that it was without jurisdiction because a question arose in the case whether or not certain proceedings in the state court rendered the rights of the plaintiff res adjudicata, but it did not hear or decide that question. The Supreme Court reversed the decree on a direct appeal, and held that the question whether or not the proceedings of the state courts had conclusively determined the rights of the plaintiff was not a jurisdictional question, and that it was the duty of the Circuit Court to hear and determine it upon its merits. There are expressions in

some of the opinions in these cases to the effect that the jurisdiction referred to in section 5 of the act creating the Circuit Courts of Appeals is the "jurisdiction of the Circuit and District Courts as such" (Mexican Central Ry. Co. v. Eckman, 187 U. S. 432, 23 Sup. Ct. 212, 47 L. Ed. 245), and that "appeals or writs of error may be taken directly from the Circuit Courts to this court in cases in which the jurisdiction of those courts is in issue—that is, their jurisdiction as federal courts—the question alone of jurisdiction being certified to this court" (Blythe v. Hinckley, 173 U. S. 501, 506, 19 Sup. Ct. 497, 499, 43 L. Ed. 783). But these statements have never been crystallized into a settled proposition of law, and they have never formed the basis of any decision. There is no decision of the Supreme Court which goes farther to sustain the contention of counsel for the plaintiff than those which have been reviewed. They do not determine the question before us for consideration. They fall far short of holding that the question whether or not a court has acquired jurisdiction of a defendant by a proper service of a summons is a question involving the jurisdiction of the Circuit Court within the meaning of section 5 of the act of March 3, 1891. That section does not limit the questions of which it treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts. It is broad and general in its terms. It contains no exception, and, as the Congress made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to enact one. Shreve v. Cheesman, 69 Fed. 785, 786, 16 C. C. A. 413, 414; Madden v. Lancaster Co., 65 Fed. 188, 12 C. C. A. 566, 573; Morgan v. City of Des Moines, 60 Fed. 208, 8 C. C. A. 569; McIver v. Ragan, 2 Wheat. 25, 29, 4 L. Ed. 175; Bank v. Dalton, 9 How. 522, 526, 13 L. Ed. 242; Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854, 27 L. Ed. 808; St. Louis, I. M. & S. Railway Co. v. B'Shears, 59 Ark. 244, 27 S. W. 2. This section declares that appeals and writs of error may be taken directly to the Supreme Court "in any case in which the jurisdiction of the court is in issue." How can it be successfully maintained that the jurisdiction of a national court is not in issue when the defendant challenges it on the ground that no proper service of a summons upon it has ever been made?

The jurisdiction of a court is the right to hear and determine a controversy between parties who have been legally brought before it for the purpose of securing a decision of the issue. The question whether or not the controversy is such that the court has the power to decide it conditions jurisdiction of the subject-matter of the litigation. The question whether or not one of the indispensable parties to the issue has been legally served with a summons to litigate it conditions the jurisdiction of the parties. And it is as essential to a lawful judgment that the court should have jurisdiction of the parties as it is that it should have power to hear and decide the controversy in issue. And here is the dividing line between the cases cited by the counsel for the plaintiff in error in which the Supreme Court held that no jurisdictional question was involved and the case before us. In those cases the subject-matters were within the jurisdiction of the court, and the

parties had been properly brought before it. The questions were not whether or not the court had the right to hear and determine the issues presented by the cases, but whether or not upon a hearing and consideration of them the complainants were entitled to relief. Where the complainants failed in the Circuit Court and the Supreme Court refused to review their failure, they failed, not for want of jurisdiction in the trial court, but for want of equity, for want of facts constituting causes of action, for want of merits in their cases. In the case at bar the plaintiff has failed, not for want of merits in its cause of action, but for want of jurisdiction, for lack of power in the Circuit Court to hear or to determine the controversy between it and the defendant, because the latter has never been legally summoned to a trial of the issue. The questions in the former cases were whether or not, in the valid exercise of their jurisdiction, the courts had rightly decided the questions determined by them. The question in this case is whether or not the Circuit Court had the power to hear or to determine any of the issues tendered by the plaintiff. The questions in the former cases were not jurisdictional questions, and the question in this case is a jurisdictional question, within the plain meaning of section 5 of the act creating the Circuit Courts of Appeals.

This conclusion finds strong support in some of the late decisions of the Supreme Court. In Shepard v. Adams, 168 U. S. 618, 623, 18 Sup. Ct. 214, 42 L. Ed. 602, the defendant challenged the jurisdiction of the United States District Court of Colorado on the ground that no legal summons had been served upon it. The court overruled the objection, and rendered judgment for the plaintiff. There was no other question in the case, and the defendant sued out a writ of error from the Supreme Court to reverse the judgment. He was met there by the same objection, founded on some expressions in the opinion in Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731, which is interposed to the motion to dismiss this writ; that is to say, that the question whether or not there was due service of process is not one which involves the jurisdiction of a federal court as such, but one common to all courts, and hence that it is not a jurisdictional question within a proper construction of section 5. The Supreme Court overruled this objection, took jurisdiction of the case under the writ, and decided it on its merits. Counsel for the plaintiff in error seek to distinguish this case from that in hand in this way: They suggest that the question in that case was a question of the jurisdiction of the federal court as such because the summons was issued in an action pending in that court, while in the case at bar the summons was issued and served while the case was pending in the state court. But in Conley v. Mathieson Alkali Works, 23 Sup. Ct. 728, 47 L. Ed. 1113, and Geer v. Mathieson Alkali Works, 23 Sup. Ct. 807, 47 L. Ed. 1122, two cases were presented to the Supreme Court, one an action at law and the other a suit in equity, in which the summonses had been served while the suits were pending in the state court. The cases were subsequently removed to the United States Circuit Court on the ground of diversity of citizenship. In that court they were dismissed because the summonses were not legally served upon the Mathieson Company. A writ of error was sued out of the Supreme Court to re-

verse the judgment at law, and a direct appeal was taken to that court from the decree in equity. The Supreme Court took jurisdiction of both cases, and determined the jurisdictional questions presented by the insufficient service of the processes upon their merits under section 5 of the act of March 3, 1891. These cases present facts substantially similar to those which condition the case in hand, and they are practically conclusive of the question before us. It is true that no objection to the jurisdiction of the Supreme Court was made in these cases, but the Supreme Court has not exhibited so rapacious a disposition to review cases in which its jurisdiction was doubtful since the establishment of the Circuit Courts of Appeals, as to inspire any confident belief that it would have failed to perceive its lack of jurisdiction in these cases without any prompting, if any such lack had existed.

Our conclusion is that the Supreme Court has jurisdiction under section 5 of the act creating the Circuit Courts of Appeals to review by writs of error or appeals taken directly to that court from the United States Circuit Court every question which involves the jurisdiction of the latter court, whether that question is peculiar to the federal courts as such or common to all courts, and that the question whether a summons was legally served on a defendant is such a jurisdictional question whether it was served while the action was pending in the state or in the federal court. Shepard v. Adams, 168 U. S. 618, 623, 18 Sup. Ct. 214, 42 L. Ed. 602; Conley v. Mathieson Alkali Works, 23 Sup. Ct. 728, 47 L. Ed. 1113; Geer v. Mathieson Alkali Works, 23 Sup. Ct. 807, 47 L. Ed. 1122; Evans-Snider-Buel Co. v. McCaskill, 101 Fed. 658, 41 C. C. A. 577; Dudley v. Board of Commissioners of Lake Co., 103 Fed. 209, 43 C. C. A. 184; Davis & Rankin Bldg. & Mfg. Co. v. Barber, 60 Fed. 465, 9 C. C. A. 79; Cabot v. McMaster, 65 Fed. 533, 13 C. C. A. 39; U. S. v. Severens, 71 Fed. 768, 18 C. C. A. 314; Hays v. Richardson (C. C. A.) 121 Fed. 536.

The second objection to the dismissal of the writ is that the Circuit Courts of Appeals are given jurisdiction by section 6 of the act creating them to review all jurisdictional questions which arise in the Circuit and District Courts of the United States in cases in which their jurisdiction is based solely on diversity of citizenship. A careful reading of section 6, however, discloses no such grant of power. Upon this subject that section provides only that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the * * * existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final * * * in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." But it is only in cases not provided for by the preceding section that the Circuit Courts of Appeals are given appellate jurisdiction, and no case in which jurisdiction of the Circuit Court is in issue falls in the class of cases not provided for by section 5. Therefore, under the first rule in Evans-Snider-Buel Co. v. McCaskill, 101 Fed. 658, 41 C.

C. A. 577, the Circuit Courts of Appeals have no jurisdiction of any case involving the jurisdiction of the Circuit Court where that court has dismissed the suit upon the ground of lack of jurisdiction. Section 6 does provide that in cases in which the jurisdiction of the Circuit Court is founded on diversity of citizenship the judgments and decrees of the Circuit Courts of Appeals shall be final. But this provision in no way limits the jurisdiction of the Supreme Court under section 5, nor does it enlarge the appellate jurisdiction of the Courts of Appeals. The very question was before the Supreme Court in the Mathieson Alkali Works Cases, 23 Sup. Ct. 728, 47 L. Ed. ——, and 23 Sup. Ct. 807, 47 L. Ed. ——, although it was not suggested or discussed. The jurisdiction of the Circuit Court in those cases was founded solely on diverse citizenship, yet the Supreme Court exercised jurisdiction to review the question whether or not the summonses were legally served on a writ and an appeal from the Circuit Court directly to the Supreme Court. The act of Congress itself and these decisions point unerringly to the conclusion that questions involving the jurisdiction of the Circuit and District Courts in cases in which their jurisdiction as federal courts rests solely on diversity of citizenship are reviewable by the Supreme Court, under section 5, to the same extent and in the same manner as questions involving the jurisdiction of those courts in cases in which their jurisdiction as federal courts is based upon other grounds.

The cases of American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, 21 Sup. Ct. 646, 45 L. Ed. 859, and Ayres v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314, do not lead to a different result. The question there considered was the jurisdiction of the Circuit Courts of Appeals to hear and determine constitutional questions arising in cases in which the jurisdiction of the Circuit Courts was founded on diversity of citizenship. The jurisdiction of the Circuit Courts over the subject-matters and the parties to the suits was not challenged or in issue in those cases, and, as the Supreme Court well said in Ayres v. Polsdorfer at page 595, 187 U. S., page 200, 23 Sup. Ct., 47 L. Ed. 314, "as to such questions other rules apply than those we have expressed in this opinion." As the rules stated in those opinions have no application to the question in hand, it is useless to review or discuss them.

The result is that this writ of error was sued out to review a judgment of a Circuit Court which sustained an objection to its jurisdiction and dismissed the action on that ground, that the Supreme Court had jurisdiction to review that judgment by writ of error direct to the Circuit Court, and therefore this court has no such jurisdiction. Dudley v. Board of Com'rs, 103 Fed. 209, 43 C. C. A. 184.

The writ of error must accordingly be dismissed, and it is so ordered.

McLOUGHLIN v. AMERICAN CIRCULAR LOOM CO.

(Circuit Court of Appeals, First Circuit. October 6, 1903.)

No. 464.

1. LIBEL—ACTIONABLE WORDS—PUBLICATION TENDING TO INJURE BUSINESS.
A letter addressed by a manufacturing concern to its agent for the sale of a conduit for electric wires, who was engaged generally in the business of installing electrical plants by contract and wiring buildings therefor, falsely charging that in his use of such conduit he had violated the rules of the insurance companies, which letter was sent to the insurance companies and agencies in the city where the addressee was in business, and to his competitors in business, is not privileged, and, while not libelous per se, is susceptible of a defamatory meaning from which damage might naturally result, and is actionable if special damage is properly alleged and proved.

2. SAME—ACTION—PLEADING SPECIAL DAMAGE.
An allegation of loss of business and employment by plaintiff, a contractor, as a basis for special damages, in a declaration in an action for libel, although it does not set out the names of the persons who were deterred from employing him, nor show that they were unknown, is nevertheless good against a demurrer which does not specify such objection, under the Massachusetts practice act (Rev. Laws, c. 173, § 15).

3. SAME.
The sufficiency of allegations of special damage in a declaration for libel considered.

In Error to the Circuit Court of the United States for the District of Massachusetts.

John L. Hall (Charles F. Choate, Jr., on the brief), for plaintiff in error.

Samuel K. Hamilton (Theodore Eaton, on the brief), for defendant in error.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. The amended declaration in this case was as follows:

"The plaintiff says he is, and since 1891 has been, doing business as an electrical contractor in the city of New Orleans, in the state of Louisiana. That his business consists mainly in the installation of electric wires and plants under contract in the city of New Orleans and vicinity. That the defendant is a corporation, established under the laws of Maine and doing business in the city of Boston and state of Massachusetts, engaged in the general manufacture of electric wires and tubes used in buildings, and especially in the manufacture of a conduit for the transmission of electricity, known as the 'Circular Loom Conduit.' That on and before the 1st of April, A. D. 1899, the plaintiff became the selling agent for the defendant in the city of New Orleans and vicinity, for the purpose of introducing and establishing the sale of the defendant's product, viz., circular loom conduits.

"On or about the 28th day of August, A. D. 1899, the defendant published, by sending to the trade in which the plaintiff was engaged, the various insurance companies and agencies in New Orleans, namely, the manager of the Underwriters' Inspection Bureau of New Orleans, to the Newman-Spranley Company, and by sending to Vincent Grey, and other persons whose names are now unknown to the plaintiff, with whom the plaintiff was not dealing and with whom the defendant had no business relations, but who were rivals of the plaintiff, a false and malicious libel concerning the plaintiff, a copy whereof is hereto annexed.

"That in consequence of said act of the defendant the plaintiff was greatly injured in his business. That he has been deprived of the selling agency of the defendant's product, the circular loom conduit. His credit has been impaired, and he has been put to great inconvenience and loss thereby. That he has been unable to undertake work and contracts which, but for the act of the defendant, he would have obtained. That he has lost commissions on sales upon the product of the defendant, which, but for the act of the defendant, he would have made, and that he has been caused to suffer great mental anxiety and distress, for which the plaintiff claims special damage."

"[Copy Annexed.]

"American Circular Loom Company,

"Chelsea, Mass., U. S. A., August 28, 1899.

"T. S. McLoughlin, Esq., New Orleans, La. Dear Sir,—You are aware that we have sent our Mr. Kirkland to New Orleans to make an original investigation of the controversy between yourself and the Board of Underwriters. Mr. Kirkland has returned and has made to us the report of such investigation. It appears, beyond controversy, that you are using, and have been using, our circular loom conduit, not only under the conditions and in the places where it is permitted by the rules, but also in places and under circumstances where it is prohibited by such rules. We desire to impress upon you the fact that this company submits itself to those underwriters' rules; that such rules have been framed with its consent and acquiescence, and that we cannot, and will not, place ourselves in opposition to the execution of those rules as written.

"Under these circumstances, we think it necessary to advise you that unless you are willing to handle our material in accordance with our wishes, and in accordance with the rules of the Board of Underwriters, our business relations must cease, as we cannot afford to have any person connected with us who puts us in hostility to an organization with which we are in entire sympathy.

"Your immediate answer to this letter is requested, and we expect you in that letter to define your future policy in regard of the subject matter of this communication.

"We deem it proper to notify you that we have sent a copy of this letter to the Board of Underwriters, to the various insurance companies operating in New Orleans, and to such other persons as we have deemed it advisable to communicate with.

"Very truly yours,

"American Circular Loom Company,
"A. T. Clark, Treas."

To this the defendant demurred as follows:

"And now comes the defendant, and demurs to plaintiff's amended declaration, and for causes of demurrer shows that said declaration does not state a legal cause of action, and is not substantially in accordance with the rules of chapter 173, p. 1549, of the Revised Laws of Massachusetts, and the particulars in which said declaration is alleged to be defective are as follows: That said declaration does not allege that the defendant published any writing defamatory to plaintiff's character or reputation, and that the letter set forth in plaintiff's declaration as containing a false and malicious libel does not contain any matter libelous of or defamatory to the plaintiff; that said declaration is alleged to be for a false and malicious libel of said plaintiff by said defendant, but that said declaration does not set forth any matter that is or may be construed to be a false and malicious libel, or in any way libelous of said plaintiff; that said declaration alleges as special damages matters which are not properly the subject of special damages; and that the consequences which are alleged to have happened on account of the publication of the letter as alleged in said declaration cannot be reasonably held to be the natural and probable consequences of the publication of said letter."

The plaintiff did not contend strenuously that the language complained of was libelous per se, without allegation and proof of special damage. Some distinctions applied in an action for defamation are

highly technical, and have been adversely criticised even by judges who applied them. The gravamen of an action for defamation is damage to the reputation of the plaintiff, naturally arising from a false report. See Odgers on Libel and Slander (3d Ed.) 95; Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474. Speaking generally, where the false report and consequent damage to the reputation are shown, an action will lie unless the occasion be privileged. From some sorts of false report the law presumes conclusively that damage has followed, and the plaintiff need neither allege nor prove it. Here the language is styled libelous per se. Logically or not, the conclusive presumption of damage arises from some written words, where it does not arise if the same words are merely spoken. Odgers, 3; Thorley v. Kerry, 4 Taunt. 355. Except where this presumption exists, special damage to the plaintiff's reputation must be alleged and proved to have been the actual and natural result of the language used. In an action of defamation, the distinction between injuria and damnum—injury to the plaintiff's reputation and damage arising from the injury—is particularly hard to draw. Some language is deemed injurious without proof of damage, and damage is conclusively presumed to have followed the injury; other language is deemed injurious to the reputation only where damage has actually resulted. Probably two diverse theories have tended to govern the action: First, that A. is responsible for defaming B. in the ordinary sense of defamation—language libelous per se; second, that A. is responsible to B. for the damage naturally resulting from the lies told by A. about B.—special damage. See Ratcliffe v. Evans (1892) 2 Q. B. 524. It may be that an action for defamation, strictly speaking, is properly maintainable only under the first theory, while under the second the action should be special on the case. But in this country, at any rate, the two theories have not been differentiated. In a few critical cases they may lead to results quite different, but in general the law is that above stated. An accurate and readily applicable definition of written language, libelous per se, does not exist, and some well-established distinctions may rest on history rather than on logic. Webb's Pollock on Torts, 290. The language here complained of, if spoken, would not support an action without proof of special damage. In the absence of innuendo and further colloquium, we do not deem that this language, though written, is libelous per se.

Defendant contends that the language set out is in no sense defamatory, and so is not actionable, though special damage has followed. We need not here consider the case of language, in no ordinary sense defamatory, which yet produces damage as its natural result. It is actionable in a community of honest men to say falsely that one is a thief. Is it actionable in a community of thieves to say falsely that one is an honest man, provided special damage naturally results from the false statement? This question need not be answered here, because we are of the opinion that the language here used is susceptible of a defamatory meaning. In substance it was this: That the plaintiff had installed electric wires contrary to the rules of the New Orleans Board of Underwriters. The letter thus charged the plaintiff

with violating the rules of the insurance companies, and it is matter of common knowledge that the owner of a house wired in a manner not permitted by these rules may well be unable to insure it. As most house owners desire insurance, and wish that their electric wires should be so arranged as to make insurance possible, the plaintiff's evidence, admissible under the allegations of his declaration, might warrant a jury in finding that the defendant's letter suggested that the plaintiff so conducted his business as to make inadvisable his employment by one having the ordinary desires of a householder. There is no conclusive presumption that damage results from the language used, and so that language is not libelous per se. Damage is a natural and proximate result of the language used, and so the language is actionable if damage actually follows. The declaration is inartificially drawn. The colloquium is defective, and the innuendo altogether wanting, but the letter is so easily susceptible of a meaning injurious to the plaintiff in the conduct of his business as to make it actionable if special damage is properly alleged and proved. The communication was not privileged. Had the publication been only to the plaintiff, there would have been no libel, but the letter became libelous when published to outsiders. If the communication to them were treated as privileged, then one might libel his enemy with impunity by publishing generally a communication originally addressed to the person defamed. It follows that, if special damage has been sufficiently alleged, the demurrer must be overruled.

The allegations of special damage appear to be these: (1) That the plaintiff has been greatly injured in his business; (2) that he has been deprived of the selling agency of the defendant's product, the circular loom conduit; (3) that his credit has been impaired; (4) that he has been put to great inconvenience and loss thereby; (5) that he has been unable to undertake work and contracts which, but for the act of the defendant, he would have obtained; (6) that he has lost commissions on sales of the defendant's product; (7) that he has been caused to suffer great mental anxiety and distress.

As has been said, loss of business and employment is a natural, though not a necessary, result of the publication; but the defendant has urged that the allegation of loss is not specific enough, and that the names must be set out of those persons who were deterred from employing him. In Trenton Ins. Co. v. Perrine, 23 N. J. Law, 402, 415, 67 Am. Dec. 400, it was said:

"The general rule certainly is that where the plaintiff alleges, by way of special damage, the loss of customers in the way of his trade, or the refusal of friends and acquaintances to associate with him, or the loss of marriage, or the loss of service, the names of such customers or friends, or the name of the person with whom marriage would have been contracted or service performed, must be stated. But the rule is relaxed when the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them, or where they are so numerous as to excuse a specific description on the score of inconvenience."

See Ratcliffe v. Evans (1892) 2 Q. B. 524; Evans v. Harris, 1 H. & N. 251. Here it is not apparent that the names were unknown to the plaintiff, and there is no allegation to that effect. But this objection, viz., failure to give names, is not specified in the defendant's

demurrer. The provisions of section 15 of the practice act (Mass. Rev. Laws, p. 1553, c. 173), are peculiarly applicable to a case like this. If this defect had been pointed out by the demurrer, the plaintiff might have asked leave to amend. Without determining that the defendant's objection would not have prevailed, had it been raised by a demurrer sufficiently specific, we hold that the objection is not fatal when not specifically stated in the causes of demurrer. Morasse v. Brochu, 151 Mass. 567, 573, 25 N. E. 74, 76, 8 L. R. A. 524, 21 Am. St. Rep. 474. If the defendant desires, he may still ask the court below to order the plaintiff to furnish the names of the persons upon whose failure to employ him he chiefly relies for proof of special damage.

The other allegations of special damage are insufficient. (2) and (6) were abandoned by plaintiff at the argument because not the natural result of the language used. They charge a loss by the defendant of the plaintiff's business, which could not have been the result of the libel. (3) Does not set out how the plaintiff's credit was impaired, and impairment of credit without further averment is not sufficiently shown to be a natural result of the libel. (4) is stated too vaguely, and perhaps was meant merely to reinforce (3). (5) is so vague as to be unintelligible. Why was the plaintiff unable to undertake work, and what difference is intended between undertaking work and obtaining it? Perhaps this specification was intended merely as a restatement of (1). As to (7), no connection between the libel and the damage is shown. On proper motion, these allegations may perhaps be stricken out, but the demurrer must be overruled.

The judgment of the Circuit Court is reversed, the demurrer of the defendant to the amended declaration is overruled, the case is remanded to the Circuit Court for further proceedings not inconsistent with our opinion passed down this day, and the costs of appeal are awarded to the plaintiff in error.

CAMPBELL v. AMERICAN ALKILI CO.

(Circuit Court of Appeals, Third Circuit. September 15, 1903.)

No. 2.

1. CORPORATIONS—ASSESSMENTS ON STOCKHOLDERS—DATE OF CALL.
A resolution was passed by the directors of a corporation that a call be made on the holders of partly paid stock on September 16th following, the same to be payable in installments at specified times thereafter. *Held*, that September 16th was the date of the call for the purpose of fixing the liability of stockholders.

2. SAME—LIABILITY OF STOCKHOLDER—TRANSFER OF STOCK.
Both at common law and under the statutes of New Jersey a stockholder in a corporation is liable for assessments on calls lawfully made after he has been accepted by the corporation as a stockholder, and while he stands registered as such on its books, and he is not released from such liability by a transfer of the stock after the call has been made, but before it becomes payable.

4. SAME—NEW JERSEY STATUTE.
Under the corporation law of New Jersey, which provides (Sess. Laws 1896, p. 283, § 18) that "every corporation shall have power to create two or more kinds of stock of such classes, with such restrictions or qualifications thereof as shall be stated or expressed in the certificate of incorporation," a provision of such certificate, also embodied in the certificates of shares of partially paid preferred stock of a corporation, that the holder of such shares of record on the books of the corporation at the time of the making of an assessment thereon, and he only, shall be liable for such assessment, is binding on such holder, and fixes his personal liability.

5. SAME—REMEDY FOR COLLECTION OF ASSESSMENTS—RIGHT TO SUE AT LAW.
A state statute giving corporations a lien on the shares of stockholders for assessments, and authorizing a forfeiture and sale of the stock in case of default, does not provide an exclusive remedy, but is cumulative, and the corporation may, at its election, maintain an action in assumpsit against the delinquent stockholder.

6. SAME—ACTION TO RECOVER ASSESSMENT—DEFENSES.
The validity of an order by the directors of a corporation making an assessment on stockholders cannot be collaterally attacked by a stockholder in an action against him to recover the assessment.

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

F. B. Bracken and John G. Johnson, for plaintiff in error.
R. D. Brown, for defendant in error.

Before ACHESON, Circuit Judge, and BUFFINGTON and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. The American Alkili Company, the plaintiff below, brought its action in assumpsit against William S. Campbell, the plaintiff in error herein, and alleged: That it was a corporation duly incorporated under the laws of the state of New Jersey on April 29, 1899, with an authorized capital of $30,000,000, of which $6,000,000 was preferred stock, consisting of 120,000 shares of the par value of $50 each, and on which preferred stock there had been paid to the company, by the original subscribers therefor, the sum of $10 each. That on the 12th day of September, 1901, at a meeting of the board of directors of said company, duly called and held, the following resolution was adopted:

"Resolved, for the purpose of providing funds for the completion of the present works, the building of additional works and providing working capital, that a call of ten dollars upon each share of the preferred stock of the company be made September 16, 1901, payable at the office of the company in four installments as follows: First installment, $2.50 per share, October 21, 1901; second installment of $2.50 per share, payable January 21, 1902; third installment of $2.50 per share, payable April 21, 1902; and fourth installment of $2.50 per share, payable July 21, 1902."

The first installment called for by the above resolution was, at a subsequent meeting of the board of directors, postponed until November 21, 1901, and that both the call made under the resolution of September 12, 1901, and the postponement of the time of payment of the first installment were ratified at a meeting of the stockholders of

¶ 4. See Corporations, vol. 12, Cent. Dig. § 390.

the company. That on September 16, 1901, the defendant below was the holder of 5,100 shares of the preferred stock of the plaintiff company, and that the same were duly registered and stood in his name upon its books; and that as such stockholder notice was given him of the passage of the resolution of September 12, 1901, above set out, and demand was made upon him for the sum due by him thereon.

We are of the opinion that this action is proper in form, and that the declaration sets out a good cause of action. Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Nashua Savings Bank v. Anglo-American Land Mortgage & A. Co., 48 C. C. A. 15, 108 Fed. 764; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818. The affidavit of defense admits that on the 12th day of September, 1901, the defendant was the owner of 5,100 shares of the preferred stock of the plaintiff corporation of the par value of $50 each, upon which there had been paid $10 each—300 of said shares having been acquired by him by original subscription, and 4,800 by subsequent purchase; that he continued to be the holder of record of all of said shares until October 3, 1901, when he sold the said shares to one David S. Thomson, surrendered his certificates, and the said stock was transferred to said Thomson on the books of the company, and new certificates for said stock were issued to said Thomson by the company, and that thereby he became "relieved and discharged of and from all liability for any unpaid calls made on said shares of preferred stock prior to the date of said transfer, and for any calls which might be made or become due thereon after said date"; that by virtue of the statutes of New Jersey (which are set forth) and the principles of law established and followed by the courts of New Jersey, a transfer of stock, followed by registry of transfer and grant of new certificates, the subscriber and former owner of stock is relieved from unpaid and future calls thereon; that the call described in plaintiff's declaration was abrogated by the subsequent action of the directors September 25, 1901, and the stockholders on October 30, 1901, whereby it was illegally permitted to reduce the capital stock of the company by allowing shareholders paying the call to exchange five shares of part paid preferred stock for two shares of the same full paid. The affidavit also sets forth and offers to prove certain acts in the organization of the company and its subsequent workings, which make this call fraudulent.

The first question which presents itself is, what is the date of the call? A call is defined in Cook on Corporations, § 104, to be "an official declaration by the proper corporate authorities that the whole or a specified part of the subscription for stock is required to be paid." The resolution of September 12, 1901 (set out at length supra) provides for a call September 16, 1901. In it both the date of the call and the payments of the installments under it were fixed. It was the same as if the call had been determined and made of that date. The resolution was only giving notice of what could have been done without notice. That the resolution provides for the payment in installments is evidence of the fact that the call was made as of a date antecedent to that of the payment of the installments. There was but one debt created—that of $10 per share, and it was payable in four "installments," which the Century Dictionary defines to be "partial payments

on account of a debt due." To use the language of the learned judge in North American Company v. Bentley, 19 L. J. Q. B. N. S. 427, "We cannot help thinking that a call is made and a debt accrues in respect of it, although the time for payment may not have arrived." We are of the opinion that the resolution of September 12th establishes the date of the call as September 16, 1901. This being so, and the transfer of the stock to Thomson being made October 3, 1901, then did the call of September 16th impose any personal liability upon Campbell, the defendant below, the then owner and registered holder of the stock; and, if Campbell thereby became liable, was this liability affected by his subsequent transfer to Thomson, and the issue of a certificate to him by the company? In Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, it was held that "the original holder of stock in a corporation is liable for unpaid installments of stock without an expressed promise to pay them." And in Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384, this doctrine was approved, and the court went further, and said that "the transferee of stock is liable for calls made after he has been accepted by the company as a stockholder and his name registered on the stock books as a corporator." This liability exists so long as he occupies that position and relation, and applies to all calls made during that period. The same obligation to pay, we think, arises also from the terms of the New Jersey statute (Sess. Laws 1896, p. 284) section 22 of which provides as follows: "The directors of every corporation may from time to time make assessments upon the shares of stock subscribed for, not exceeding in the whole the par value thereof; and the sum so assessed shall be paid to the treasurer at such times and by such installments as the directors shall direct." And section 40 of the act makes the transfer books the test as to who are shareholders. Under these provisions there is an implied promise by the shareholder to pay the assessments, and beyond that is the equity to contribute to the capital stock as a trust fund for creditors. Section 21 of the act provides as follows: "Each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share." The transferee is vested, by substitution, with the rights of the transferror to the stock, but assumes also corresponding obligations. Because the transferror ceases to have a voice in the management of the company, and has no longer any interest or ownership in the property, he is freed from further liability, and the transferee is substituted and subjected to future calls by the corporation for further aid to carry on its business and fulfill its corporate ends.

Campbell, the defendant below, being the registered holder of 5,100 shares of preferred stock on September 16, 1901, was liable, as such holder, for any unpaid and uncalled for subscription thereon; and when such call was made by resolution of September 12th as of September 16th, an obligation was then imposed on him to pay. Cook on Corporations, § 256; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936. But the transferee of preferred stock duly registered on the books of the company was liable for after-assessments as provided in the certificates held by the defendant. "After payment of ten dollars per share on the preferred

stock the subscribers thereto shall not be liable for any balance of their subscription excepting upon such shares as shall stand of record on the books of the company in their name at the time when any subsequent assessments or calls are made, but the holder of such shares of record on the books of the company at that time and they only shall be liable for the same." Section 18 of the act (Sess. Laws 1896, p. 283) provides that "every corporation shall have power to create two or more kinds of stock of such classes, with such restrictions or qualifications thereof as shall be stated or expressed in the certificate of incorporation"; while section 8, subsec. 4 (Sess. Laws 1896, p. 280), enacts that "the certificate of incorporation shall provide a description of the different classes of stock, * * * with the terms on which preferred shares are created." Under these provisions the conditions referred to were properly embraced, and, as such, the defendant, by having the shares standing in his name when the assessment was made, obligated himself to pay the same. We are therefore of the opinion that the call of September 16, 1901, created a personal liability upon Campbell, the defendant below, the then registered holder of the stock, for its payment, and that this liability was one of which he could not rid himself by afterwards transferring his share. The transfer of the stock by Campbell to Thomson, and the issue by the company of a new certificate to Thomson, did not relieve Campbell from his liability for the call. That liability had accrued September 16th, when the call was made. It was complete and perfect, and the subsequent transfer on October 3d was merely an act of accommodation to enable the shareholder to sell and legally transfer his stock. There was no expressed purpose of the shareholder or the company to affect liabilities or rights then existing. It in no way inured to the benefit of the company, nor could it serve to relieve the defendant of his obligations to the company.

Can this liability to pay be enforced by an action at law? Doubtless it can, unless the company is deprived of it by the remedy of forfeiture provided by the statute. Where a right of action and a right of forfeiture exist, it is manifest that the company cannot resort to both; but where a personal liability is imposed on a delinquent shareholder, and the right to forfeit the share is also given, the law is clear that the latter right is cumulative, and not exclusive. Ashton v. Burbank, 2 Fed. Cas. 26, 2 Dill. 435. "A grant of the power to declare a forfeiture for nonpayment does not by implication deprive the corporation of an option of remedies." Cook on Corporations, § 124. It is put to its election, and may resort to either; not both. It will be noticed that the statute in this case is not mandatory, but permissive. The treasurer is not directed to sell, and can only do so when ordered by the board of directors, and then he shall sell at public sale. There is no obligation imposed on the directors to follow this remedy permitted by the statute. The language is (section 23): "If the owner of any share shall neglect to pay any sum assessed for thirty days after the time appointed for payment, the treasurer, when ordered by the board shall sell at public auction such number of shares of the delinquent owner as will pay all assessments due from him." The statute itself recognizes the pre-existing liability and delinquency of the shareholder.

The assessment was "due from him," and he was "delinquent." In the meanwhile a right of action had accrued to the company for the collection of the amount due, and this right could not have been intended to be taken away by a continuance of the default, but to have furnished additional optional remedy if the default continued for a specified time. Under the law, generally, a corporation has a right either to sell or forfeit. When, therefore, the New Jersey statute expressly conferred a right to forfeit, it only conferred a power expressly which had always existed impliedly without the statute. It is obvious, therefore, that the express grant of an implied power of forfeiture of stock should not be held to exclude the generally implied power to sue for unpaid assessments, for both the right to forfeit and the right to sue may impliedly exist concurrently at law.

Has the defendant, then, being liable for the assessment levied upon the stock of which he was a registered holder on the books of the company at the time of the call, shown any valid defense? We think not. Doubtless a stockholder has a right to defend and resist a fraudulent call, "but an order of assessment, whether made by the directors, as provided in the contract of subscription, or by the court, as the successor in this respect, was doubtless, unless directly attacked, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder." Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986. If, therefore, a stockholder desires to attack an assessment, he must do so directly, and not collaterally (Elizabethtown Gaslight Co. v. Green, 49 N. J. Eq. 329, 24 Atl. 560); otherwise it might happen that one stockholder might be released and another held, while the same legal liability attached to each.

On the whole case we are of the opinion that the defendant's liability attached September 16, 1901, the date of the call; that he was not relieved of his liability by the transfer of his stock October 3, 1901; and that to the action here properly brought he has no defense.

The judgment of the Circuit Court is affirmed.

MULLER v. KELLY.

(Circuit Court of Appeals, Third Circuit. September 24, 1903.)

No. 8.

1. ATTORNEY AND CLIENT—VALIDITY OF CONTRACT FOR CONTINGENT FEE—QUESTIONS FOR JURY.

Plaintiff, a Swiss immigrant, who had been in this country but about a month, and neither spoke nor understood English, was thrown from a street car, and severely and permanently injured. He was taken to a hospital, where he remained unconscious for two or three days, after which for several months he continued in a highly nervous condition, diagnosed as hysteria, of such character and severity that his only acquaintance was forbidden to talk to him, and all communication with him was through a physician who spoke German and by means of writing. His injuries were of such character that after he had been confined in the hospital five months, and after examinations by its own physicians, the traction company paid $10,000 as compensation for his injuries with-

out suit or contest. Some 15 days after the injury, plaintiff, through the agency of the physician, who acted as interpreter, signed a writing by which he employed defendant as his attorney, and agreed to pay him for his services one-half the amount recovered from the company. He did not see defendant, and had never previously heard of him. He afterward received as his share of the recovery some $4,500, and receipted for the same before leaving the hospital. Subsequently he brought suit against defendant to recover the $5,000 retained by the latter. *Held*, that plaintiff was entitled to have submitted to the jury the question whether, under the circumstances shown, there was any contract with defendant, and whether, if so, it was fair and conscionable; the rule of the federal courts as well as the courts of the state being that such contracts will be closely scrutinized, and if extortionate or unconscionable, or if obtained by undue means, will not be upheld.

Dallas, Circuit Judge, dissenting.

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

For opinion below, see 116 Fed. 545.

Edward F. Hoffman, for plaintiff in error.

D. Webster Dougherty, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. Jean Muller, the plaintiff in error, a Swiss immigrant, landed at Philadelphia in April, 1900. He spoke no English, had no relatives in this country, and, indeed, no acquaintances, save one Ghaul, with whom he boarded. He found employment at Cramps' Shipyards. On May 18th he was forcibly ejected from a street car while in motion by a conductor and badly injured. He was removed to a hospital in an unconscious condition, and so remained for two or three days. On his return to consciousness he was in a pitiable state. As a result of his injuries he had either become totally deaf or his mental condition was that of hysteria. He was in so highly a nervous condition that he had to be forbidden intercourse. He was communicated with by the doctor writing on slips of paper. His mental condition was then and for some months diagnosed as hysteria. Dr. Boyer, of the hospital staff, thought it was hysteria, and the defendant himself testified that there was such doubt among the physicians as to whether the plaintiff's injuries were real or a case of hysteria that he procured the services of several expert neurologists to ascertain that fact. Probably the most cogent proof of the grave character of his injuries was that after five months confinement in the hospital under treatment, and after examinations of him made by its own physicians, the traction company paid, without suit or contest, the very unusual sum of $10,000 as compensation for the injuries inflicted on him. Mr. Duane, the counsel for that company, characterized it "as the strongest case in favor of the plaintiff as regards damages which has ever been referred to me by the Union Traction Company. It was for that reason I was willing to pay the very unusual sum of ten thousand dollars in settlement." When the plaintiff regained consciousness he was in a highly nervous and hysterical state. When his boarding master Ghaul saw him several days

later, which was near the date of the power of attorney in question, the plaintiff could not talk to him without crying, and his condition was such that the attendant physician had to forbid Ghaul talking with him. Indeed, one witness who visited him so late as September testified that Dr. Kieffer, the hospital surgeon in charge of plaintiff, then had him secrete himself so that he could see the condition of the plaintiff unobserved, and that he saw him moving along leaning his whole weight against the walls. He was wholly dependent for communication with others on Dr. Kieffer, who spoke German, and communicated by writing on slips of paper. The nature of the interpreting services so rendered was testified to by Brodt, a claim adjuster of the traction company, who visited the plaintiff, and conversed with him through the doctor, who suggested that he be paid by the company $25 or $30 for interpreting and keeping counsel from seeing the plaintiff. It was also in evidence there was later deducted from the amount paid by the traction company $150 for his (Kieffer's) services as interpreter. In this state of affairs, some 15 days after the accident, and when, if his testimony is believed, he was unsuccessfully requesting to see the Swiss consul for consultation, the plaintiff, without knowing or even seeing the defendant, is alleged to have made, through the agency of Dr. Kieffer, an agreement with the defendant for a contingent fee, the outcome of which agreement was to allow the latter to charge the sum of $5,000 for alleged services, to pay Dr. Kieffer $150 for services as interpreter, to pay physicians for examining the plaintiff to qualify themselves to testify as to his mental and physical condition $255, and to leave the plaintiff, after deducting $66.25 for witness and court costs, the sum of $4,528.75 as his share of the $10,000 paid by the traction company to the defendant as compensation for Muller's injuries. The evidence indicates that the plaintiff is permanently disabled, and that upon the sum paid by the traction company depends his future livelihood. After leaving the hospital and procuring counsel through the intervention of the Swiss consul, Muller brought suit against the defendant, his former attorney, to recover the balance; but at the close of the testimony the case was taken from the jury and binding instructions given against him, the court holding, in effect, that the plaintiff was concluded by the written agreement to pay the contingent fee, and by his written receipt for the balance paid him just before he left the hospital. The refusal of the court to submit the case to the jury is here assigned for error.

After careful consideration, we are of opinion the assignment should be sustained. The agreement was not only between counsel and client; it was for an unusual and very large amount; it was made without the parties meeting; it was arbitrarily fixed by counsel, without knowing the extent of the plaintiff's injuries, without information from him as to the circumstances or facts of the case; it was made by the client without any information of the character, standing, ability, or reliability of the counsel, under the statement of the doctor, in whom he would naturally have all faith, that he would have to pay such fees to any American lawyer; it was made, if the plaintiff's testimony was believed, under the belief that he was engaging another lawyer, who had been recommended by Ghaul; and not only was it

made by one ignorant of our language and procedure, but it was made with a sick and shattered man, suffering from the effects of a most serious accident, and of whose mental balance and capacity there was, to say the least, grave question. Under such circumstances, we think the question was not one of changing a written contract, but whether, under the circumstances, there was any contract between them. The counsel admitted receiving the money. He sought to defend against payment of the unpaid balance by showing a contract for this large sum, made under the circumstances recited, with his client. In view of the attendant facts and circumstances of this case, we think the plaintiff had, under the authorities, a right to have that question determined by a jury. Now, in this case, we discard for present purposes all questions of ethics and the grave temptations to professional misconduct agreements, such as the present are prone to foster, and assume the right of counsel, under proper conditions, to make such bargains. But conceding the right to so contract, as was done in Taylor v. Bemiss, 110 U. S. 45, 3 Sup. Ct. 441, 28 L. Ed. 64: "This, however," as was there said by Mr. Justice Miller, "does not remove the suspicion which naturally attaches to such contracts; and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or of any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved." In Pennsylvania the rule is the same. In Shoemaker v. Stiles, 102 Pa. 553, it was said: "The parties were attorney and client. The relation gave rise to great confidence, and the attorney is presumed to have the power to strongly influence his client, and to gain by his good nature and credulity, and to obtain undue advantages and gratuities. Hence the law often declares transactions between them void which between other persons would be unobjectionable. Unless the transaction was fair and conscionable, it is deemed a constructive fraud." And in Chester v. Barber, 97 Pa. 463: "That an attorney may make any contract he sees proper with his client in regard to his compensation, and acting in his own behalf, and with reference to his own property, is not denied. All that the law will do in such a case is to scrutinize the transaction, and see that it is fair, and that no unconscionable advantage has been taken either of the necessities or the ignorance of the client." The general consensus of opinion is summarized in 5 Am. & Eng. Ency. Law (2d Ed.) p. 828: "It may be stated as a well-grounded rule that a contract for a contingent fee must be made in good faith, uberrima fides, without suppression or reserve of fact, or apprehended difficulties, or undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction is characterized throughout by all good faith to the client." Indeed, in the case of Herman v. Metropolitan Street Ry. Co. (C. C.) 121 Fed. 184, where an attorney claimed 50 per cent. for the recovery of $500 in an accident case, under an agreement for a contingent fee, Judge Lacombe went to the length of saying that a fee of such proportion was in itself in that case unconscionable. He there said: "The court is not satisfied that such a contract was made, but, if it were, it was so utterly

unconscionable as to be void. Matter of Fitzsimons (Sup., First Dept., Dec., 1902) 79 N. Y. Supp. 194. The action was to recover damages for injuries resulting from an ordinary street accident—a collision between a car and a truck. To constrain or persuade a client into an agreement to give half the recovery, and to pay all the disbursements, for preparing and trying such a case, is an abuse of confidence, which, in the language of the cases cited, it would not be in the interest of public policy or professional ethics to approve." Under these circumstances, and in view of the facts and circumstances of this case, and the testimony that the fee charged was far in excess of the value of the services rendered, we think the plaintiff was entitled to have the jury pass upon his mental capacity at the time to enter into an agreement of this character, and to "scrutinize the transaction, and see that it was fair, and that no unconscionable advantage has been taken either of the necessities or the ignorance of the client" (Chester v. Barber, supra); to ascertain whether the transaction was fair and conscionable (Shoemaker v. Stiles, supra); and, if the compensation was so clearly excessive as to amount to extortion, to protect the party aggrieved thereby (Taylor v. Bemiss, supra). The plaintiff having been deprived of his constitutional right to a jury trial, the case will be reversed, and a venire de novo awarded.

DALLAS, Circuit Judge (dissenting). A contract for a contingent fee is valid. Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753; Wright v. Tebbitts, 91 U. S. 252, 23 L. Ed. 320; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64. Where a party to such a contract alleges that he lacked contractual capacity when he made it, the burden of sustaining that allegation rests upon him, precisely as it would with respect to any other contract. Therefore I cannot agree that the trial court should have permitted the jury to set aside the written contract which was admittedly made in this case, upon evidence that the plaintiff below was nervous and hysterical, but without any proof that he was incapable of comprehending what he was doing, and in the face of testimony which, as I think, clearly shows that he was not.

I do agree that it is the duty of the courts to scrutinize such transactions, and I may be permitted to add that, in my judgment, this duty should be rigorously discharged. If it be found that the attorney has exercised undue influence over the client, has been guilty of fraud, imposition, or extortion, or has in any manner abused the confidence which pertains to the relation of attorney and client, the party aggrieved ought to be, and in a proper case will be, protected. But, as I read it, this record discloses no testimony that the attorney against whom this suit was brought did any of these things. Therefore I think the learned judge was right in directing a verdict for the defendant, and that the judgment which was entered should be affirmed.

BURLEIGH et al. v. FOREMAN.

(Circuit Court of Appeals, First Circuit. September 22, 1903.)

No. 472.

1. BANKRUPTCY—APPEALABLE ORDERS.

Following Union Trust Co., Petitioner (C. C. A.) 122 Fed. 937, a court of bankruptcy has undoubted power to marshal assets in the hands of a trustee, as between partnership and individual creditors, in the exercise of its equitable jurisdiction conferred by Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]; and when, in the course of such proceedings, a distinct and separable issue is raised between parties intervening, involving substantial rights, and which might arise at common law or in equity, the case presents a controversy within the meaning of section 24a, and an appeal lies from the order made thereon under such section to the Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Massachusetts.

Addison C. Burnham (Albert S. Hutchinson, of counsel), for appellants.

Bancroft Gherardi Davis, for appellee.

Before COLT, PUTNAM, and ALDRICH, Circuit Judges.

PUTNAM, Circuit Judge. This is an appeal from a decree of the District Court for the district of Massachusetts. The proceedings arose out of the bankruptcy of the copartnership of E. C. Hodges & Co., and the question involved is an issue between the creditors of the copartnership and the creditors of one of the copartners, Hodges, relative to the title to the proceeds of seats at the Boston and the New York Stock Exchanges, and at the Chicago Board of Trade, and certain notes and shares of stock of the Wheelman Company. All these assets stood in the name of Hodges; but the creditors of the copartnership claim that they, in fact, belonged to it. A decree was entered that the property constituted joint assets. Thereupon this appeal was seasonably taken. The appellants are Charles B. Burleigh and the Washington National Bank, creditors of Hodges, and Freeman Hutchinson as trustee of the joint and several estates. There is only one appellee, Henry G. Foreman, a creditor of the copartnership.

Of course, in strictness, Burleigh, the Washington National Bank, and Foreman should have been required to intervene in the litigation each in behalf of himself and of all other creditors of the same class. Unless interventions are made in that way, it cannot be clear that adjudications are conclusive against any creditors except those nominally parties to the proceedings. However, no point is made on that account, and, on the record as it stands, we are not required to assume that there are any joint or several creditors except those before us.

The proceeding seems to have commenced with the filing of accounts by the trustee as required by law, crediting the assets in dispute to the individual estate of Hodges, and praying, in several peti-

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

tions and amended petitions, that dividends should be ordered on that basis. Thereupon, Foreman filed several answers to the petitions, solely in his own behalf as stated, without any apparent authority from the court to intervene, if any was needed. Burleigh and the Washington National Bank, in like manner, filed petitions praying that the assets should be marshaled as now claimed by them. The record contains a number of petitions and amendments, in various stages, before the ultimate issues were framed. The result was that there was an order directing reformed pleadings, which clearly recognized the standing as litigants of the creditors who took this appeal. The District Court, having, as we have said, decided that the assets in question belonged to the copartnership, entered accordingly a decree which fully disposed of that issue, and which, therefore, so far as this subject-matter is concerned, was final. Thereupon, Burleigh, the Washington National Bank, and Hutchinson as trustee appealed, as we have said, against Foreman only.

The appellee now moves to dismiss the appeal for several reasons, only one of which has been relied on at bar. That is as follows:

"The matter sought to be brought before this court on appeal is not within the terms of section 25a, and is not a controversy in bankruptcy proceedings within the meaning of section 24a of the bankruptcy act."

Section 2 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], enumerates certain matters over which the courts of bankruptcy are invested with jurisdiction at law and in equity. This gives them undoubted cognizance of the marshaling of assets in the possession of the trustee in proceedings like that underlying this appeal, as was fully explained by us in Union Trust Company, Petitioner (C. C. A.) 122 Fed. 937. In this respect the District Courts are not within the prohibition of Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and of decisions which have followed that case, but their powers are analogous to those exercised by equity courts in marshaling and distributing assets which have come within their control and into their custody. When, however, the equity courts assume a jurisdiction of that character, it is a fundamental rule, so far as the federal tribunals are concerned, that, whenever any party intervening raises a distinct and separable issue or controversy involving substantial pecuniary rights, an appeal lies. Pursuing that analogy, an appeal should be allowed in the present case. A construction of the bankruptcy act of 1898 which would lead to a different conclusion would be monstrous. It would give a single judge absolute power over questions of fact concerning estates in bankruptcy, no matter how immense, while no such power exists in any other branch of the federal judicial jurisdiction. Such a result should not be accepted unless the statute furnishes some express provision in that direction, clear and positive. None such exists.

The relief given by the bankruptcy act of 1898 to litigants dissatisfied with the conclusions of the District Court are distinctly threefold: First, there is an appeal provided in section 25, with reference to the specific matters named therein. This was needed if an appeal was to be allowed, as the matters to which it relates could arise in bank-

ruptcy only. Second, section 24b gives the several Circuit Courts of Appeals jurisdiction "to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction." Third, section 24a invests them "with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

Notwithstanding the limited form of expression in section 24b, the appellee maintains that its provision for revision relates to all matters covered by section 2 of the act of 1898, exclusive of all other methods of relief. It is true that, when a statute vests a new jurisdiction and simultaneously enacts a specific remedy, it ordinarily excludes by implication all others. Nevertheless, this is not a universal rule, as is very peculiarly illustrated with reference to the construction of that clause of section 5 of the act of March 3, 1891 (26 Stat. 826), establishing the Circuit Courts of Appeals, which provides an appeal to the Supreme Court in cases in which the jurisdiction of the court below is in issue. It is the settled construction of this statute that, contrary to the usual rule to which we have referred, the losing party in a Circuit Court or a District Court may take to the Supreme Court the question of jurisdiction in accordance with this provision of statute, or, notwithstanding the ordinary implication arising from the specific grant of this method of relief, he may take the entire case, including the question of jurisdiction, to the Circuit Court of Appeals. So with reference to this provision of the bankruptcy act of 1898, on which the appellee relies, it is not unreasonable to hold that a dissatisfied litigant may appeal as to both the law and facts, or may, where a question of law is concerned, take the less expensive and the more summary manner of raising that alone by a revisory petition. Certainly, no detriment could come therefrom, because, in the latter case, the party aggrieved waives all questions of fact which is for the advantage of the winning party in the court below. Such certainly has been the practical construction of this statutory provision, because, in many cases before us, and also in some cases before the Supreme Court, revisory petitions have been considered without objection, even where the issue was clearly of an adversary character, and, in accordance with the rule of Bardes v. Hawarden Bank, not within the jurisdiction of the court of bankruptcy except by the consent of both parties thereto. But this case rests on a more substantial basis.

The appellee maintains that we early decided this question in his favor. This is not maintainable in view of the express caution which we have given the bar in several cases, among the rest in Hutchinson v. Otis (decided on May 22, 1902) 115 Fed. 937, 941, 53 C. C. A. 419, in Hutchinson, Trustee, v. Otis, Wilcox & Co., Hutchinson, Petitioner, and Osborne, Petitioner (decided by us on September 4, 1902) 123 Fed. 14. We need not refer to these opinions at length, because they leave it clear that there has been no formal decision by us of the issue now before us. In the same vein, on a revisory petition in Franklin A. Chase et al., Petitioners, 124 Fed. 753, we passed down on June 18, 1903, an opinion sustaining the petition, although the issue there was of an adversary character, and might have been forced

into a formal suit on the rule of Louisville Trust Company v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

Neither has the Supreme Court expressly ruled on the proposition before us. It has, without question, permitted cases to come before it based on revisory petitions to the Circuit Courts of Appeals without comment on this topic. White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Company v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, already cited; Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318; and Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. In these cases it has proceeded so indiscriminately on the foundation of a revised petition to a Circuit Court of Appeals as to give much color to our proposition that in many cases parties considering themselves aggrieved may proceed either by such a petition or by appeal. Wall v. Cox and Louisville Trust Company v. Comingor, ubi supra, were clearly cases of an adversary character, and so far beyond the jurisdiction of the District Court unless by consent, in accordance with the rule in Bardes v. Hawarden Bank, that the party aggrieved certainly had a right of appeal, on all rules of law, if he had seen fit to exercise it. We have searched carefully the late decision of the Supreme Court in Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, without finding any light on this particular topic.

But, clearly, "proceedings of the several inferior courts of bankruptcy" and "controversies arising in bankruptcy proceedings," as to the latter of which appeals to the Circuit Courts of Appeals are expressly allowed, may take on entirely different characters. The Supreme Court has clearly recognized the distinction in Bardes v. Hawarden Bank, ubi supra, at page 536, 178 U. S., at page 1005, 20 Sup. Ct., and 44 L. Ed. 1175, and again in Denver First National Bank v. Klug, 186 U. S. 202, 205, 22 Sup. Ct. 899, 46 L. Ed. 1127. We have explained this in Hutchinson v. Otis (C. C. A.) 123 Fed. 14.

The subject-matter of this appeal is not in any way peculiar to bankruptcy. Questions of marshaling assets between a copartnership and individual partners arise at common law, but oftener at equity. In the present case the controversy is governed entirely by the principles of the common law and the rules of equity, and it is, therefore, for the reasons we have given, of an essentially different class from the matters as to which section 25a allows appeals. It is involved in the present "bankruptcy proceedings" simply because it arose in them, within the meaning of the citation already made from section 24a of the statute of 1898. The question involved is not, in any proper sense of the word, a mere proceeding in bankruptcy; and there is no reason, either in the theory of the law or in the express language of the statute, why relief should be limited to that kind which is afforded only with reference to such proceedings.

The motion to dismiss the appeal is denied.

DUNN v. TRAIN.

(Circuit Court of Appeals, First Circuit. September 29, 1903.)

No. 461.

1. PLEDGES—VALIDITY—SUFFICIENCY OF DELIVERY.
By an agreement a paper company was to deliver all the product of its mill to plaintiffs, who were its selling agents, as security for advances which were made to it by plaintiffs, and such deliveries were made as fast as the goods were manufactured to a designated agent for plaintiffs, who was also an employé of the company, and the product when so delivered was placed by itself on the premises of the company, and was thereafter controlled by the agent, who shipped it from time to time for sale when ordered by plaintiffs. *Held* that, under the rule that there must be both delivery and continued possession to constitute a valid pledge as to third parties, there was such actual delivery and continued possession by the pledgees as to render the pledge valid as against an assignee in insolvency of the company, with respect to the goods on hand in the custody of the agent when the assignee was appointed.

2. SAME—RECEIPTS.
A pledge is not invalidated because no receipt was given the pledgor for the goods when they were actually delivered to an agent of the pledgee, although they remained on the premises of the pledgor, nor because on a transfer of possession by the agent to a successor he took no receipt for the goods.

3. INSOLVENCY—VALIDITY OF TRANSFERS—BURDEN OF PROOF.
To entitle an assignee in insolvency under the statute of Maine to invoke the provisions of such statute making void transfers of property by the insolvent within four months to one having reasonable cause to believe him insolvent, or in contemplation of insolvency, or for the purpose of giving preference to pre-existing debts, such assignee must establish by proof the facts which bring the transaction in question within the terms of the statute and make it applicable.

In Error to the Circuit Court of the United States for the District of Maine.

Charles F. Woodard, for plaintiff in error.

George E. Bird (William M. Bradley, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This case involves an agreement or pledge under which the plaintiff below, as selling agent of the Bangor Pulp & Paper Company, had advanced money largely in excess of the value of the replevied goods, and one which contemplated that the material in question—bundles and rolls of paper already finished into paper from pulp, and such as should from day to day be finished—should be delivered to the plaintiff, now the defendant in error, as security for the sums so advanced. There is no question here as to the consideration or as to the actual good faith of the parties, neither is there any question about the intention of the parties to create security by pledge.

This case must therefore turn upon the question of delivery and acceptance, or, in other words, upon change of possession. We as-

sume that it was necessary to the creation of a valid pledge, as against third parties, that it must have been intended that possession should change from the pledgor to the pledgee, and that, possession being changed, it must be preserved by the pledgee through a retention of such dominion over the property as the rules of law require.

This we assume, at the outset, to be an essential element of such an agreement where the question of right is to be determined between the pledgee and a bona fide purchaser or attaching creditor, and for this case we may assume such to be the rule as between a pledgee and an assignee in insolvency. Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779. Having assumed this, as contended for by the plaintiff in error, the citations from the Maine statutes and the authorities fail to apply, for the reason that they are directed against situations where a change of possession does not exist; and it results, therefore, that the only question left to that side upon this branch of the case relates to the sufficiency of the delivery and acceptance. In other words, did the parties, intending to make the pledge effective, do enough to answer the requirements of the law?

It being a question of intention, and a question whether the change in the situation of the property was such as to be notice of a change of possession, it was, under the circumstances, largely a question of fact, to be determined under rules of law.

The learned judge who heard the case below has found that the paper manufactured at the time of the agreement—350,000 pounds at 2 cents a pound—was billed to the pledgees by the Bangor Pulp & Paper Company, and that the Bangor Pulp & Paper Company received from the pledgees $6,500, and receipted for the same; that the paper, so billed and receipted for, remained in the custody of the agent of the pledgees at the mill of the Bangor Pulp & Paper Company at Orono, Me., an agent whom the parties agreed upon for that purpose, and who was an employé of the paper company; that, by arrangement of the parties, the paper thereafter manufactured was also put into possession of the pledgees in the same way to secure the liens for advances made thereon from time to time, and that it all remained in the hands of the agents of the pledgees, subject to their orders; and that thereafterwards, to the end that the situation might be made more secure for the pledgees, the Bangor Pulp & Paper Company, on the 31st day of August, 1895, sent a communication to Train, Smith & Co., the pledgees, as follows:

"Boston, August 31, 1895.

"Messrs. Train, Smith & Company—Gentlemen: In your order to keep your general lien unimpaired and, at the same time, to save the freight on the goods, we agree to deliver each day to your agent here, Mr. John H. Kline, the finished product of our paper mill, taking his receipt therefor. These goods are to remain in his possession as your agent and may be kept in store by him in our basement without charge until shipped by him in your name. We are to allow Mr. Kline to act as your agent. Very truly yours,

"Bangor Pulp and Paper Company,
"Chas. W. Walcott, Asst. Treasurer."

It was further found as fact that from the said 31st day of August the paper company for a time delivered to Mr. Kline, under this arrangement, all the finished product of the mill, the place of such de-

posit being accessible from other portions of the mill; that paper thus deposited remained where it was deposited in the mill, apart by itself, not confused with any other paper, until December 30, 1895, at which time the paper company had constructed a new storehouse, and thereupon the paper which had been already delivered and deposited in the basement and shipping room of the mill, as above stated, was transferred to the new storehouse, and remained under the care of Gedney, who had been appointed the agent of Train, Smith & Co., where it remained apart from all other paper until replevied; that the several agents who had been appointed for the purpose of holding possession and taking delivery, when ceasing to act for the pledgees, made no formal delivery to their successor, but left the pile where it was and as it was, each successor adding to the pile the product as it was delivered to him; that no distinguishing marks had been put upon any of the paper; that part of the deliveries were receipted for by the agent, while others were not, but the paper for which receipts had not been given was placed daily with the paper for which receipts were given, and the same was taken charge of by the agent.

The learned judge ruled that the plaintiffs below became pledgees of the paper so set apart and deposited with their agents, with power and right to sell all or any portion of the same and credit the proceeds, and that the pledgees were entitled to hold such paper under general advances actually made; that paper delivered without receipts and taken into the control of the plaintiffs' agents was affected with the pledge the same as that receipted for.

We think the learned judge was right. The substantial question, as we have said, is whether there was a sufficient delivery and acceptance of the property. There is no rule of law that a delivery or change of possession shall be established by a receipt. There may be a valid delivery and acceptance, or, in other words, a change of possession, without a receipt. The real question being whether there was a sufficient delivery and change of possession, the receipts, such as were given, were merely evidence upon that question, and there was no error in including the property not receipted for, provided the facts in other respects were sufficient to warrant the holding.

We assume, of course, as we have already said, and in accordance with the cases cited by the plaintiff in error from the decisions of the Supreme Court of Maine and of the Supreme Court of the United States, that, as against third parties, a delivery of possession is essential to a valid pledge or lien, and that continued possession is likewise essential, and thus the situation at once resolves itself into one where the real question is whether, upon the facts disclosed by the findings, we should say, as a matter of law, that the facts did not warrant the findings below.

Thus, the necessity of delivery and continued possession being assumed, we must consider whether, upon the facts disclosed, the situation was such as to require this court to say that the findings as to delivery and possession were not warranted by law. In this connection it must be observed that the general and specific findings, together with the rulings and the judgment thereon, to say nothing of presumptions which ordinarily go with general findings and judg-

ment, sufficiently show that the learned judge below treated delivery to the pledgees and continued possession by them as essential elements of a valid pledge. The whole theory of the findings proceeds upon the idea that the parties understood a change of possession to be necessary, and that they undertook to create such a change, and that the judge who tried the case considered such a change essential.

Upon the question whether possession was maintained, if acquired, it will be seen that there is no finding that the pledgees abandoned such possession of the property as they had, and, indeed, the record discloses no evidence tending to show an intentional relinquishment of such possession as they had. On the contrary, the evidence and the finding show that, through their agents, they continued to exercise dominion over the property. And, if it were a question whether the findings were justified by the evidence, it would apparently be found that there is no evidence of an abandonment of the delivery and possession which the pledgees claim to have perpetuated through their agents from Kline down through to Gedney.

We are not aware of any absolute rule of law which would render actual possession and dominion inoperative, and a pledge invalid because the keeper selected to protect the property was in the employ of the pledgor. Such a bailee or keeper was in the employ of the manufacturers in Sumner v. Hamlet, 12 Pick. 76; and even, as said in Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779, temporary possession may be in the pledgor himself as special bailee without defeating the legal possession of the pledgee. Neither is there any absolute rule of law that, where one keeper succeeds another, formal delivery shall be made to the successor. Of course, enough should be done to identify the property, and to show that dominion and control over the property were assumed by the successor, and this sufficiently appears; for the learned judge below has said that the pile being left where it was, and as it was, the successor added to this pile the product as it was delivered to him. Nor is there any absolute rule of law which requires property pledged to be removed from the premises of the pledgor. It is enough if the facts sufficiently show that the goods are actually set apart in the keeping of the special bailee, with authority to notify third persons that they are held in pledge, and to remove the goods, if found necessary for the safety of his principal.

Resuming consideration of the substantial question, which relates to the sufficiency of the delivery, the general rule is that the delivery must be such as to pass property, and this rule is apparently satisfied by depositing the article pledged or sold in some suitable place for the pledgee or keeper to take away when he chooses, and the delivery may be either actual or constructive. There is no occasion, however, to deal with the doctrine of constructive delivery, for the goods here were actually delivered in pursuance of an agreement and upon a valuable consideration actually advanced.

The Maine Case of Merrill v. Parker, 24 Me. 89, while not strictly in point, as there were no third-party interests, is still a strong case for the defendant in error upon the question of sufficiency of change in possession, because there an important thing remained to be done by the buyer, who was to call and pay for the goods which had been bar-

gained for and set aside in the seller's shop; still it was held that enough was done to pass the title.

Of the cases which we have examined as illustrating the principle involved in the question we are considering, that of Sumner v. Hamlet, 12 Pick. 76, would seem to apply itself to the situation more closely than any other. See, also, Thorndike v. Bath, 114 Mass. 116, 19 Am. Rep. 318.

Of course, where the property pledged is not removed from the premises of the pledgee, the fact of actual delivery and of actual control and dominion by the pledgee or its agent should clearly and unmistakably appear, and, the fact being so established, the requirements of the law are answered. In this case it is distinctly found that the delivery or deposit was actually made to the pledgee, and that dominion over the property was exercised by the pledgee through its agents down through to Gedney, when, in December, as distinctly found by the learned judge below, the paper which had been already delivered and deposited in the basement and shipping room of the mill was transferred to the new storehouse and remained under the care of Gedney, who had been appointed the agent of Train, Smith & Co., where it remained apart from all other paper until replevied.

Now, as to the question of the effect of insolvency proceedings. Some part of the goods replevied were delivered within four months of the assignment and of the insolvency proceedings; but they were delivered in pursuance of an agreement entered into more than four months before, and we must assume, from the general finding and judgment, upon money actually advanced in good faith, and not upon reasonable cause to believe or in contemplation of insolvency, or for the purpose of giving preference to a pre-existing debt, or in fraud of the laws of Maine relating to insolvency. We cannot upon writ of error go into the question of fact whether the Bangor Pulp & Paper Company was actually insolvent or whether the pledgee had reason to believe that it was in a failing condition. The statute in question is not operative in the hands of an assignee in insolvency against an actual transaction of this kind, unless he establishes in the proper court the facts contemplated by the statute as showing conditions under which it will become effective. This the assignee has not done. There are no findings against the pledgees upon the questions of fact necessary to make the statute operative in the hands of the assignee, while the general findings, the rulings, and the judgment carry the presumption that the facts contemplated by the statute were found against the assignee. This being so, we are not called upon to examine the question whether insolvency proceedings would affect or impair the delivery of goods within four months, under an agreement, prior to such period, made in contemplation of insolvency, as a preference to secure a pre-existing debt upon reasonable cause to believe insolvency, or in fraud of the insolvency laws of Maine.

Upon the findings, we think there was no error in the rulings as to the insolvency phase of the case.

Having sustained the position of the court below as to the right of possession by the pledgees, there is, we think, no occasion for dis-

cussing at length the questions raised by the fifth assignment, for it is clear enough, the pledge being valid and the right of possession on the part of the pledgees being established as an existing and continuing right, that the claim of possession on the part of the assignees prior to the date of the writ, without discharging the lien or pledge by paying or tendering the amount due, was wrongful.

The judgment of the Circuit Court is affirmed, and the defendant in error is to recover costs of appeal.

In re BOSTON DRY GOODS CO. et al.

In re NOYES BROS.

(Circuit Court of Appeals, First Circuit. October 13, 1903.)

No. 463 (Original).

1. BANKRUPTCY—PETITION FOR REVISION—SUFFICIENCY OF RECORD.

On a petition to revise in matter of law the proceedings of a district court in bankruptcy, in order that it may appear by the record that the issues raised were presented below, and for other reasons, findings which involve distinct propositions of law, or something as a substitute therefor, are necessary, and they cannot be supplied by a mere opinion of the court. While in some cases involving issues of a substantial character justice may require a relaxation of the rule, or the consideration of issues not presented to the original tribunal, such course will not be followed where the questions raised relate merely to matters of form or administration, and no material detriment to the estate can result from the action complained of.

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

Frank H. Stewart, for petitioners.

Jeremiah Smith, Jr., pro se, and Ralph S. Bartlett, for George G. Stratton and thirty-one other creditors.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a petition under the bankruptcy act of July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], by sundry creditors of Noyes Bros., Incorporated, bankrupt. Our jurisdiction is, of course, limited to matters of law. The object of the petition is that we should revise the determination of the District Court with reference to the election of trustees of the bankrupt estate. It was brought by several creditors who voted for one Mr. Spring for trustee, and who constituted the majority in number of those present at the meeting whose claims had been allowed. The referee admitted and canvassed votes alleged to have been thrown by other creditors, whose claims had been allowed, for a board of three trustees. These, as their votes were canvassed, constituted a majority

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

in amount; so the referee determined that there was no election, and appointed one of the respondents sole trustee. His action was confirmed by the District Court. The petitioners claim that their votes elected Mr. Spring trustee, and object to the canvassing made by the referee, and to his appointing the present respondent trustee, and, in fact, to his appointing any trustee.

It was observed in Falter v. Reinhard (D. C.) 104 Fed. 292, 295, as to Mr. Zinn, whose choice as trustee was ultimately set aside in part for the very reasons which are urged in this case, that there could be no personal objection, and that he was a reputable citizen and a business man of acknowledged ability, whose competency for the position was not questioned. We must observe that the same may properly be said about all the persons who were candidates for that office in the case before us. Moreover, there is no evidence and no suggestion that any substantial detriment would come to the estate as the result of these proceedings, whichever way they may be determined.

Ordinarily, with regard to revisory petitions of the class to which the one at bar belongs, we have made due allowance for the facts that the bankruptcy act of July 1, 1898, gives no specific directions as to the practice with reference thereto, and that our rule 36, framed concerning the same, should be regarded as tentative, having been designed especially to secure prompt administration, and with a lack of experience on the part alike of the bench and the bar. Yet, of course, it must be admitted that we are not expected to look through the whole record for the purpose of ascertaining the issues intended to be laid before us, and we are not justified in doing so with regard to conflicting or obscure statements. It must also be admitted that ordinarily a record conforming strictly to the purpose of the statute would present to us simply, clearly, and unequivocally issues of law, to the like effect as by bills of exceptions, by proceedings without a jury, under sections 649 and 700 of the Revised Statutes [U. S. Comp. St. 1901, pp. 525, 570], by proceedings in the Supreme Court in causes of admiralty and maritime jurisdiction, while appeals lay from the Circuit Courts to the Supreme Court as provided in the act of February 16, 1875, c. 77, 18 Stat. 315 [U. S. Comp. St. 1901, p. 525], and by proceedings certifying causes to the Supreme Court as provided in section 6 of the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], establishing the Circuit Courts of Appeals. While, with reference to a proceeding of the class before us, there is nothing which especially directs the District Court with regard to findings of fact or statements of conclusions of law, as do some of the statutes to which we refer, yet the various decisions of the Supreme Court as to those statutes must be studied for a proper understanding of the substantial requisites of a record like that at bar. Moreover, while as to some matters of a substantial character justice may require that jurisdiction be taken on appeal of issues not presented to the original tribunal, yet, as we will see, there is nothing of that kind in the case before us; and, in order that it may appear by the record that issues raised on appeal were presented below, findings of

fact which involve distinct propositions of law, or something else as a substitute therefor, are necessary.

The petition in the present case was filed, as we have said, by one class of creditors, making the trustee a respondent, as also one of the other class of creditors by name, and it also assumed to make 31 others respondents, without naming them, all in the same class as the creditor specified. The answers make some objection to this description of the 31 other creditors; but this was not followed up, and all we need say is that we do not now assume to approve the form of the petition in this particular or to disapprove it.

The record intends to raise two leading questions. One is, what powers has the court in canvassing votes for a trustee alleged to have been procured or solicited by the bankrupt, and how far should it exercise them, and according to what rules. The second is whether an attorney was properly allowed to represent creditors who were not personally present at the meeting. As to both of these questions, the allegations of the petition are in the form of statments by way of inducement, and therefore they are neither positive, direct, nor full. There are departures between the allegations in the body of the petition and the seriatim statement of the claimed errors of the District Court, and further departures between each of them and the certificate of the referee as to the questions which arose before him. The petition is also erroneous in that it assumes that the opinion of the learned judge of the District Court states the "findings, rulings, and orders" of that court, so that it may be brought before us to enable us to ascertain the questions of law involved. The greater number of the alleged errors are based on this hypothesis. A mere opinion is, of course, no part of the record. There are no findings of the District Court in any proper sense of the word, and all we have in lieu thereof are such admissions as may be found in the answer, which do not in any way touch the substantial difficulties, and the certificate of the referee, all the essential parts of which are as follows:

"The votes of certain creditors for the choice of a trustee were challenged on the ground that the proof of their claims and the authorization of appearance thereon by the attorney had been obtained through the solicitation of the bankrupt by its treasurer, David W. Noyes, and its attorney, Amos L. Hatheway, Esq., one of the receivers, for the purpose of procuring the election of the latter as one of the three trustees, for whom the votes were cast. The other candidates on this ticket were Jeremiah Smith, Jr., Esq., also one of the receivers, and Victor J. Loring, Esq., counsel for one of the larger creditors, neither of whom participated in such solicitation as was made. The evidence upon the question was very brief, and is herewith transmitted with the exhibits. As I could not find that any undue influence had been exerted upon these creditors, nor any improper inducements offered them to procure the proofs of their claims, and, the matter being one in my discretion, I ruled that they should be allowed to vote, and their votes were received accordingly.

"Further objection was made to the reception of certain of these votes which had been signed by creditors who were not present in person at the meeting, though an appearance had been entered for all of them by attorney, by indorsement of his name upon their respective claims. The canvassing of the votes being in progress, and no result having been declared, I permitted the attorney for these creditors to amend their votes by substituting his own name as attorney, and casting the votes as such. The result of the ballot was that the three candidates voted for by these creditors had a majority in value of the claims which had been proved and allowed, while the candi-

date of the other creditors, Mr. Plummer C. Spring, also one of the receivers, had a majority in number. No request being made by any one that another ballot be taken, I declared there was no election, and appointed Mr. Smith as trustee, from which said ruling parties have petitioned for a review by the judge."

As we have already said, the petitioners assume that the opinion of the learned judge of the District Court states the "findings, rulings, and orders" of that court. This, as we have said, forms no part of the record, so that there are no findings of that court in any proper sense of the word. The decree of the court is general in its terms, not containing any findings, but merely affirming the judgment and orders of the referee. The record discloses no application to the District Court for specific findings of fact, so that, in all respects, the record is as the petitioners saw fit to make it.

We are therefore left to the certificate of the referee to ascertain from it, if we can, the issues which are intended to be presented. It suggests two issues. One is with reference to the solicitation, inducement, and influence of the bankrupt with regard to the election of trustees; the other relates to permitting an attorney to enter an appearance for the respondent creditors, and further permitting the amendment of their votes by inserting his name as attorney and casting the votes as such.

As to the first issue, the certificate transmits the oral evidence with reference thereto, together with the exhibits before the referee. It is possible that, on searching through the evidence and the exhibits, we might find a specific issue of law involved, and the same is the fact with reference to the second issue. Of course, the matter of the admittance by the referee of an attorney to appear before him presents no specific formalities which necessarily raise an issue of law. The practice in the District Court in Massachusetts is for referees to admit attorneys to appear without any formal authorization. This is allowable and proper, because it conforms the practice of the referee, as it should conform, to the practice of the court itself. This is to admit members of the bar of the Circuit Courts and District Courts to appear on oral applications, according to the practice which prevails alike in the state courts and in the federal courts. Shaw v. Bill, 95 U. S. 10, 24 L. Ed. 333.

In this particular case we do not feel called on to exercise the liberality with reference to the practice on petitions of this character which we have sometimes exercised, for the reasons which we have already stated. If it involved substantial interests, we might make the "due allowance" which we have said we have ordinarily made, and endeavor to sift out from the record the issues of law, if it presents any. We might feel called on to do this even in cases which could be said to relate to the mere administration by the District Court of the bankruptcy statutes. But the case at bar is not merely administrative in its character; it relates to a subject-matter as to which, as we have already said, there is no suggestion of any practical detriment that would come to the estate from the determination of the District Court to which the petition relates, even if, strictly speaking, that determination should have been otherwise than what it was. It would

be detrimental to the authority of the District Court, injurious to its administration of the bankruptcy statutes, and involve the numerous and useless delays which those statutes evidently have been framed to avoid, if, in administrative matters where no substantial interests are concerned, we became meddlesome beyond what the law requires of us. This observation applies particularly to this case, to the extent that we ought not to take jurisdiction over propositions of the character submitted to us, which the record does not clearly show were brought specifically to the attention of the District Court, as we have already explained. Therefore we are of the opinion that, if the petitioners desired to raise the issues which they have sought to present, they should have held themselves bound by the strict rules applicable to petitions of this character; and that, in this particular case, we ought not undertake to revise the findings and conclusions of the referee, which have been solemnly affirmed by the District Court, on a record which confuses the issues of law and fact as they are confused in the one before us.

The authority given by the referee to the attorney for the respondent creditors to amend votes was clearly properly exercised according to the liberal rules touching amendments which prevail in bankruptcy proceedings, and, indeed, it would be the same even under the rules of the common law.

The petitioners raise an objection based on the statement of the referee as to the matter being one in his discretion. At the most, this was surplusage, because his action was prima facie justified by his statement preceding it. The expression can hardly be construed as the petitioners construe it, because it is unreasonable to conclude that the referee determined that the matter was within his discretion in the larger sense of the word. The District Court did not so construe it, because it affirmed in terms "the orders and judgment of the referee," and used no expression to justify any suggestion that it intended to approve the exercise by him of mere discretion. At all events, it is especially plain, on the commonest rules of practice relating to appellate proceedings to which we have referred, that the record should make it clear that a verbal criticism of this character was brought directly to the attention of the court of the original jurisdiction before it was sought to be made the basis of a revisory petition, and there is nothing whatever of that character in the case at bar.

Let there be a decree dismissing the petition, with costs for the respondents.

RUMFORD CHEMICAL WORKS v. NEW YORK BAKING POWDER CO. et al.

(Circuit Court, S. D. New York. August 27, 1903.)

1. PATENTS—INVENTION—CHANGE IN FORM OF MATERIAL.
Merely changing the form or condition of a substance by mechanical means, by grinding or reducing it to a finer state, or conversely by producing it in a granular instead of a powdered form, does not make it a new article, in the sense of the patent law, where it remains unchanged in composition and properties.

2. SAME—BAKING POWDER.
The Catlin patent, No. 474,811, for a baking powder or preparation of the usual composition, but in which the phosphoric acid element is in granular form essentially free from pulverulent material instead of in a finely pulverized condition, as in prior compounds, the purpose being to render it less subject to atmospheric change, so that it may be put up in less expensive packages, is void for lack of patenable invention, in the absence of proof that the product of the patent possesses different properties in use than those of the prior art.

In Equity. This cause comes here at final hearing upon pleadings and proofs. The bill is in the usual form for injunction and accounting, infringement being charged of United States letters patent 474,811 to Charles A. Catlin (assignor to plaintiff), May 17, 1892, for baking powder.

Philip Mauro, for complainant.

Briesen & Knauth (Paul Bakewell, of counsel), for defendants.

LACOMBE, Circuit Judge. The specifications are more than usually full, and an extended quotation from them will sufficiently present the questions whose decision seems controlling of the main issue in the case. The patentee states that his—

"* * * invention relates to that class of baking preparations in which the active acid agent is, either in whole or in part, some form of phosphoric acid or acid phosphate.

"Under the general head of baking preparations may be included, first, the ordinary baking powder, composed of a mixture of the phosphoric acid element with a carbonate or bicarbonate as active agents; second, the phosphoric acid element, when put up alone, as is sometimes done, without the carbonate or bicarbonate; third, preparations in which the phosphoric acid element and carbonate or its equivalent are put up in separate packages, to be mixed before use; and, fourth, preparations known as 'self-raising flour,' 'quick-raising flour,' 'prepared flour,' and by various names, in which the phosphoric acid element and carbonate are mixed by the manufacturer with flour in proper proportions for use in making bread.

"Broadly stated, the present invention consists in the production of a baking preparation in which the phosphoric acid element is in a practically uniform granular condition, free from pulverulent phosphatic material. This granular phosphoric acid material constitutes a new product or article of manufacture, possessing peculiar and distinctive properties and characteristics of great value for the purposes stated, as will be hereinafter explained.

"As is well known to those familiar with such matters, preparations of the kind above referred to, as ordinarily prepared, while possessing the highest dietetic value and leavening efficiency, possess, nevertheless, the property of serious deterioration when freely exposed to atmospheric humidity, compelling the manufacturer to employ extraordinary and expensive means in packing to protect them from this influence.

"Heretofore it has been the aim of the manufacturer to produce the phosphatic element in the finest pulverulent condition possible, believing that thus, and thus only, could highest efficiency be obtained. I have discovered, however, that the fine pulverulent condition of the commercial phosphatic powders is not necessary to highest efficiency in the leavening quality, but is rather detrimental to it. Indeed, the results of my experiments have demonstrated that, when a baking powder having the phosphatic element in a granular condition is used in place of one containing that element mainly in a fine pulverulent form, the leavening efficiency of the preparation is materially augmented, while at the same time the deterioration quality is retarded, if not entirely overcome. The reason for the increased efficiency will be readily understood when we take into consideration the fact that within limits a somewhat slow evolution of the leavening carbonic acid gas is desirable, in order that too much of it may not escape from the dough during the mixture and kneading before the loaf is placed in the oven, but rather that a considerable part of it shall remain to be evolved during the baking process, that the dough may be at its highest expansion when hardened by the baking into the permanent cellular structure of the finished loaf. The slow evolution quality is not possessed in a marked degree by phosphatic baking powders, as heretofore prepared, and especially is it lacking when the phosphatic element employed is of a highly acidulous character. This is due to the ready solubility of the acid agent in its finely powdered condition, which, of course, brings it into rapid reaction with the alkaline bicarbonate, and causes the rapid evolution of its gas. When, on the contrary, the particles of the acid are in a coarse condition, solution and consequent reaction are retarded. In practice I have found, therefore, that by giving to the phosphatic element of the baking powder a uniformly coarse condition the property of slow evolution of the gas is increased, and a consequent marked increase in baking efficiency is obtained. In this respect, therefore, the new product possesses a distinct advantage over phosphatic powders heretofore made and used.

"As is well-known, acid phosphates possess naturally a highly deliquescent property, and this to such a degree when reduced to a finely powdered state and exposed to variable atmospheric conditions that they at times greedily absorb moisture, and thereby acquire of themselves alone (or impart to any mixture of powders of which they form a considerable proportion) a sticky, clammy condition. This absorption of the said element, when packed separately in the usual fine condition, causes a recrystallization of the powder, which in such case hardens into a caky crystalline mass, unsuitable for the use intended. Moreover, such a powder or mixture of powders is difficult to pour either in or out of any small-necked receptacle, and is especially difficult to measure out in the quantities in which baking powders are used. This objectionable quality in phosphatic powders, I have found, does not attach to any serious extent to the new granular preparation. The reason for this improvement is plainly apparent when we take into consideration the fact that in the same weight of material the surface exposed to the atmospheric influence is greatly increased the finer its pulverulent condition. * * *"

The specification proceeds:

"The improved keeping quality of baking powder mixtures containing the acid phosphates in a uniformly granular condition is due partly to the reduced deliquescent property of the acidulated material in such condition, already referred to, and partly to the greatly reduced number of points of contact which such granular acidulated material presents to the carbonate, with which it is in admixture, in proportion to the weight employed. Another reason for this is the increased size of the interspaces between the active particles due to this granular condition, which permits, when a fine diluent is employed, of a more complete introduction of said diluent between these particles and their isolation from each other."

The patentee next describes the method of preparing his product, which is acidulated phosphate so reduced by grinding that it will sift through a No. 9 silk bolt, but not through a No. 16 silk bolt. The

evidence shows that theretofore the material had been used as it came through a No. 9 bolt, containing granules of the size of the patent, mixed with so large a proportion of fine particles that it was not essentially free from pulverulent (powdered or dust-like) material, but, on the contrary, was characteristically pulverulent. The patentee states, however, that he does not restrict himself to the method of production described nor to the particular size of granules set forth.

The claims are:

"(1) A baking preparation containing phosphoric acid or its compounds in granular condition, essentially free from pulverulent phosphatic material, substantially as described.

"(2) A baking preparation composed of a phosphoric-acid element in granular form, essentially free from pulverulent phosphatic material, in admixture with a carbonate or bicarbonate, as set forth."

The evidence produced by the complainant shows, more forcibly even than the specifications indicate, that the object sought to be attained was the production of material which would better resist the deteriorating effects of moisture in the atmosphere, and could thus be kept without losing its efficiency, both when packed in its commercial receptacles and when more freely exposed during domestic use. The specification correctly states that existing preparations "possessed the highest dietetic value and leavening efficiency." That does not necessarily mean that they were not susceptible of improvement in those particulars; but the investigations of the patentee were directed, not to such improvement, but to prevent their "serious deterioration when freely exposed to atmospheric humidity, compelling the manufacturer to employ extraordinary and expensive means in packing to protect them from this influence." The patent fully, clearly, and accurately sets forth the difficulty which existed in dealing with such highly deliquescent material "when reduced to a finely powdered state," and the sole remedy suggested is its reduction to a state not finely powdered, but uniformly granular (or containing only a negligible quantity of the powder), so that less surface is exposed to the atmosphere and to the carbonate with which it is in admixture. The evidence indicates that the phosphoric acid element was not, theretofore, used in a condition so free from pulverulent material, and that the change of form has decreased the absorption of moisture, and thus prevented deterioration during the period it is kept before being put to use. But the difficulty with sustaining a patent for such a change of form produced by mechanical division is found in the propositions laid down by the Supreme Court (affirming the Circuit Court, 1 Ban. & A. 497, Fed. Cas. No. 9,607) in Glue Co. v. Upton, 97 U. S. 6, 24 L. Ed. 985. That case presented the converse of the one at bar. There the absorption of moisture by the glue was accelerated by increasing its fragmentary division; here the absorption of moisture by the phosphatic material is retarded by decreasing its fragmentary division. The evidence indicates that in decreasing that division Catlin reversed the practice of his predecessors, and that the result has been to enable the manufacturers to market efficient phosphatic material alone, or combined with the carbonate, in more economical packages; but it is not perceived how, under the decision cited, the

patent can be sustained unless the difference of form effects some alteration or improvement in the properties of the material.

That this difficulty would be encountered in sustaining a patent for his No. 9 to No. 16 granules seems to have been fully appreciated by the patentee, or, rather, by his patent solicitor, who carefully prepared the specifications, apparently to avoid such difficulty by indicating that the patentee's investigations showed that reduction to the granular state, essentially eliminating the powder, affected the properties of the composition.

It is frequently stated in the specifications that the new product possesses peculiar and distinctive properties. It is asserted that the fine pulverulent condition of the commercial baking powder is rather detrimental to the highest efficiency in the leavening quality, while by using the same in a granular condition the leavening efficiency of the preparation is materially augmented. The reason for this is pointed out at some length in a passage which will be found in the quotation supra, and which ascribes the result to the slower evolution of carbonic acid gas during mixing, kneading, and baking. "In practice," says the specification, "I have found that by giving the phosphatic element a uniformly coarse condition the property of slow evolution of the gas is increased, and a consequent marked increase in baking efficiency is obtained."

If this were all so, there would be no difficulty in granting the prayer of the bill, for infringement is plain, and the various other defenses—anticipation, abandonment, and prior use—are not especially persuasive. But the record does not sustain the statements in the specification. Interrogated specifically as to whether there is a greater slowness of evolution of carbonic acid gas obtained by the granular condition of the phosphate, the expert called by complainant says that he does not know. There is not a scintilla of evidence to show that the product of the patent has commended itself to the public as making better bread. The evidence of the principal disinterested witness called from the trade (Clotworthy) is to the effect that between the complainant's fine powder (sold in bottles) and the granular compound of the patent he has never discovered any difference. There is considerable testimony as to experiments made by complainant's employés to determine whether the phosphatic material in granular form would dissolve readily enough in the dough to perform its office by combination with the bicarbonate. Sometimes the results of these experiments were satisfactory, sometimes not; black specks, or black and yellow spots, appearing to spoil the appearance of the loaf. The only evidence to sustain the proposition that the substitution of granules for powder augmented the leavening efficiency is given by the patentee himself. He says:

"The fine condition gives an even, velvety structure, while the other gives a more decidedly porous and more attractive structure to the bread. * * * The effects of granulation in the ultimate results appeared to me to give a very much more presentable loaf, though perhaps not to all others, than where the materials were in fine condition."

This statement is but the pardonable exaggeration of the inventor, who has given time and thought through several years to his experi-

ments, and who, with conspicuous honesty and frankness, admits that others think differently. The effect produced on the court by an examination of the testimony is that the most which can be said is that the substitution of a granular mechanical division for a pulverulent mechanical division of the phosphatic material does not so change its properties as to destroy or impair its leavening efficiency. That such efficiency is augmented is not proved. Under the principles laid down in Glue Co. v. Upton, supra, the bill must be dismissed, with costs.

On Rehearing.

(October 3, 1903.)

All the points raised on this application for rehearing were before the court, and were carefully considered before decision at final hearing. This court may have erred as to the conclusion that Glue Co. v. Upton, 97 U. S. 3, 24 L. Ed. 985, was controlling of the case at bar, but it did so only after consideration of all that is now presented as ground for reaching a different conclusion.

The petition for reargument is denied.

SALMON v. RURAL INDEPENDENT SCHOOL DIST. OF ALLISON et al.

(Circuit Court, N. D. Iowa, W. D. December 27, 1902.)

1. PARTIES—ACTION ON MUNICIPAL BONDS—TITLE OF PLAINTIFF.
   Under Code Iowa, § 3459, requiring actions to be prosecuted in the name of the real party in interest, one to whom negotiable municipal bonds, transferable by delivery, have been delivered as agent for the purpose may sue thereon in his own name, being vested with the legal title, although in such case the action is subject to any defense which exists against the beneficial owner of the bonds.

2. MUNICIPAL BONDS—ESTOPPEL BY RECITALS—ACTUAL NOTICE OF INVALIDITY BY HOLDER.
   A holder of bonds issued by a school district, which were in themselves in excess of the constitutional limit of the district's indebtedness, and contained no recital that they were issued in conformity to the Constitution, who obtained the issuance in exchange therefor of new bonds containing such recital, could not rely thereon to validate the new bonds in his hands.

3. SAME—ILLEGALITY IN INCEPTION—BURDEN OF PROVING WANT OF NOTICE.
   A holder of bonds issued by a school district illegally and without consideration has the burden of proving that he acquired the same for value, and without notice of their invalidity, to entitle him to recover thereon.

4. SAME—ESTOPPEL BY RECITALS—BONA FIDE HOLDERS.
   A holder of bonds of a school district, which were issued illegally and without consideration, and were in themselves in excess of the constitutional limit of the district's indebtedness, procured new bonds to be issued in exchange therefor, containing a recital that they were issued in accordance with the Constitution of the state, which recital was not contained in the original bonds. There was no proof that he purchased the original bonds for value and without notice of their invalidity, and he had actual knowledge that the recital in the new bonds was untrue. *Held*, in actions thereon by transferees, that one who obtained title by

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¶ 3. Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.

See Municipal Corporations, vol. 36, Cent. Dig. § 2006.

descent from the original holder could not recover, but that, as against one who was shown to have been a bona fide purchaser for value and without notice, the district was estopped by the recitals that the bonds were issued in compliance with the statutes and Constitution of the state.

At Law. Action on bonds and coupons issued by the independent school district of Riverside. Jury trial waived, and case submitted to the court.

From the evidence submitted and the stipulations signed by the parties the court finds the facts to be as follows:

(1) The plaintiff, Charles B. Salmon, is now, and was when this action was begun, a citizen of the state of Wisconsin, and the defendants the rural independent school districts of Allison and Jackson were when this action was brought, and now are, corporations created under the laws of the state of Iowa, and the amount involved in the action exceeds the sum of two thousand dollars, exclusive of interest and costs.

(2) Under the laws of Iowa then in force, the independent school district of Riverside, in Lyon county, Iowa, was organized for school purposes in the year 1872, and continued its corporate existence until the year 1885, when the territory comprising that district was divided into two districts, now known as the rural independent district of Allison and the rural independent district of Jackson, and by operation of the laws of the state of Iowa said last-named districts succeeded to the property and liabilities of the former independent school district of Riverside, two-thirds of the liabilities being chargeable against the district of Allison, and one-third against the district of Jackson.

(3) The value of the taxable property, as shown by the state and county tax lists of Lyon county, Iowa, within the boundaries of the independent school district of Riverside, was as follows for the several years named:

1872	$43,995 32
1873	68,307 01
1874	68,890 83
1875	70,435 64
1876	70,706 96
1877	57,247 58
1878	72,175 97
1879	47,220 00
1880	44,571 00
1881	44,033 00
1882	49,170 00

As shown by the tax lists of Lyon county in the year 1880, there was exempted from taxation property to the amount of $22,494 under the provisions of the timber culture acts of the state of Iowa, which sum is not included in the value of the taxable property of the district for that year as given in the above columns.

(4) The bonds declared on in this action are the following: No. 32, Dated April 1, 1881, due April 1, 1891, amount $500; No. 29, Dated July 1, 1881, due July 1, 1891, amount $500; No. 38, Dated July 1, 1881, due July 1, 1891, amount $500; No. 22, Dated November 5, 1881, due November 5, 1891, amount $1,000; No. 23, Dated November 5, 1881, due November 5, 1891, amount $1,000; No. 62, Dated February 15, 1882, due February 15, 1892, amount $100; No. 4, Dated March 11, 1882, due March 11, 1892, amount $1,000; No. 5, Dated March 11, 1882, due March 11, 1892, amount $1,000; No. 6, Dated March 11, 1882, due March 11, 1892, amount $1,000; No. 24, Dated March 11, 1882, due March 11, 1892, amount $1,000; No. 34, Dated March 11, 1882, due March 11, 1892, amount $1,000. And are payable to "——— or bearer," or to "——— or order." The signatures to the bonds and coupons are the genuine signatures of the persons signing the same, and these persons, when their signatures were attached to the bonds and coupons, held the offices indicated by their signatures in the independent school district of Riverside, of Lyon county, Iowa.

(5) That bond No. 32, dated April 1, 1881, for $500, was issued as part of a series of four bonds, numbering from 31 to 33, for $500 each, and one numbered 51, for $200.

(6) That bonds numbered 29 and 38, for $500 each, dated July 1, 1881, were part of a series numbered from 1 to 40, inclusive, and aggregating in amount $25,700, issued in pursuance of a resolution adopted by the board of directors of the independent school district of Riverside, and spread upon the records of said board, in the terms following:

"Riverside, Lyon County, Iowa, June 21, 1881.

"Board of directors of the independent school district of Riverside met at the school district at call of president, members all present. The following resolution was passed: Whereas, E. E. Carpenter comes before this board with bonds of said district bearing 10% interest, and offers to surrender to said district upon the issue and delivery to him new bonds of said district bearing 7%; the old bonds being taken at 70 cents on the dollar, bonds issued in the year 1873, on bonds issued in 1887 or later at par, in exchange for new bonds of said district: Therefore it is resolved by this board that they issue the bonds of said district for Riverside, and said bonds shall be issued by the president and secretary and delivered to the treasurer, to exchange as above stated. Said bonds shall number as follows: Bonds Nos. 1, 2, 3, 4, 5, 6, 7, 8, for one thousand dollars each; and bonds Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39 for five hundred dollars each; and bond No. 40 for $200; and shall bear interest at 7 %, payable semiannually, on the first day of January and July of each year; the above described bonds were issued and delivered to the treasurer for exchange. It is further resolved that the treasurer be authorized to exchange any bonds in his possession for old bonds of said district at 50 cents on the dollar, and be allowed 2 % commission for refunding such bonds, as provided in the resolution of July 30, 1880. Board adjourned at call of president.

"G. W. Stoops, President."

(7) The bonds in suit, numbered 22 and 23, dated November 5, 1881, for $1,000 each, were part of a series numbered from 18 to 30, inclusive, for $1,000 each, and were issued pursuant to a resolution adopted by the board of directors of the independent school district of Riverside, reading as follows:

"Whereas, F. A. Keep came before the board with a proposition to settle with the district some bonds of said district which he held at the rate of 50 cents on the dollar, and to exchange new bonds drawing 7 % interest, not counting the accrued interest: Now therefore it is resolved, by the board, that they issue bonds to the amount of $12,000, and exchange the same with the aforesaid F. A. Keep, and allow the treasurer 2 % for exchange as provided in the resolutions of July 30, 1880. Therefore the secretary and president [is] authorized to issue the amount, and the president to turn over to the treasurer and take his receipt for the same. The following numbers were issued: 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, all for $1,000. There being no further business, adjourned, at call of chairman.

"G. R. Matthews, Secy. G. W. Stoops, President."

(8) The bonds in suit numbered 4, 5, 6, 24, and 34, dated March 11, 1882, for $1,000, each formed part of a series numbered from 1 to 39, inclusive, issued in pursuance of a resolution of the board of directors of the independent school district of Riverside, and spread upon the records of the board in the following terms:

"Riverside, March 11, 1882.

"Board of directors of independent district of Riverside, Lyon county, Iowa, met at the schoolhouse in said district on the 11th day of March, 1882. The following resolution was passed: Whereas, C. W. Rollins came before the board with a resolution to settle with the district some bonds of said district which he held to the amount of $72,000.00, at 50 cents on the dollar, and take in exchange new bonds, drawing 7 % interest, not counting accrued interest: Now, therefore, it is resolved by the board that they issue bonds to the amount of $36,000.00, and exchange the same with the aforesaid C.

W. Rollins, and also to allow the treasurer 2 % for exchanging, as provided in resolutions of June 30, 1880. Therefore the secretary and president is authorized and directed to turn over to the treasurer, and take his receipt for the same, said bonds to be numbered as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1,000 each; 25, 26, 27, 28, $500 each; 29, 30, 31, 32, $1,000 each; 33, 34, $500 each; 35, 36, 37, 38, 39, $1,000 each. There being no further business, adjourned subject to the call of the chairman."

(9) That the secretary's record of the proceedings of the board of directors of the independent school district of Riverside shows that beginning with July 12, 1877, and ending with March 11, 1882, the following amounts of bonds were ordered issued:

July	12, 1877,	refunding	bonds	$ 5,000 00
Dec.	15, 1877,	"	"	6,000 00
July	1, 1878,	"	"	8,300 00
July	16, 1878,	"	"	800 00
Dec.	19, 1878,	"	"	1,600 00
June	21, 1879,	"	"	500 00
July	15, 1879,	"	"	3,200 00
Sept.	11, 1879,	"	"	1,600 00
Oct.	15, 1879,	"	"	5,200 00
July	10, 1880,	"	"	3,300 00
July	3, 1880,	"	"	5,000 00
June	10, 1880,	"	"	10,000 00
July	30, 1880,	"	"	4,500 00
Dec.	4, 1880,	"	"	10,500 00
April	6, 1881,	"	"	1,700 00
June	21, 1881,	"	"	23,700 00
Nov.	5, 1881,	"	"	13,000 00
Feb.	15, 1882,	"	"	20,500 00
March	11, 1882,	"	"	36,000 00
Total				$160,400 00

(10) That the highest valuation of the taxable property within the limits of the independent school district of Riverside during its existence was that of the year 1883, being in the sum of $98,168, the valuation for the year 1884, the last year of the district, being $97,575.

(11) That during the existence of the independent school district of Riverside there had been erected within its boundaries two schoolhouses, and no more, of the total value of $1,500.

(12) That the assessed valuation of the property within the rural independent district of Allison for the year 1885 was $72,974, for the year 1899 was the sum of $141,510, for the year 1900 was the sum of $146,086, and for the year 1901 was the sum of $149,699.

(13) That the assessed valuation of the property within the rural independent district of Jackson for the year 1885 was the sum of $31,431, for the year 1899 was the sum of $81,788, for the year 1900 was the sum of $83,603, and for the year 1901 was the sum of $82,479.

(14) That at the several dates when the bonds and coupons sued on were issued in the name of the independent school district of Riverside and prior thereto the said district of Riverside was indebted in amounts largely in excess of 5 per cent. of the taxable property within said school district, without including in such indebtedness the several bonds issued under date of April 1, 1881, July 1, 1881, November 5, 1881, February 15, 1882, and March 11, 1882.

(15) That prior to June 21, 1881, there were judgments rendered and outstanding against the independent school district of Riverside in the aggregate sum of $6,500, which the records of the courts showed were outstanding and unpaid at the several dates when the bonds in suit were issued, and prior to the division of the district of Riverside judgments amounting to $3,887.94 were rendered against it, all of which judgments have since been paid off by the defendant districts.

(16) At the time of the division of the district of Riverside there were outstanding judgment bonds issued by the district upon which judgment was rendered in the district court of Lyon county, Iowa, against the defendant districts, in the sum of $4,479.62, which judgment has since been paid by the defendant districts of Allison and Jackson.

(17) That none of the bonds in suit were issued or used in the payment or refunding of any judgment bonds issued by the independent school district of Riverside, or in payment or funding of any judgments against said district.

(18) The plaintiff herein, Charles B. Salmon, is now, and was when this suit was brought, the beneficial owner of bonds Nos. 62, 5, 22, 23, 29, and 34, declared on, together with the coupons belonging thereto. The remaining bonds and coupons declared on are now, and were when this suit was brought, the property of Mrs. Cora Andrews, and the same were by her given in charge of plaintiff for collection, he being her agent for that purpose, and being under obligation to account to Mrs. Cora Andrews for the proceeds, if any, realized from said bonds and coupons.

(19) The bonds and coupons of which the plaintiff is the beneficial owner, as stated in the last finding, became the property of plaintiff in the latter part of the year 1884, at which time the plaintiff bought the assets of the Citizens' National Bank of Beloit, Wis., including the bonds and coupons in question, the same being turned over by the Citizens' National Bank to the plaintiff at their face value.

(20) The bonds and coupons owned by Mrs. Cora Andrews came to her from her father's estate, James A. Chapman, who died about the year 1890, or possibly later, the exact date not being proven. James A. Chapman resided at Beloit, Wis., and at the time of the issuance of the bonds sued on was a director in the Citizens' National Bank of Beloit, Wisconsin.

(21) With the exception of bonds No. 32, dated April 1, 1881, for $500, and No. 62, for $100, dated February 15, 1882, the several bonds sued on were issued and came into the possession of James A. Chapman and the Citizens' National Bank of Beloit, Wisconsin, under the following circumstances: One E. E. Carpenter, in the years 1881 and 1882, and for some years previous thereto, had owned and managed a private bank, under the name of the Sioux Valley Bank, at Beloit, Lyon county, Iowa, and had dealt largely in the bonds issued by Lyon county and other counties in northwestern Iowa and by the school districts in these counties. Previous to the year 1881 the said Carpenter had sold to the Citizens' National Bank of Beloit, Wis., and to James A. Chapman, negotiable bonds issued under the name of the independent school district of Riverside to the amount of $8,000 or over, and had personally guarantied the payment thereof. These bonds did not contain a recital to the effect that they were issued in accordance with the Constitution of the state of Iowa, or that they were within the limit of indebtedness fixed by the Constitution with respect to municipal indebtedness. In the month of April, 1881, Carpenter was visiting at the house of James A. Chapman in Beloit, Wis., and at that time Chapman and Carpenter discussed the question of the advisability of getting an exchange of the bonds then held by the Citizens' National Bank and James A. Chapman, issued in the name of the independent school district of Riverside, which bonds were not then due, for new bonds which should contain a recital intended to avoid the effect of the 5 per cent. limitation on the debt creating power of the district contained in the Constitution of the state of Iowa. It was finally agreed that Carpenter should undertake to secure an exchange of the bonds held by the Citizens' National Bank and James A. Chapman, he being authorized to reduce the interest on the new bonds to 7 per cent., the old bonds bearing 10 per cent., for new bonds containing the proposed recital; it being further agreed that if the proposed exchange of bonds was secured Carpenter was to be released from his guaranty of the payment of the bonds so exchanged. In pursuance of this arrangement, Carpenter brought about an exchange of bonds, receiving for the Citizens' National Bank, of the bonds sued on, Nos. 5, 22, 23, 29, and 34, aggregating $4,500, and for James A. Chapman bonds Nos. 4, 6, 24, and 38, aggregating $3,500. In issuing the new bonds, forms were used which as originally printed did not contain any recital with respect to the Constitution of the state, but before the signing of

the bonds sued on there was written in on the face of the bond the words, "and in accordance with the Constitution of said state."

(22) The purpose of the exchange of bonds thus made was as stated by the said Carpenter in his testimony, wherein, in reply to the question, "What was the object in exchanging those bonds for new bonds drawing 7 %?" he answered, "The object on my part was to get rid of my guarantee, and the object on the part of Mr. Chapman was to get the statement that they were issued in accordance with the Constitution."

(23) During the year 1873 there had been issued in the name of the independent school district of Riverside bonds to the amount of $150,000 or more which were fraudulent and without consideration, and during the period beginning with July 12, 1877, and ending with March 11, 1882, there were issued bonds in the aggregate sum of $160,400, and it does not appear that the said independent school district of Riverside received any consideration therefor.

(24) At and prior to the times when E. E. Carpenter effected the exchange of the bonds owned by the Citizens' National Bank and James A. Chapman for the bonds now in suit, as set forth in finding No. 21, the said Carpenter had knowledge of the fact that the bonds of 1873 were without consideration, and had been issued to the amount of $150,000, and he also knew of the issue of bonds between 1877 and 1881 of at least $25,000, for which, in the language of said Carpenter, no fair consideration was received by the district.

(25) According to the testimony of E. E. Carpenter, the bonds owned by James A. Chapman and the Citizens' National Bank, and by him exchanged for the bonds in suit, were partly of the issues of 1877, 1878, and 1873.

(26) It does not appear that the independent school district of Riverside received any consideration in any form for the bonds for which the bonds in suit were exchanged.

(27) Bond No. 32, dated April 1, 1881, became, by its terms, due and payable on April 1, 1891, more than 10 years before this suit was brought.

(28) Bond No. 62, dated February 15, 1882, for $100, is the property of plaintiff. It contains no recital to the effect that it was issued in accordance with the Constitution of the state. At the date of its issue the independent school district of Riverside was indebted in an amount largely in excess of the constitutional limits. It is not now shown that the said school district of Riverside received any consideration for the issuance of this bond.

(29) On the backs of the several bonds sued on there is printed chapter 132 of the Acts of the 18th General Assembly of the State of Iowa, and the bonds and coupons are of the general form shown in Exhibits A, B, and C, attached to the petition in this case, and the bonds and coupons sued on, having been introduced in evidence, are hereby made part of these findings of facts.

(30) The amount of the bonds owned by the plaintiff, and included in this suit, is four thousand and six hundred dollars ($4,600). The amount of the coupons sued on, and not barred by the statute of limitations, is three hundred four and $^{50}/_{100}$ dollars ($304.50). The total interest due on the bonds and coupons at six per cent. per annum, up to December 30, 1902, is three thousand two hundred and forty-seven and $^{35}/_{100}$ dollars ($3,247.35). The total amount due on the bonds and coupons of which the plaintiff is the beneficial owner, including interest up to December 30, 1902, is the sum of eight thousand one hundred and fifty-four and $^{35}/_{100}$ dollars ($8,154.35).

Quick & Carter, for plaintiff.

O. J. Taylor and E. C. Roach, for defendants.

SHIRAS, District Judge (after stating the facts as above). The first question presented for determination in this case is whether the action in the name of the plaintiff can be maintained on the bonds which are the property of Mrs. Cora Andrews, it being claimed on part of the defendants that the provisions of section 3459 of the Code of Iowa, declaring that actions must be prosecuted in the name of

the real party in interest, forbids bringing a suit in the name of an agent. In Abell Note Co. v. Hurd, 85 Iowa, 559, 52 N. W. 488, the state Supreme Court, in construing this section of the Code, declared the law to be "that the party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, but he is open in such case to any defense which exists against the party beneficially interested." The fact, therefore, that the plaintiff in this case is the agent of the beneficial owner does not prohibit bringing the action in his name, and the delivery to him of the possession of the bonds, which in effect are payable to bearer, with the authority to enforce the collection thereof, clothes him with sufficient title to maintain the action in his own name. Village of Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281; O'Brien v. Smith, 68 U. S. (1 Black) 99, 17 L. Ed. 64.

The second count in the petition is based upon bond No. 32, for $500, dated April 1, 1881, and which by its terms came due on April 1, 1891. As this action was not begun until June 19, 1901, more than 10 years had elapsed after the maturity of the bonds before the bringing of the suit, and the bar of the state statute of limitations, pleaded by the defendants, defeats recovery thereon.

With the exception of bond No. 62, dated February 15, 1882, the remaining bonds sued on were those which were obtained in exchange for other bonds owned by the Citizens' National Bank and by James A. Chapman under the circumstances detailed in finding No. 21. Would these bonds be valid in the hands of the original owners thereof?

It is certainly clear from the evidence that when Carpenter, as the agent of the Citizens' National Bank and James A. Chapman, undertook to bring about the exchange of bonds, these parties well knew that the amount of bonds held by each party was in excess of 5 per cent. of the taxable property in the independent school district of Riverside, and therefore knew that the bonds to be issued to them under the contract of exchange would be in excess of the constitutional limit of 5 per cent. on the assessed value of the property in the district. As shown by the valuations of property within the district as set forth in finding No. 3, the district could not in the years 1880, 1881, or 1882 incur an indebtedness equal to $3,500 without exceeding the constitutional limit; and certainly when Chapman, acting in his own behalf and on behalf of the Citizens' National Bank, of which he was a director, arranged with Carpenter that the latter should take the bonds owned by himself and the bank, which amounted to $8,000, exclusive of interest, and exchange them for new bonds, he knew, as a matter of fact, that the bonds to be exchanged represented an amount largely in excess of the legal limit of indebtedness, and he well knew that if the proposed exchange was carried through the amount of bonds to be issued to himself and the bank would be largely in excess of the constitutional limit, and therefore it is not open to Chapman or to the bank to claim that they in good faith took the bonds in suit relying on the recital therein contained that they were issued in accordance with the Constitution of the state.

Furthermore, in procuring the issuance of these bonds, Carpenter acted as the agent of the parties owning the bonds, and he well knew that the amount of bonds he was purposing to obtain was largely in excess of the limit of indebtedness prescribed by the Constitution, and, furthermore, that the bonds already issued in the name of the district greatly exceeded the legal limit. Under these circumstances, it would not be open to the bank or to Chapman to claim that they took the bonds in suit in good faith, and relying on the recital therein contained that the same were in accordance with the Constitution of the state. They knew that this recital was not true, and it was by their own procurement that this recital was placed in the bonds, and therefore it would not validate the bonds in their hands. If it be said that in fact the bonds sued on were exchanged for the other bonds held by the bank and Chapman, and therefore did not increase the indebtedness of the district, the question is whether it is shown that the bonds originally held by these parties were valid and enforceable against the district.

The evidence shows that these bonds were, in amount, in excess of the legal limit of indebtedness; that they did not contain any recital to the effect that they were in accordance with the Constitution of the state; that the district had not received any consideration therefor; and that, in effect, they were illegally and fraudulently issued.

If the present action had been brought by the bank and James A. Chapman on the bonds originally held by them, a recovery could not have been had thereon under the evidence adduced in this case, for the reasons (1) that the amount of bonds held by each of the parties was in excess of the limit imposed by the Constitution of the state upon the debt creating power of the district, and the bonds contained no recitals estopping the district from relying upon this defense; and (2) that the evidence showed that the bonds were issued without consideration, and were in fact illegal in their inception, thus casting the burden on the holders of the bonds of showing that they were in fact innocent holders thereof for value.

Under the settled rule, the parties were bound to take notice of the constitutional limitation upon the power of the district to create indebtedness, and of the amount of the taxable property within the district as shown by the tax lists; and, as the bonds taken and held by them were in excess of the legal limits, they could not be held to be valid and enforceable unless a state of facts were proven which would except them out of the constitutional prohibition, and this has not been done. Furthermore, as the bonds held by them were in fact without consideration and fraudulently issued, the burden would be shifted to them of proving that they were innocent holders for value thereof.

Thus, in Collins v. Gilbert, 94 U. S. 758, 761, 24 L. Ed. 170, the rule is stated to be that, "if it be alleged and proved that the instrument had its inception in illegality or fraud, a presumption arises from that proof that the plaintiff took it without value; or, in other words, it so far shifts the burden of proof that, unless the plaintiff gives satisfactory evidence that he gave value for the same, the defense will prevail."

The evidence fails to show with clearness what the consideration was, if any, for the original transfer of the bonds, and therefore it must be held that if this action was in the name of the Citizens' National Bank and James A. Chapman upon the bonds exchanged for those in suit, a recovery thereon could not be had for the reasons stated. The fact, however, that the bonds sued on would be invalid and nonenforceable if sued by the original holders does not necessarily defeat the suit as it now stands, provided it be shown that the present holders of the bonds, or either of them, are innocent holders for value of the bonds owned by them. Being bonds issued in exchange for other bonds, the municipality issuing them is estopped from pleading the constitutional inhibition against an innocent purchaser for value, this being the rule established by the repeated decisions of the Circuit Court of Appeals for this circuit. Independent School District v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Fairfield v. Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342.

With respect to the bonds owned by Mrs. Cora Andrews, it is not shown that she paid value for them, or that she ever purchased them; the inference from the evidence being that she inherited them from her father, James A. Chapman. The exact date of his death is not proven, and it may be the fact, therefore, that the title or right to these bonds, which were issued in 1881 or 1882, and matured in 10 years from their date, did not pass to Mrs. Andrews until after their maturity. It not appearing that she became the owner of the bonds before they became due, and it not appearing that she paid value therefor, it cannot be held that she is an innocent holder for value of the bonds in question, and therefore the same defenses are available against her as would be open to the defendants if the action was in the name of James A. Chapman, and, as already held, he could not, if living, maintain the action thereon, and therefore there can be no recovery on the bonds and coupons belonging to Mrs. Andrews.

With respect to the bonds owned by Charles B. Salmon, and sued on in his own right, the evidence shows that he became the owner thereof before maturity and for value; and, although in amount those bonds exceeded the constitutional limit of 5 per cent. of the taxable property in the school district, yet as they were issued as refunding bonds, and recite that they were issued under the provisions of chapter 132, p. 127, of the Acts of the 18th General Assembly of the state, I am compelled to hold, under the rulings of the Circuit Court of Appeals in the cases already cited, that a recovery thereon can be had upon the bonds, and also upon all coupons maturing since June 19, 1891, as the statute of limitations bars recovery on all the coupons coming due more than 10 years before this action was commenced.

The total amount now due on the bonds and coupons owned by the plaintiff is the sum of $8,154.35, and for two-thirds of this amount, being $5,436.22, judgment will be entered in his favor against the rural independent district of Allison, and of this judgment $3,066.66 will bear interest at the contract rate of 7 per cent., and $2,369.56 at 6 per cent. For the remaining one-third of the total sum due on the bonds and coupons, being the sum of $2,718.11, judgment in favor

of the plaintiff will be entered against the rural independent school district of Jackson, of which amount $1,533.66 will bear interest at the contract rate of 7 per cent., and $1,284.41 at 6 per cent. Of the total taxable costs, one-half is adjudged against the plaintiff, two-sixths against the rural independent district of Allison, and one-sixth against the rural independent district of Jackson.

OCCIDENTAL CONSOLIDATED MIN. CO. v. COMSTOCK TUNNEL CO.

(Circuit Court, D. Nevada. September 8, 1903.)

No. 708.

1. NEW TRIAL—EXCESSIVE VERDICT.
   A court will not interfere with a verdict assessing damages, which it was exclusively within the province of the jury to determine, unless the amount is so excessive as to indicate passion or prejudice on the part of the jury, and cannot be accounted for in any other manner.
2. DAMAGES—BREACH OF CONTRACT—SUFFICIENCY OF PROOF.
   While remote or speculative damages, based solely on conjecture, are not recoverable for breach of a contract, the plaintiff is not precluded from recovering such general damages as are shown by the testimony to have necessarily resulted from the breach, although the amount may not be made so clear and certain that it can be exactly computed.
3. SAME—EVIDENCE OF GENERAL DAMAGES.
   The fact that, as the result of breach of contracts by defendant, plaintiff was prevented from working its mine without great loss, expense, and inconvenience, goes to the matter of general damages arising from the breach, and was proper for the jury to take into consideration in determining the actual loss to plaintiff, exercising their best judgment as to the amount of such loss.

At Law. On motion for new trial.

See 111 Fed. 135.

W. E. F. Deal, for plaintiff.

W. T. Baggett and F. M. Huffaker, for defendant.

HAWLEY, District Judge (orally). It was claimed by defendant upon the motion for new trial that the court erred in instructing the jury as to the measure of damages which the plaintiff was entitled to recover, if the jury should find in its favor. I am of opinion that the instructions given upon this point were as favorable to the defendant as the law would warrant. No exceptions were taken to the charge of the court as to the measure of damages. It is true that in one portion of the charge the word "deduct" was inappropriately used, but it is manifest that, notwithstanding this inadvertence, or improper use of the word, the jury could not have been misled thereby. The only debatable point, to my mind, raised by the motion for new trial, is the claim made by defendant that the verdict of the jury is contrary to the instructions given by the court as to the measure of damages in this: that the amount is excessive, and cannot be sustained, because it cannot be accounted for or reached under any principle announced by the court in its charge.

¶ 1. See New Trial, vol. 37, Cent. Dig. § 153.

Conceding that the amount of the verdict is larger than the court would have given if the cause had been tried by it without a jury, this fact alone ought not to induce the court to grant a new trial. The matter of assessing the damages is, in cases of this character, exclusively within the province of the jury to determine, and the court should never interfere with the verdict, unless the amount is so excessive as to indicate passion and prejudice on the part of the jury, and cannot be accounted for in any other manner.

The court, in considering this question, must not lose sight of the general character of the action. If the principles of law announced by the court as to the right of the plaintiff to recover under the contracts are correct, then the jury had many things to consider in regard to the general damages that might be given. The suit was brought to recover actual damages in the sum of $27,292.25, and for general damages in the sum of $100,000, alleged to have been sustained by the breach of the contract on the part of the defendant, "in that by the said wrongful acts of said defendant, and by the violation by it of said contracts, said plaintiff has been deprived of the right to drain, mine, and work its said claims on said Brunswick lode by means of said Sutro tunnel and said Zadig drift." If the verdict cannot be sustained by the evidence, it ought to be set aside, but if the jury kept within the limits of the evidence, and the verdict is not so strongly against the preponderance of the evidence as to indicate to the judicial mind that it was only reached through passion or prejudice or improper motives of any kind, and no error of law occurred, the verdict should not be interfered with by the court. Any other conclusion would impair the right to a trial by jury, guarantied to all litigants in actions of this character. Cramp & Sons S. & E. B. Co. v. Sloan (C. C.) 21 Fed. 561.

It may be that it would have been erroneous for the court to have instructed the jury that, in the event of finding a verdict for the plaintiff, interest should be added to the amount the plaintiff had expended; but I am not prepared to say that the jury, in the exercise of its discretion, had no right to consider the question of interest in assessing the damages. Lincoln v. Claflin, 7 Wall. 132, 139, 19 L. Ed. 106. While the plaintiff could not recover remote or speculative damages based solely on conjecture, it is not deprived from recovering such general damages as are shown by the testimony to have been necessarily occasioned as the result of the breach, although the amount may not be made so absolutely clear and certain as to be easy of computation. As was said by the court in Wakeman v. Wheeler & Wilson M. Co., 101 N. Y. 205, 209, 4 N. E. 264, 266, 54 Am. Rep. 676:

"One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible, and imaginary, but they must be reasonably certain, and such only as actually follow, or may follow, from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately, upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered, because they

cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain."

It is usually the right of the party complaining of the breach of the contract "to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have, in lieu thereof, its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors." Holt M. Co. v. Thornton, 136 Cal. 232, 235, 68 Pac. 708; Shoemaker v. Acker, 116 Cal. 239, 245, 48 Pac. 62, and authorities there cited; Blagen v. Thompson, 23 Or. 240, 254, 31 Pac. 647, 18 L. R. A. 315; Railroad Co. v. Rodgers, 24 Ind. 103.

The object of the law in awarding damages is to make amends or reparation by putting the party injured in the same position, as far as money can do it, as he would have been if the contract had been performed. Iron Co. v. Teaford, 96 Va. 373, 31 S. E. 525; Burrell v. N. Y. S. S. S. Co., 14 Mich. 34. "The fact that the value of a contract or the advantage to be derived from it is contingent—that is, that the expected advantage depends on the concurrence of circumstances subsequently to transpire, and which may by possibility not happen—is not an insuperable objection to recovering damages for its loss. * * * The nature of the contingency must be considered. If it is purely conjectural, and cannot be reasonably anticipated to happen in the usual course of things, it is too uncertain. There must be proof legally tending to show and sufficient to satisfy the jury that it would happen." 1 Suth. on Damages, § 72. In actions of this character, "when a cause of action accrues, there is a right, as of that date, to all the consequent damages which will ever ensue. They are recoverable in one action, if they can be proved, and only one can be maintained. It may be brought at any time after the accrual of the right. The question is a practical and legal one in each case, whether the cause of action is of such a nature that the injurious consequences of the wrong complained of can reach into the future, or whether any subsequent damages will be owing to a continuous fault, which may be the foundation of a new action." 1 Suth. on Damages, § 120. Under this rule, it was admissible for the plaintiff to show that it had no other accessible means to reach its mine for the purpose of extracting ore therefrom than through the tunnel, except by sinking a shaft from the surface. The testimony of Mr. Ross, as to the expense that would be incurred in sinking a double compartment shaft with stations, could not be considered as the correct measure of damages, because the party might never sink such a shaft. It was too remote and speculative. But the fact that the mine could not be worked in any other way than from the surface was a proper matter for the jury to

take into consideration in determining what was the actual loss to the plaintiff in being deprived of working through the tunnel, as provided for in the contract.

One of the results of the breach of the contract was to prevent the parties from working in the tunnel without great loss and expense and inconvenience. This was a matter of general damage, which the jury had a right to take into consideration, and assess it in accordance with their best judgment as to what it would be.

If the amount of money which the plaintiff had advanced and lost in round figures was $27,000, the interest on that amount would raise it to about $35,000. This would leave but $15,000 for other general damages, and while the amount may seem to be large, still it cannot be said that it does not come within the measure of damages which the jury, in its discretion, deemed to be just and proper.

The motion for new trial is denied.

INDIANAPOLIS & N. W. TRACTION CO. v. CONSOLIDATED TRACTION CO.

CONSOLIDATED TRACTION CO. v. CITY OF CRAWFORDSVILLE et al.

(Circuit Court, D. Indiana. September 24, 1903.)

No. 10,219.

1. INJUNCTION—VIOLATION—CONSTRUCTION OF INTERLOCUTORY ORDER.

A city filed a bill against a street railroad company to enjoin it from laying tracks in the streets. The defendant filed a cross-bill against the city and another company to enjoin the laying of tracks by the latter. On the adjournment of a hearing on motions for preliminary injunctions on both bill and cross-bill the court entered an order in two numbered paragraphs; the first continuing a restraining order entered on the original bill, and the second restraining both the defendants and the complainant in the cross-bill from laying tracks until the further order of the court. Before the further hearing the original bill was dismissed, and the defendant therein dismissed its cross-bill as to the city. *Held* that, the controversy on the cross-bill being between the two companies claiming conflicting rights, the second paragraph of the order related solely to such controversy, and properly restrained both parties from taking any action to change the status; that such order remained in force and was violated by the construction of tracks by the complainant in the cross-bill before any further hearing or order of the court.

In re proceeding for contempt against the Indianapolis & Northwestern Traction Company, George Townsend, Clift Wise, W. N. Harding, and William H. Johnston.

The city of Crawfordsville sued the Indianapolis & Northwestern Traction Company in the circuit court of Montgomery county, Ind., to enjoin that company from constructing its railroad tracks in the streets of that city. The traction company answered, and also filed a cross-complaint against the city of Crawfordsville and the Consolidated Traction Company. In this cross-complaint the Northwestern Traction Company asserted a franchise to construct its tracks in the streets of Crawfordsville; charged that the city had subsequently and without right granted a franchise to the Consolidated Traction Company, which impaired the obligation of the previous contract between the city and the Northwestern Traction Company, all in violation of section 10 of article 1 of the Constitution of the United States; and injunctive relief

was asked against both the defendants to the cross-complaint to restrain them from interfering with the Northwestern Traction Company in the construction of its tracks in the streets of the city of Crawfordsville.

On the 23d of June, 1903, the hearing was commenced in the Montgomery circuit court of an application for a temporary injunction by the city of Crawfordsville on its complaint against the Northwestern Traction Company, and also of an application by the Northwestern Traction Company for a temporary injunction on its cross-complaint against the city and the Consolidated Traction Company. It developed that the hearing could not be concluded that day, and the court ordered the further hearing adjourned until July 6, 1903, and at the same time entered the following order:

"It is hereby ordered by the court upon its own motion:

"(1) That the restraining order heretofore granted by the Hon. Jere West, judge of this court, on the 17th day of June, 1903, on the application and complaint of the City of Crawfordsville vs. Indianapolis and Northwestern Traction Company, be continued until the 6th day of July, 1903, and until the further order of this court, and that upon said day the application of said the city of Crawfordsville for a temporary injunction herein shall be heard without further notice, and that the undertaking heretofore filed shall continue as security to said defendant under this order.

"(2) That, upon the cross-complaint of Indianapolis and Northwestern Traction Company vs. The City of Crawfordsville and the Consolidated Traction Company, said defendants to said cross-complaint, and each of them, and their respective officers, agents, and servants, upon the execution by the cross-complainant of the undertaking required by law, be severally restrained from taking any action to change and from changing the present status of the matters embraced in said cross-complaint as they now exist, and that the said Consolidated Traction Company be restrained from entering upon and constructing, or attempting to construct, its said street railroad upon East Pike street, Elston avenue, and Main street, or any part thereof, in the city of Crawfordsville, until the 6th day of July, 1903, and until the further order of this court, and that upon said 6th day of July, 1903, the application of the said Indianapolis and Northwestern Traction Company for a temporary injunction herein be heard without further notice, and that until said last-mentioned date, and until the further order of this court, the Indianapolis and Northwestern Traction Company, its officers, agents, and servants, and employees, be, and it and they are hereby, restrained from constructing, or attempting to construct, any street railroad upon any of the streets, avenues, alleys, bridges, and public places in the city of Crawfordsville, or any part or portion thereof."

On July 6, 1903, and before the hearing of the applications for temporary injunctions was resumed, the city of Crawfordsville dismissed its complaint against the Northwestern Traction Company, and that company dismissed its cross-complaint against the city. Thereupon the Consolidated Traction Company immediately filed its petition and bond for a removal of the cause pending against it on the cross-complaint of the Northwestern Traction Company to this court, and an order of removal was entered by the Montgomery circuit court. The transcript of the record from the Montgomery circuit court was filed in this court on the 8th day of July, 1903, and on the 13th day of the same month the Northwestern Traction Company filed its motion to remand the cause.

Whilst this motion was still pending and undetermined, to wit, on July 27, 1903, the Northwestern Traction Company commenced the work of laying its railroad tracks in certain streets in the city of Crawfordsville, and continued the work until it had constructed 3,030 feet of track in Main street and Elston avenue, and 1,591 feet of track in Pike street.

The Consolidated Traction Company filed its verified petition, praying that the Northwestern Traction Company and certain individuals named in the petition be required to show cause why they should not be adjudged guilty of contempt, and that upon the hearing of the petition they be required, within a short time, to be fixed by the court, to remove from Main street, Elston avenue, and Pike street all the tracks that had been constructed in those streets. The motion to remand was overruled. A motion to quash the

petition and citation in the contempt proceedings was also overruled, and that petition was heard upon the answers of the respondents and upon written and oral testimony introduced at the hearing.

Harding, Hovey & Wiltsie, Elliott, Elliott & Littleton, and Miller, Elam & Fesler, for complainant.

John G. Williams and Crane & McCabe, for defendants.

BAKER, Circuit Judge (orally). As I indicated when the motion to quash the citation was overruled, in my judgment the effect of the division of the order into two separate paragraphs, separately numbered, was very clear. The first paragraph stated that on the complaint of the city against the Northwestern Company the Northwestern Company was restrained, and no other party was defendant to the complaint of the city except the Northwestern. Upon the dismissal of the city's complaint, of course the injunctional order that was based upon that complaint fell with it. That is indisputable to my mind.

The second paragraph of the order is one continuous sentence, showing that, on the cross-complaint of the Northwestern Company against the city and the Consolidated Company, the city and the Consolidated are restrained and the Northwestern is restrained. I was unable then, and I am unable now, to view that in any other light than a just term that the court had power to impose, and did impose, upon a complainant whose complaint disclosed a controversy between it and the Consolidated Company as to rights in the streets of the city of Crawfordsville; that is, the Northwestern wanted to have the hands of the Consolidated tied pending an investigation of their respective rights, because there was a conflict in interest between the two companies. In other words, both cannot occupy the same place at the same time, and it appeared right on the face of the Northwestern's bill that both of them were claiming rights that were in conflict. If the Consolidated was not claiming anything that conflicted with the claims of the Northwestern, it would be utterly idle and useless for the Northwestern to ask any restraining order against the Consolidated; but it was asked because the Consolidated was shown by the Northwestern's bill to be making claims that were antagonistic to, and in conflict with, the claims the Northwestern was setting up in its bill. Under such circumstances, I think any court, as a condition of tying the hands of one antagonist, should compel the other to respect the status also.

From the hearing to-day, I am convinced beyond any shadow of doubt that Judge Elliott, Mr. Will Elliott, Mr. Harding, Mr. Hovey, Mr. Wiltsie, and Mr. Johnston all entertained the belief, in good faith, that such was not the scope and effect of the order, but that the order was simply an enlargement of the order which was made on the motion of the city of Crawfordsville. What Mr. Harding and Mr. William H. Johnston did in the way of driving spikes I look upon as being fully as trivial as what the oldest citizen did in driving the first spike on the first rail.

I will therefore discharge Mr. Harding and Mr. Johnston.

Mr. Townsend and Mr. Wise, I am satisfied beyond doubt from the evidence, had no intention to disrespect any order that had been

entered by the Montgomery circuit court. What they did was done in good faith, upon the advice of counsel who in good faith believed that they were advising their clients correctly. I will therefore discharge Mr. Townsend and Mr. Wise.

Of course, what I have said with respect to the attorneys and these superintendents would also acquit the Northwestern corporation, so far as any intention by it to violate a pending order of the Montgomery circuit court is concerned, and I do acquit the Northwestern Company, as well as these individuals, of any intentional violation of the order. But an order was in force, compelling both corporations to respect the status. That has veen violated. I will therefore not acquit the Northwestern of the charge, but, finding no bad faith, I will assess nothing against it in the way of punishment. No acts that have been done by it or in its behalf, I think, are worthy of any punitive judgment; but in this proceeding the Consolidated Company is entitled to have the status restored, and also to be made good in respect to its expense in calling this matter to the attention of the court.

I will therefore find the Northwestern guilty of having violated a valid injunctional order, and, as that injunctional order was made for the purpose of compelling the parties to preserve the status, I direct the marshal of this court to take up, at the expense of the Northwestern Company, all of the tracks that were put down by the Northwestern Company in violation of this injunctional order; but I suspend the operation of the order upon the marshal until the further order of this court, and until the final hearing on the merits, unless, by reason of some conduct on the part of the Northwestern Company, the Consolidated Company shall make a motion for an early enforcement of the order. I further direct the Northwestern to pay all of the costs of this proceeding, and to pay into court for the use of the Consolidated Company, as a partial reimbursement of its expenses in bringing this matter to the court's attention, the sum of $200.

THORNTON v. INSURANCE COS.

(Circuit Court, M. D. Pennsylvania. October 8, 1903.)

Nos. 1 and 2, Oct. Term.

1. CLERKS OF CIRCUIT COURTS—FEES—MAKING AND CERTIFYING RECORD FOR APPELLATE COURT.
   A clerk of a circuit court is entitled to charge for making up and certifying the record in a case in response to a writ of error at the rate of 15 cents for each folio of 100 words.
2. SAME—PRINTING RECORD
   There is no statutory provision which authorizes the clerk of a circuit or district court to charge a fee for printing the record in a case for the Circuit Court of Appeals, in addition to the cost of printing, although by the fee bill adopted by the latter court under statutory authority its own clerk is entitled to such fee, and is also required by the rules to accept any portion of the record of proper size and type which may have been printed by any other court.
3. COSTS—PRINTING RECORD—MISTAKE OF CLERK.
   Where the clerk of a circuit court undertakes to have the record in a case printed for use in the Circuit Court of Appeals, as permitted by the

rules of that court, he is entitled to charge only the reasonable cost of such printing; and where, owing to his misconception of the time within which the printing was required to be done, without consulting the parties, he had the work hastened at an increased cost, when it was in fact unnecessary, he cannot tax such increased cost.

Appeal by Defendants from Taxation of Costs.

M. J. Martin, for defendants.
R. A. Zimmerman, for clerk.

ARCHBALD, District Judge. It was the duty of the clerk, in response to the writ of error, to make up and certify the record and return it to the Court of Appeals, for which he is entitled to charge at the rate of 15 cents for each folio of 100 words. McIlwaine v. Ellington (C. C.) 99 Fed. 133. He is confined, however, to that which he has so certified, and no more, and that is found in the first volume of the record as printed, at the end of which his certificate appears. It does not extend to the other two volumes, made up of the evidence, which is no part of the record except as it is brought into it by bills of exceptions duly noted and sealed. So far the matter is clear.

But there is more difficulty with regard to the printing. By the rules of the Court of Appeals of this Circuit, the clerk of that court, upon the filing of the transcript of the record, is to cause it to be printed (Rule 23, § 1; Page's Rules, pp. 161, 162), receiving therefor a fee of 25 cents a page, in addition to the cost of printing (Rule 31, § 7; Page's Rules, p. 169). He is required, however, to accept any portions of the record of proper size and type that may have been printed in any other court (Rule 23, § 2; Page's Rules, p. 162); and this makes a place for the practice which prevails in some of the districts of the circuit, including this one, of having the clerk of the court from which the record comes to do the printing. The clerk of the Circuit Court performed this service in the present instance, and claims a fee per folio for it, and the question is whether he is entitled thereto. He is not unless he can point to a statute which justifies the charge; and this, unfortunately, he cannot do. The fee of 25 cents a page which is allowed to the clerk of the Court of Appeals is given him by the fee bill which the act of Congress expressly authorizes that court to adopt (Act Feb. 19, 1897, c. 263, 29 Stat. 536 [U. S. Comp. St. 1901, p. 557]); but there is no equivalent provision with regard to the circuit or district clerk, nor any means by which the fee that is so provided can be transposed and made to apply to either of them. The right to it was raised and denied in the case of Doherty's Accounts, Bowlers' Comptrollers' Decisions, 253, where a similar fee per folio for proof-reading, in addition to the bill of printing, was disallowed. The clerk is therefore confined to the cost of printing, the advantage that he gets out of having it done being that he can use the printed copy in certifying the record, thus saving himself the trouble and expense of otherwise transcribing it.

But in undertaking to do the printing he is only entitled to what it is reasonably worth, and this gives rise to another complication. The ordinary price per page for such work does not exceed $1, while the bill that is presented is for $1.25. This is sought to be

justified on the ground that the printing had to be done by a certain time, entailing additional labor and expense. But the action of the clerk in this respect was taken on his own responsibility without consulting with the defendants, and they are not answerable for the expense of the extra effort unless it was necessary; and that it was not, it seems to me, is clear. The writ of error was taken and the citation allowed February 14th last, and made returnable March 16th, 30 days ahead, in accordance with the rules. As the March term of the Court of Appeals began on March 3d, this apparently carried the argument over till September, and the parties were so advised. And, while the transcript of the record had still to be filed by the return day in order to prevent the case from being dismissed (Rule 16, § 1; Page's Rules, p. 155), the record did not have to be printed by that time, the printing being only required in anticipation of the argument (Rule 23, § 1; Page's Rules, p. 161). But the circuit clerk, misconceiving this, and confusing the time for filing the record with the time for printing it, put the copy into the hands of the printer on February 28th, with a peremptory order to have it ready so that the record could be lodged in printed form with the clerk of the Court of Appeals on March 10th, six days in advance of the return day, according to the supposed exigency of the rule last cited. While it may have been to the convenience of the clerk to combine the two acts, and to certify the printed record as his transcript (to which, of course, there is no objection), it was not necessary, and the defendants cannot, therefore, be charged with the additional expense required to accomplish it. This question is not affected by the subsequent steps by which the case was advanced and an argument at the March term secured. These were all taken after the order for the printing had been given and executed; and, as there was an abundance of time after the case had been actually advanced to print the record at ordinary rates, the extra charge cannot be maintained on the basis of having contributed to that result.

In accordance with these views, the clerk's fees are retaxed and allowed as follows:

For making up and certifying the record, 950 folios, at 15 cents each...	$ 145
For printing 1186 pages at $1 a page.....	1,186
Total	$1,331

UNITED STATES ex rel. KINGWOOD COAL CO. v. WEST VIRGINIA NORTHERN R. CO. et al.

(Circuit Court, N. D. West Virginia. October 15, 1903.)

1. INTERSTATE COMMERCE—DISTRIBUTION OF COAL CARS TO MINES BY RAILROAD COMPANY.

Under the provisions of section 3 of the interstate commerce law it is the legal duty of a railroad company, in furnishing cars to coal mines along its line, where a limited number only can be supplied, to distribute the same impartially, without unjust discrimination or favoritism; and such distribution should be based on a disinterested and intelligent examination by experts of the different mines, and upon a consideration

of all the factors which go to make up their capacity, both actual and potential, the most important being the number of workings and their capacity for production, the equipment in use for handling and loading the product being secondary, because it may be readily and quickly increased if necessary to meet the requirements.

2 SAME—UNJUST DISCRIMINATION.

Evidence considered, and *held* to show that the distribution of cars by a railroad company between coal mining companies on its line of road was made upon a basis which gave an undue preference to certain companies, and operated to the undue prejudice and disadvantage of the relator company, in violation of section 3 of the interstate commerce law.

Suit on Relation for Violation of Interstate Commerce Law.

J. W. Davis, V. G. Robinson, and J. J. Davis, for relator.
C. G. Sprout, P. J. Cragan, and John H. Halt, for respondents.

GOFF, Circuit Judge. This proceeding was instituted under the provisions of the act of Congress of February 4, 1887 (24 Stat. 379, c. 104), amended March 2, 1889 (25 Stat. 855, c. 382), and February 8, 1895 (28 Stat. 643, c. 61 [U. S. Comp. St. 1901, p. 3154]). On the petition of the Kingwood Coal Company, duly verified, the alternative writ was issued on the 1st day of May, 1903. The answer of respondents was regularly tendered and filed, issues joined, testimony heard, and the case argued and submitted. By agreement of all the parties a jury was waived, and the questions raised by the pleadings were submitted for the finding and judgment of this court. Many witnesses were examined, documentary testimony offered, and counsel has been fully heard. The court has carefully considered, and at least endeavored to digest, the evidence, and to properly apply it to the law applicable to the facts found.

The relator is a corporation engaged in the mining and shipping of coal in Preston county, W. Va., on the line of the West Virginia Northern Railroad company, one of the respondents. The Irona Coal Company and the Atlantic Coal & Coke Company, also respondents, are likewise engaged in mining and shipping coal, their mines being located on the line of their co-respondent, the West Virginia Northern Railroad Company, the three mines mentioned being the only collieries so located and operated. It is charged in the petition filed by the relator that the respondent railroad company, in the transportation of the coal mined at said mines, and entering into and becoming part of the interstate commerce of the country, has been, and was when the petition was filed, discriminating in favor of the Atlantic Coal & Coke Company and the Irona Coal Company, and against the Kingwood Coal Company. It appears that the West Virginia Northern Railroad Company is not the owner of any of the cars used on its line for the transportation of coal, but that all such cars are furnished by the Baltimore & Ohio Railroad Company, over the tracks of which such coal ultimately reaches its markets. After such cars are delivered to the West Virginia Northern Railroad Company, they are distributed among the mines along its line under the superintendence of its general manager. Under the pleadings the matter to be determined by the judgment of this court is, did the West Virginia Northern Railroad Company, in distributing the cars so re-

ceived by it from the Baltimore & Ohio Railroad Company, make a just allotment of them among the three mines mentioned, or did it so assign them as to unlawfully discriminate in favor of two of them as against the other one?

It was and is the duty of the West Virginia Northern Railroad Company to so manage its business with all three of the coal mines located on and shipping coal over its line in the same relative and impartial way, so as to show no favoritism to either one of them; thereby exercising the power and discretion confided to it, so as not to act in a manner the result of which would necessarily build up one at the expense of the others, or advance the interest of two to the detriment of the third. It is quite evident that railroad companies can, by the improper distribution of cars among competing coal companies, build up some of them and make them prosper, while at the same time it tears down and eventually destroys others. Hence the wise provision of the law that no favoritism shall be shown, and that no unjust discrimination will be permitted. The relator insists that on May 1, 1903, it was discriminated against by the West Virginia Northern Railroad Company—that it should then have received at least 33⅓ per cent. of the tonnage of the cars furnished to said company by the Baltimore & Ohio Railroad Company, when in fact it received much less than that allotment, the other two mentioned mines receiving at the same time much more than their just and equitable share. We are now to deal with conditions as they existed on and subsequent to that date, considering previous incidents only as they may tend to elucidate matters as they, in fact, were when the petition was filed.

It is quite clear that the output of a coal mine is largely controlled by the number of railroad cars available for use in sending its coal to market. Prudent and economical management requires that no more coal be mined at any time than can be promptly sent to market, and hence it follows that the absence of a sufficient number of railroad cars in which to transport its output removes the incentive that otherwise would exist to increase the production of a mine. I find that at the time this suit was instituted the cars distributed by the West Virginia Northern Railroad Company were apportioned on a basis virtually as follows, viz., to the Kingwood Coal Company, 17 per cent.; to the Atlantic Coal & Coke Company, 27 per cent.; and to the Irona Coal Company, 56 per cent. This allotment was founded on a rating of the capacity for output per day of the mines as follows, viz., 400 tons to the Kingwood Coal Company, 600 tons to the Atlantic Coal & Coke Company, and 1,250 tons to the Irona Coal Company. Was this method of distribution a proper one? Did it produce that just and equitable result contemplated by the statute applicable thereto? Was it free from unfair discrimination and was it at least approximately correct? The agreed method of car distribution that had existed down to and for a time subsequent to the first shipment of coal from the mines of the Atlantic Coal & Coke Company—the mine last opened for business—was no longer in force when, at the instance of the relator, this proceeding was commenced, but at that time the officials of the West Virginia Northern Railroad Company, for reasons of their own, arbitrarily determined the method of

distribution, and made the allotments thereunder, and it is such action on the part of that company that this court, in deciding the issues herein joined, is required to pass upon.

I am of the opinion that in reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty it should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employés, the mine openings, and the miners' houses. No one of these various and essential elements can safely be said to be absolutely controlling, though likely the most important of them all are the real working places, the available points at which coal can be profitably mined. At each true working place a certain quantity of coal, to be determined by the thickness of the seam and conditions peculiar to the different coal fields, can be excavated and removed during stated periods of time; and so it follows that, if other essentials are adequate, the daily output of a mine can be computed by the number of its available working places. If the working places in a mine can provide a larger quantity of coal than the mine cars can haul, or the tipples can load, or the machines used and the miners employed can remove, then at that mine, during the time that such conditions exist, the daily output should be gauged by a careful investigation of the elements so tending to restrict its production. But even in instances of this character it is essential that a comprehensive study of the true status of the mine be made; otherwise unjust discrimination will ensue, with the inevitable result of irreparable injury to the mine so treated. If, for instance, it should appear during the inspection that the tipple had suffered an injury, or had been entirely destroyed, the presumption would be that it would be repaired or replaced immediately, and for the purpose of car distribution the mine should be rated as if the tipple were intact, though during the temporary disability its quota of cars would neither be needed nor furnished. Again, if the inspection should disclose the fact that the working places would produce and the tipples could load more coal than the mine cars could haul, still, if the number of such cars were sufficient to move the coal required to load the limited number of railroad cars assigned such mine, then the capacity of the mine for output should be ascertained from the number and character of the working places—there being no other deficiency than mine cars—for no mine should be required to keep on hand a greater number of mine cars than are necessary to move the coal required to utilize the tonnage allotted to it, for the supply of mine cars can be without delay increased should such tonnage be enlarged. Indeed, the entire supply of mine cars might either be disabled or destroyed, and still the mine itself, in all other respects, remain in perfect condition—a temporary suspension of shipping capacity existing, but its real al-

lotment for transportation purposes remaining the same. If the tipple capacity of the mine is found to exceed the maximum power of its working places, it would certainly be improper to rate that mine by such capacity, even if its mine cars and switch facilities relatively worked with its tipple. And if the mine car supply were in excess of the requirements of its working places, or of the ability of its tipple, or of its allotment of railroad cars, it would be an injustice to other mines, where such conditions did not exist, if such excess of mine cars were calculated to their limit in the rating for distribution of railroad cars.

When mines have been working for some time, not to the limit of their capacity, but on an output based on a restricted allotment of railroad cars, and a new inspection is taken from which to make the distribution of railroad cars for future use because of changed conditions, then such previous facts and the results naturally following therefrom should be noted with discernment before the maximum capacity of such mine for future output is announced. If this is not done, the mine is apt to be discriminated against, even though such was not intended, and mines where such conditions did not exist will, under the new allotment, develop themselves much faster than the mine which had theretofore been restricted in its output. If the railroad management withholds cars from a mine, it thereby, to a certain extent, retards its development, while, on the other hand, if such management discriminates in favor of a mine by allowing it more cars than its proper rating entitles it to, the result is the rapid and abnormal development of that mine, to the prejudice of those competing with it. It is therefore evident that, if equitable rules are not observed, the power that controls the railroad car supply can foster one mine at the expense of another, or can build up one locality while it is tearing down another. Hence it is greatly to be desired that this power of control should not be dominated by an interest in the output and profits of any of the mines subject to its jurisdiction, for, as has been most expressively said, "if self the wavering balance shake, it's rarely right adjusted."

The capacity of a coal mine for rating purposes is the amount of coal it is able to place in the railroad cars in a given time, and that depends on its working places, the thickness of its coal seams, its switches, workmen, mine cars, and tipples, its general equipment, and its management. The output of a mine is the amount of coal it in fact places in the railroad cars for shipment, and that is regulated by the number of such cars it is able to secure, provided its general equipment is efficient; and it may be and generally is less than its capacity, but can never exceed it. It is on account of these matters and those similar in character—of frequent occurrence in the mining regions—that no ironclad rule can be established with safety for the disposition of the questions we are now considering, and so it is that no separate element of a mine's capacity can be said to certainly control its output, which can in fact only be determined by the careful observation of impartial experts who have worthily and discriminatively studied and applied the conditions applicable thereto.

From these observations we deduce the rules that should govern

the situation confronting us in the present case, and when we properly apply them the judgment now to be entered suggests itself. As to the working places in the three mines mentioned, while there is some confusion concerning them, there is no real conflict, as the difference in the testimony regarding them is founded on the different views entertained by the witnesses as to what constitutes a working place; and hence, from their testimony, there is no real trouble in finding what we may well call the basic facts which are decisive of this controversy. From the testimony I find that at the time this suit was instituted the Kingwood Coal Company could fairly count and work at least 65 working places, the Irona Coal Company at least 103, and the Atlantic Coal & Coke Company at least 45. These working places, those available for mining purposes, were liable to such changes as were occasioned by abandonment, by accident, by development, and by the utilization of pillar spaces; but for all practical purposes necessary to their equitable rating said mines contained the places mentioned respectively, and they have changed in fact but little since then in number, though it seems that the pressure caused by litigation has made it possible to present them in a different light. That each mine possessed all of the equipment required to handle all of the coal that could be mined from such working places is plainly shown, and, that being so, it follows that the distribution of the railroad cars should have been on a basis that would have allotted to the Kingwood Coal Company 31 per cent., to the Irona Coal Company 48 per cent., and to the Atlantic Coal & Coke Company 21 per cent. of the cars allowed the West Virginia Northern Railroad by the Baltimore & Ohio Railroad Company. And yet at the period mentioned the railroad management made virtually the following apportionment of its cars: To the Kingwood Coal Company 18 per cent., to the Irona Coal Company 56 per cent., and to the Atlantic Coal & Coke Company 26 per cent. This allotment was not in accord with the actual conditions then existing at those mines, and, as I see the facts, it arbitrarily increased the numbers of cars that the Irona Coal Company should have received from 48 to 56 per cent., and the number the Atlantic Coal & Coke Company was entitled to from 21 to 26 per cent., while it unjustly reduced the number due the Kingwood Coal Company from 31 to 18 per cent. The ratings of the different mines made by the experts sent for that purpose after this controversy arose—one of which was adopted by the officials of the West Virginia Northern Railroad Company—were, to say the least, arbitrary and unreliable, and they were founded upon mistaken data; for instance, 48 working places for the Kingwood Coal Company, instead of 65—a misconception of the situation that, under the circumstances then existing, should not have been made. The rating in force at the mines mentioned on the day the relator filed its petition in this case was based upon a total daily capacity of 2,250 tons of coal, of which, as has been shown, 400 were allowed to the Kingwood Coal Company, 1,250 to the Irona Coal Company, and 600 to the Atlantic Coal & Coke Company; and this in the face of the undisputed testimony, admitted by the experts and conceded by the general manager of the West Virginia Northern Railroad Company, that the King-

wood Coal Company had then more working places than had the Atlantic Coal & Coke Company. And when we recall the fact that all of the mines had all of the mining paraphernalia requisite for the excavating and loading of more coal than could be transported in the railroad cars allotted to them respectively, the injustice of that rating is not only indubitable, but amazing.

The petition for the writ of mandamus prays that the relator, the Kingwood Coal Company, be decreed to be entitled to 33⅓ per cent. of the total car supply furnished by the West Virginia Northern Railroad Company to the coal mines located along its line. The alternative writ was based upon that allegation and prayer, and it may be amended, if desired by the relator, so as to conform to the facts as the court has found them to be, after which the peremptory writ may issue requiring the defendant the West Virginia Northern Railroad Company to cease giving preference and advantage to the Irona Coal Company and to the Atlantic Coal & Coke Company over the Kingwood Coal Company in the shipping and transportation of coal, and to furnish to said Kingwood Coal Company without discrimination, and upon conditions as favorable as those given to other shippers, the full supply of cars due it under existing conditions, amounting in tonnage thereof to at least 31 per cent. of the present distribution.

MERCHANT BANKING CO., Limited, v. CARGO OF STEAMSHIP AFTON.

(District Court, S. D. New York. October 8, 1903.)

1. SHIPPING—RIGHTS OF MORTGAGEE—FREIGHTS.
   The mortgagee of a ship which is left in possession of the owners, on subsequently taking possession under the mortgage, is entitled to the freights thereafter coming due, whether or not they were earned in whole or in part before he went into possession; but he is entitled to such freights subject to such engagements as the owners have previously entered into in respect to the voyage, they having the right to full control and to make any contracts necessary for the operation of the vessel so long as they remained in possession.
2. SAME—CONTRACTS MADE BY MORTGAGOR IN POSSESSION.
   The owners of a steamship, who had given a mortgage thereon, but who remained in possession, chartered her for a voyage; the charter party providing for advancements to a stated amount by the charterers to the master, the same to be deducted on final settlement of freights. By subsequent agreement, at different ports during the voyage further advances were made to the master as required by him, for which receipts signed by him were indorsed on the charter, stating that the money was drawn against freight. On reaching the port of delivery the mortgagee took possession of the vessel. *Held*, that it was competent for the parties to the charter to enlarge the provision for advances, and, having done so, such action was binding on the mortgagee, who, on subsequently taking possession, was entitled to recover from the charterer only the balance of the freight due after deduction of all the advances.

Butler, Notman, Joline & Mynderse (Frederick M. Brown, of counsel), for libelant.

Clark & Veeder (Charles C. Burlingham, of counsel), for claimants.

HOLT, District Judge. This is a libel against the cargo of the steamship Afton and the freight moneys arising therefrom, to recover the sum of $8,737.55. In December, 1900, the firm of McLaren & McLaren, of Glasgow, owners of the steamship Afton, executed a mortgage on the steamer to the libelant, the Merchant Banking Company, Limited, of London, to secure a running account and advances to be made thereafter. The mortgage was duly recorded at Glasgow, but the mortgagee did not go into possession of the steamer at that time, the mortgagors continuing in possession. In July, 1902, McLaren & McLaren chartered the steamer, which was then on a voyage to Shanghai, to Shewan, Tomes & Co., the claimants in this suit, for the return voyage from China to New York. The charter party provided that the steamer should have a lien on the cargo for freight; that a lump sum freight of £7,750 was to be paid on delivery of the cargo; and that sufficient cash, not exceeding £1,500, was to be advanced to the master, if required, at the loading ports, on account of freight, the same to be deducted on final settlement of freight. During the voyage, at different ports in China, the master called for and received from Shewan, Tomes & Co. the agreed sum of £1,500, and also additional advances, amounting to £1,803. 8s. 4d, the equivalent in American currency of $8,737.55. For these additional advances, receipts, signed by the master, were indorsed on the charter party, stating that the money was received as advance freight, or, in some of the receipts, as advance against freight, to be collected from the first payment of the charter money. When the steamer reached New York, the libelant, the Merchant Banking Company, Limited, took formal possession of the steamer under the mortgage, on which there was then due about £110,000, and which was then in default. Subsequently the cargo was delivered, and the freights collected by Shewan, Tomes & Co. under an arrangement which preserved to the Merchant Banking Company, Limited, its rights as mortgagee in possession for the balance of the charter freight. On the final settlement between the Merchant Banking Company, Limited, and Shewan, Tomes & Co., Shewan, Tomes & Co. retained for their own reimbursement said sum of $8,737.55, which they had advanced to the master of the steamer, and paid over the balance to the bank. This action is brought to recover the amount so retained.

The owners of a ship, who have executed a mortgage upon her, so long as the mortgagee does not go into actual possession, retain full control of the vessel; and any contracts or obligations which are necessary for the operation of the vessel bind the mortgagee, unless they substantially impair his security. If a mortgagee goes into possession, he is entitled to the freights thereafter coming due, whether or not they were earned, in whole or in part, before he went into possession; but he is entitled to such freights subject to such engagements as the owners have previously entered into in respect to the voyage. The charter party provided that the master should not be entitled to draw more than £1,500 on the voyage against freight money, but in the course of the voyage it became necessary for him to draw, and he did draw, an additional £1,803. The receipts show that the agreement

was that it was drawn against freight, the same as the £1,500 authorized by the charter. The parties to the charter had a right to modify the provision restricting the amount to be drawn by the captain to £1,500, and they did so; and the agreement which they entered into in that respect before the mortgagee went into possession was, in my opinion, binding upon the mortgagee when it took possession. Liverpool Marine Credit Co. v. Wilson, 7 Ch. App. Cas. 507; Kimball v. Farmers', etc., Bank (Super. Buff.) 11 N. Y. Supp. 730; Keith v. Burrows, 2 App. Cas. 636; Collins v. Lamport, 34 L. J. Ch. 196; Jones on Chattel Mortgages, §§ 546, 548. The cases of Brown v. Tanner, L. R. 3 Ch. App. 597 (1868), and Tanner v. Phillips, 1 Asp. Mar. Cas. 448 (1872), on which the libelant relies, were cases in which, in addition to the mortgage of the ship, a formal assignment of the freights to be earned was made, which I think distinguishes those cases in a very material respect from this case.

My conclusion is that the libel should be dismissed, with costs.

McFARLAND v. CONSOLIDATED GAS CO.

(Circuit Court, S. D. New York. August 24, 1903.)

1. PLEADING—BILL OF PARTICULARS—NEW YORK PRACTICE.
A plaintiff, in an action for a personal injury, required on motion of defendant to furnish a bill of particulars under the statute of New York, where he had previously obtained extensions of time to serve such bill.

On Motion for Bill of Particulars.

James W. Osborne, for plaintiff.
Theron G. Strong, for defendant.

HOLT, District Judge. It is difficult to harmonize the cases in which it has been held that bills of particulars should be given or should not be given in negligence suits. They appear to have been ordered much more freely in cases brought by the person injured than in cases brought by the personal representatives of the person injured. I think that among the cases cited those most similar to the case at bar have ordered bills of particulars to be furnished. Wilson v. American, etc., Co., 56 App. Div. 527, 67 N. Y. Supp. 508; Myers v. Albany Ry. Co., 5 App. Div. 596, 39 N. Y. Supp. 446; Field v. N. Y. Central Ry. Co., 35 Misc. Rep. 111, 71 N. Y. Supp. 220. The fact, too, that the plaintiff repeatedly obtained extensions of time in order to serve a bill of particulars is of considerable weight, as tending to prove an acquiescence in the propriety of the claim that one should be delivered.

My conclusion is that the motion should be granted.

In re FILER.

(District Court, S. D. New York. April 27, 1901.)

1. BANKRUPTCY—PROVABLE DEBTS.
   A claim for money obtained by the bankrupt from the claimant by fraudulent means, of such character that the claimant might waive the tort and sue on an implied contract, is provable in bankruptcy.
2. SAME.
   Where a bankrupt who was in the employ of a firm of brokers caused them to purchase stocks on false and fictitious orders purporting to have been given by customers, such purchases being in fact intended for his own benefit, the firm had the right to treat him as the principal in the transactions, and to prove the debt against him in bankruptcy, as one for money paid at his request and for his use.
3. SAME.
   A claim against the estate of a bankrupt for sums of money obtained by him from the claimants, while in their employ, by forging indorsements on checks and cashing the same, by taking cash from the drawer, and by inducing them to purchase stocks on false and fictitious orders, cannot be denied allowance, as an unliquidated demand, where the amounts taken from and paid out by the claimants are certain.
4. SAME—PREFERENCES.
   Where a bankrupt caused a firm of brokers to purchase stocks for his benefit, which they held as collateral security for the money advanced in making the purchases, the sale of such stocks by them within four months prior to the bankruptcy for the purpose of liquidating his account did not create a preference, requiring the firm to surrender the sums received for the stocks before proving their debt in bankruptcy.

In Bankruptcy. On review of decision of referee allowing the claim of Kohn & Co.

The following is the opinion of Dexter, referee (April 10, 1901):

Kohn & Co., bankers and brokers in the city of New York, present a verified claim against the above-named bankrupt in the sum of $86,248.21, arising out of the following transactions: William B. Filer was the bookkeeper and cashier of the claimants, and as such abused the confidence placed in him, and by various fraudulent acts obtained moneys from his employers, and misappropriated the same to his own use. The first three items of indebtedness, amounting to $12,000, inclusive of interest, are based upon the taking of that amount of money by means of checks of Kohn & Co. intrusted to the bankrupt, and paid to him upon forged indorsements; the bankrupt concealing his thefts by false entries upon the books of account of the firm. The fourth, fifth, and sixth items of indebtedness are based upon the taking by the bankrupt of specified amounts of money from Kohn & Co., aggregating $3,696, and differ from the first three items only in the manner of taking; the money having been taken from the cash drawer of Kohn & Co., instead of from the firm's bank account, and similarly concealed by false entries in the firm's books. The seventh item of indebtedness is the largest part of the claim, amounting to $70,593.91, and is based upon moneys laid out and expended for account of said bankrupt in the purchase of stocks and bonds, which the said bankrupt caused the firm to purchase upon the false and fraudulent pretense that such purchases had been ordered by divers customers of the firm, whereas in fact no such purchases had been ordered by these customers, but the purchases were caused to be made by the bankrupt with the intention on his part of appropriating to his own use the bonds and stocks, or the profits to accrue from the subsequent sales thereof. It is also based upon services rendered in making the purchase and sales of such stocks and bonds at the customary rates of charge for brokers' commissions. To this proof of debt, preliminary objections have been filed by certain creditors upon the grounds: First, to

each and every item of said claim on the ground that the same is not a debt which may be proved as provided in the United States bankruptcy law; second, to each and every item of said claim on the ground that the same is unliquidated; third, to each and every item of said claim on the ground that said Kohn & Co., alleged creditors, have received preferences which have not been surrendered.

The objection that the debts due Kohn & Co. are not provable in bankruptcy must be overruled. The several debts are susceptible of two constructions: They may be treated as contracts implied in law, or as claims based upon a tort. It is well settled that where a claim arises ex delicto, but is also of such a character as to constitute a claim on the theory of quasi contract, the debt is provable in bankruptcy. The creditor has the election to waive the tort and sue in contract. In re Hirschman, 4 Am. Bankr. R. 715, 104 Fed. 69; In re Lazarovic, 1 Am. Bankr. R. 476. I can add nothing to the well-considered opinion in Re Hirschman.

As to the items of the account exclusive of the seventh and largest item, it is apparent that the proof of debt specifically alleges that the bankrupt received the moneys obtained by the checks and from the cash drawer. The claim as to these items is clearly based upon a claim for moneys had and received by the bankrupt to the use of the claimants.

As to the seventh item of indebtedness—that the sales were for account of said bankrupt—I am of the opinion that the claim specifically alleges a good cause of action in the nature of contract, and is provable in bankruptcy. There is a distinct allegation that the brokers laid out and expended for the account of the bankrupt divers and sundry sums for the purchase of divers and sundry stocks. The remaining portion of the claim is merely evidential, and sets forth the manner in which the firm were induced to purchase or subscribe and pay for these bonds and stocks. The objecting creditors strenuously urge that the claim as stated is purely a cause of action for damages caused by the fraudulent representations of the bankrupt. I cannot accede to this contention. This is not a case of where a third party makes representations as to the financial responsibility and credit of a proposed vendee, knowing the statements to be false. In such a case it may be that the vendor, who parts with his goods on the faith of such representations, may recover his loss from the party making the false representations, and sue in tort. I take it in this case that the bankrupt could, at the election of the firm, be treated as the principal. It was for them only to make the election of remedies. They have chosen to treat this fraudulent account as made for the bankrupt's account. The fact that he used the names of bona fide customers of the firm does not, in my opinion, alter the case, any more than if he had used entirely fictitious names. The fraud was the inducing cause of the transaction, but the transaction itself was clearly as stated in their claim, namely, an expenditure for account of the bankrupt. He cannot be heard to question this disposition of the matter, as it is the one most favorable to him. Nor can the customers whose names were fraudulently used as a cover for the bankrupt's operations be prejudiced. There was no pretense that the bankrupt was the agent of these customers. He was merely an employé of their brokers, and no contractual relations could exist towards third parties, arising from this employment It is contended by the claimants that in order to constitute an implied contract, under this case, there must be an unjust enrichment of the person whose promise is implied. That is unquestionably true; but if the account was the bankrupt's—if he took whatever profits were made, or was putting himself in a position to reap all the benefit from the account, as the principal, at an expenditure of money for his account by Kohn & Co.—this was an expenditure for the bankrupt's use, and he distinctly received a benefit from it, as a matter of law. The fact that the money was lost in a speculation does not detract from the character of the demand, any more than if, when the bankrupt drew the money out of the drawer, he had lost the money from his pocket. It may be stated as a general proposition that a plaintiff can recover against a defendant, as for money paid to his use, to the extent of the claim paid by the plaintiff which should have been paid by the defendant. Keener on Quasi Contracts, p. 396 et seq.

The second objection, that the claim is not provable for the reason that it is unliquidated, must also be overruled, as, in the view which I have taken of the transaction, the claim, as presented, is for a liquidated amount. It is absolutely certain what is due, and how much is due. No further computation or any extrinsic evidence is necessary to show what that amount is. The measure of damages is the actual amount of money taken, which amount is stated; but, even as an unliquidated account, it could still be proven in bankruptcy. Bankr. Act July 1, 1898, c. 541, § 63, subd. "b," 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]; In re Rouse, 1 Am. Bankr. R. 393.

The third objection is that the claim is not provable for the reason that Kohn & Co. have received preferences which have not been surrendered. The preference that was obtained by the attachment mentioned in the claim has been expressly surrendered, but the objecting creditor contends that it appears on the face of the schedules annexed to the claim that Kohn & Co. received various sums of money from Filer on account of purchases and sales subsequent to the date of his absconding, when they knew that he was insolvent, and within a few days thereafter obtained an attachment against his property. Some of these items to which my attention has been called are within the period of four months prior to the filing of the petition. It does not seem to me that these various credits fall within the category of payments. They appear to be sales of stocks made for the purpose of showing the amount of the indebtedness due from the bankrupt—in other words, of stating the account. The stocks were purchased, under the theory of the claim, for the account of the bankrupt, and held by Kohn & Co. as collateral to the loan of the money used in their purchase. This is the usual theory of brokers' purchases and sales. So far as appears, the stocks came into the possession of Kohn & Co. before the bankrupt absconded. The fact that they were sold subsequently for the purpose of liquidating his account does not create a preference. It was merely a change of property from one form to another—from stock to money—and the bankrupt transferred nothing which would enable the creditor to obtain a greater per cent. for his debt than any other creditor, but the sale merely determined the amount of the debt. Of course, upon the hearing upon the merits, if evidence is offered to controvert this prima facie claim, and to show that a preference was created, a proper direction may be made according to the equities of the case.

For the reasons aforesaid, I overrule the objections to the claim of Kohn & Co., and allow the claim as proved.

The above facts, with my opinion thereon, are certified to the learned district judge for his decision.

Nicoll, Anable & Lindsay, for claimants Kohn & Co.
Fleischman & Fox, for objecting creditors.

BROWN, District Judge. I have carefully examined the authorities cited in opposition to the claim of Kohn & Co., in the seventh paragraph, and do not think them applicable. I am of the opinion that the referee's ruling was correct, on the ground that Kohn & Co. had the right to treat the bankrupt as the principal in the purchase of stocks which he had induced them to purchase under false and fictitious orders. The bankrupt was in fact the real principal. There was no other. The purchases were by his order, and were intended to be for his benefit; and, on such facts, he would be estopped to deny that he was the real principal, and an action in assumpsit would lie as for moneys paid at his request and for his use. Bayley v. Wilkins, 7 C. B. 886; Westropp v. Solomon, 8 C. B. 345; Smith v. Ludio, 5 C. B. (N. S.) 587; Brittian v. Lloyd, 14 M. & W. 762; Perin v. Parker, 126 Ill. 201, 18 N. E. 747, 2 L. R. A. 336, 9 Am. St. Rep. 571; Id., 25 Ill. App. 465. Such a debt is provable in bankruptcy. On the other points, also, I think the referee's ruling is correct.

THE CITY OF PORTSMOUTH.

(District Court, E. D. Virginia. July 28, 1903.)

1. SHIPPING—INJURY OF PASSENGER—NEGLIGENT FASTENING OF VESSEL TO DOCK.

A steam ferryboat which, while discharging passengers on a dock or float, by reason of being insufficiently secured swung away from the float, leaving a space of several inches, is liable for an injury to a passenger, who in attempting to pass from the vessel, and in the exercise of due care, stepped into such space, or was thrown by the lurching of the vessel, and fell between the vessel and dock.

2. DAMAGES—PERSONAL INJURY—AMOUNT OF AWARD.

An award of $4,000 damages made to a woman passenger, who fell while passing from a steam ferryboat and sustained a severe sprain of her ankle, and also a fracture of the coccyx, which latter injury, as shown by the medical testimony, was permanent in character, and such as would seriously affect the nervous system of a weak, delicate woman, and tend to make her an invalid and nervous wreck, was reasonable.

In Admiralty. Suit for personal injuries to passenger.

Miller & Coleman, for libelant.

T. J. Wool and McLemore & Corbitt, for respondent.

WADDILL, District Judge. The libelant in this case seeks to recover damages for personal injuries sustained by her, while traveling as a passenger on the ferry steamer City of Portsmouth, plying between the cities of Norfolk and Portsmouth, by falling between the steamer and the float while leaving the steamer at its berth in the city of Portsmouth. The libelant's case, briefly, is that on the night of the 10th of June, 1902, on leaving the steamer in the usual manner, after it was supposed to have been made fast, she (the libelant), exercising due care, and as other passengers were leaving, "by reason of carelessness and negligence in mooring said steamer to said float or dock, a large opening between the said steamer and the said dock was caused by the said steamer backing from the side of the dock for a distance sufficient to allow her to miss her footing, and to fall between said steamer and said dock, where she hung until dragged from her perilous position; and by reason of her fall between said steamship and said dock she was permanently injured about her back, body, limbs, and internally." The respondent, the owner of the steamer, denies all negligence on their part as to the mooring of said steamer, or that there was any opening between the steamer and the dock; and insist that the libelant received no permanent injury to her back, body, limbs, or internally, and that, if she did, it was due to the negligence and carelessness of the libelant, and on account of no fault of respondent.

The case turns almost entirely upon a correct determination of the facts, since, whatever may be the true criterion of duty due by the respondent to the libelant, it cannot be doubted, if the condition of the passageway provided for the exit of passengers from the steamer was as claimed by libelant, that the respondent failed in its duty to exercise proper care for her on the occasion in question. The accident was an unusual one, as well in the manner in which it happened as in the ex-

tent of the injury sustained by the libelant. That the libelant did fall, and as a result received serious injury, cannot be questioned. To maintain the facts contended for by her, four eyewitnesses to the occurrence were examined, three of whom were in no manner interested, strangers to the libelant, who happened to be traveling on the steamer, saw her fall, and pulled her up from between the float and steamer; and two of them aided in taking her home, a short distance away. These witnesses appear to be entirely respectable and intelligent, and by their manner of testifying and their general demeanor would carry conviction to the mind of any impartial person as to the truthfulness of their several statements. They, in effect, say, that the libelant was leaving the steamer, the same having been apparently made fast, and passengers invited to leave, quite a number of pasengers having passed off before her; that they observed libelant suddenly fall, and sprang to her assistance, raised her up, and helped her off the boat, one or more of them standing at the time with one foot on the steamer, and the other on the float; and they describe the opening as sufficiently wide to allow the libelant's limb to pass through as claimed by her. One of them also testified that while the libelant was being pulled out of the space between the boat and float, he saw the man at the wheel pulling on the wheel, pulling the boat up to the float, and that there was then an opening 8 or 10 inches wide. The libelant further testified that as she was stepping from the steamer there was a sudden lurch of the boat from the dock, which threw her violently back, her limb slipping between the steamer and the float, striking her back against the boat, by which her body was greatly bruised and her ankle sprained; that she did not, for the moment, suppose that she was seriously hurt, though she felt faint when putting her foot to the floor; and, although it was suggested that she get a carriage, she insisted on walking to her home, and was assisted there; and that, though suffering great pain, she did not realize for several days that she was seriously hurt. She is sustained in her statement as to the steamer's lurching by at least one witness. The respondent did not know of the accident at the time, and, indeed, heard nothing of it until its officers saw an account of it in the papers on the next day. Hence, although quite a number of witnesses were examined for respondent, including the master of the steamer and two deckhands on duty at the time, the latter witnesses only testified generally as to the landing of the boat, as they did not see or know of the occurrence at the time and until they saw it in the papers the following evening. Two witnesses were examined by the respondent, both of whom testified to the fall of Mrs. Carr, and described the manner in which she fell differently from the libelant's witnesses, and indicated that she stumbled and fell, as distinguished from falling between the float and the boat; and the evidence of the master of the steamer tends to establish that the float did not come down to the level of the deck of the steamer, so as to form an even surface, but that the float was several inches higher than the steamer. Whatever may be the precise manner in which the libelant fell, certain it is that the space between the float and the steamer should not have been left in such condition as that a passenger stepping from one to the other could

fall between the two, and the float itself should not have been left in such condition that passengers would fall over it on leaving the steamer. The evidence of respondent's witnesses, including the master of the steamer, is not inconsistent with the fact of the lurching of the steamer, as claimed by the libelant; as the master explains in his evidence that, after the gates had been opened for passengers to leave the steamer, the deckhand went to his wheel, and stayed there, trying to heave in the steamer, and it looked to him as if he could not get it in; and, further, that he (the master) was working the steamer ahead until about 150 passengers had gotten off. From the whole case, therefore, the court is satisfied, from the overwhelming preponderance of the evidence, that there was, either from the lurching of the steamer, or the failure properly to moor the same, a space between the steamer and the float, sufficient for the libelant to step between the two, and in which she did step, while passing from the steamer, and sustained the injuries sued for.

The character of the injury sustained by the libelant is unusual, as before stated. It was at first supposed she had only sprained her ankle, and probably wrenched her back; but it subsequently developed that the sprain of the ankle was of a serious character, necessitating a plaster cast, and that the injury to her back, aside from the bruises and wrench, consisted of a fracture of the coccyx—the coccyx being described by one physician as the rudimentary tip of the spinal column, and a fracture of which, another of the physicians states, generally makes an invalid for life, and that it usually sets up a painful condition that lasts for years, making a nervous wreck of the party afflicted, and tends, in case of a female, to incapacitate her for future child-bearing; and that the treatment of such an injury was difficult, and could only be entirely relieved by an operation, which was serious in its character. The evidence further tended to show that the libelant was a nervous, delicate woman, predisposed to fainting attacks, and therefore one susceptible to an injury of this nature; that the injuries were of a kind that would affect her nervous system, were not easily discernible, and could not be noticed on some occasions without actual examination. Indeed, two highly reputable physicians introduced by libelant testified that they could not have judged of the injuries at all without seeing for themselves, and one of them testified that at first, by reason of the appearance of the libelant, before he had made an examination, he wondered if the case might not be one of blackmail; but that her true condition by examination was, and could easily be, ascertained by a skilled physician.

The character and extent of the injury was the more beclouded by the fact that libelant's regular attending physician immediately after the accident had the misfortune, some six weeks after the occurrence, to be assassinated by a crazy patient, which deprived us of his evidence. It sufficiently appeared that, within a few days after the libelant had fallen, the sprained ankle was placed in a plaster of paris cast, and that for some six weeks thereafter she was confined to bed, suffering great pain; and some two days before the death of the doctor he removed the cast, after which time another physician was called in, who testified as to her condition from thence on, as did members

of the family and friends, all of whom described the libelant as a great sufferer at times, though on other occasions she was apparently well and free from pain. It is clearly evident that the injuries to the libelant were painful and serious in character, and for which she is entitled to recover in this case.

The respondent at the trial introduced two witnesses—one who testified that the libelant at the time she received the injury was under the influence of liquor; and the other that the injury from which she suffered was not caused by the accident on the steamer, but by reason of a fall upon a chair in her home on the Sunday after the accident. In reference to each of these defenses it may be said that they were sufficiently important, if true, to have justified the respondent in setting them up in its pleadings; and, because of the failure to do so, the court can but view them in the light rather of an afterthought than otherwise, and it should not readily be assumed that such important omissions would have been made in the pleadings if there had been any real evidence to support them. Thomas v. Winne (C. C. A.) 122 Fed. 396, 397. There is no evidence to support the suggestion of drunkenness, and there is nothing to give color to the charge further than that the libelant, on the night of the accident, while taking supper at a restaurant in the city of Norfolk, did take one, and possibly two, glasses of intoxicants; the testimony being in conflict whether there was one or two, and as to the character of what was drank. The imprudence of this act on the part of the libelant may be conceded, and it is to be regretted that in modern life the custom has become too prevalent for reputable females to drink spirituous liquors in public places. Such conduct is always likely to be the subject of unfavorable criticism, and the present case is a striking illustration of the unfortunate consequences likely to flow therefrom. But the idea of drunkenness on this occasion is entirely dispelled. The evidence of those present at the restaurant, as well as persons who saw the libelant on the steamer, aided her when she fell, and assisted her home, all show the utter lack of foundation for this claim. Indeed, the respondent's witnesses so entirely vindicate her from this charge, that the fact of making the same tends rather to show that the purpose was to otherwise reflect upon the libelant, rather than to maintain the defense of drunkenness.

So far as the injury by the fall on the chair is concerned, it is sufficient to say that the evidence likewise fails to support this contention. While it is true the physician for the respondent saw the libelant on several occasions at and about the time of the accident, and under more or less embarrassing circumstances, as he admits, says that the libelant on the Sunday night after the accident, when he called to see her on account of an attack of hysteria, told him that she had fallen in a paroxysm of pain, and hit her back on a chair, and hurt her spine, this the libelant positively denies, and explains that when he came she was under the influence of morphine, and fainting with pain; that she informed him she was suffering terribly with her back, in exactly the place she was struck on the ferry; and that, instead of saying what the doctor said, she said she was trying to pull a chair to sit down—her limb then being in the plaster of paris cast—when

she hurt herself again. If the statement, as testified to by the respondent's physician, that she had fallen and struck her back on a chair and hurt her spine, were true, it by no means follows that she then sustained the severe injury to her coccyx, or that she had not previously sustained the same; on the contrary, it is quite consistent that the original injury had occurred, and hence the serious effect of the slight fall or jar from the chair. It is also apparent from the physician's evidence that he had not, previous to the latter fall, made any examination that would tend to throw light upon this particular injury, and that it was not until the Tuesday following the fall from the chair that he made such examination, and as to the making of which, taking into account the peculiarly delicate character of the examination, and what had occurred in reference to the doctor's previous connection with the case, and what took place at the time as to whether or not he should make the examination, it cannot be said that the doctor is free from just criticism in making the examination at all under the circumstances. Aside from the improbability of the libelant sustaining the injury to her coccyx by a fall on the chair, the fact that this defense is based upon the alleged statement of the libelant, made when seriously suffering as the result of the injury sued for, should not lead the court quickly to adopt that theory, which appears not to have been of sufficient importance to be set up in pleadings (Inland & Sea-Board Coasting Co. v. Tolson, 139 U. S. 551, 553, 554, 11 Sup. Ct. 653, 35 L. Ed. 270); particularly as the doctor is most positively contradicted both by the libelant and her husband—the latter of whom heard what occurred between them—as to some of the important features of the case.

The character of the injury has been quite fully considered, and it only remains to determine what damages should be allowed to the libelant. This is a difficult question, one largely in the discretion of the court, and of peculiar delicacy in this case. Injuries affecting the nervous system are more or less serious, and their extent difficult of ascertainment. They are liable to be of uncertain duration and intensity; and, in short, it is impossible to see and foretell just what will be the result in such cases. With a woman of nervous temperament, and with injuries of the character sustained in this case, it may be treated as reasonably certain that she will not quickly recover from them. Medical experts testified that the injuries sustained are all permanent in character, and from which the libelant will suffer all of her life, and tend to make her an invalid and a nervous wreck. An award, therefore, of $4,000, is thought only to be reasonable, and the same will be allowed accordingly.

WHITFIELD v. ÆTNA LIFE INS. CO.

(Circuit Court, W. D. Missouri, W. D. November 2, 1903.)

No. 2,698.

1. LIFE INSURANCE—SUICIDE—EFFECT OF MISSOURI STATUTE.
Rev. St. Mo. 1899, § 7896, which provides that "in all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void," does not prohibit the parties from contracting in an accident policy that a smaller amount shall be payable thereon in case of the death of the insured from suicide than the amount expressed in the caption of the policy, and which is agreed to be paid in case of death from an accidental and involuntary cause; and a provision in such a policy, nominally for $5,000 in case of death resulting from accident, that, if death shall result from injuries voluntarily inflicted, the recovery shall be limited to $500, is valid and enforceable.

Action on Accident Insurance Policy to Recover for Death of the Insured.

Frank Hagerman, for plaintiff.
Jones, Jones & Hocker and L. C. Boyle, for defendant.

PHILIPS, District Judge. The question to be decided is whether, upon the agreed statement of facts, the plaintiff is entitled to recover the sum of $5,000, the principal sum designated at the head of the insurance policy, or the sum of $500, specified in the contract as the sum recoverable where the death of the assured resulted from injuries voluntarily inflicted upon himself by a pistol shot. The decision turns upon the proper construction of section 7896 of the Revised Statutes of Missouri of 1899, which declares that:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

It is conceded, in the absence of this express statutory provision, that, at common law, suicide, voluntarily inflicted by the assured, would constitute a complete defense to the action on the policy contract. The statute in question simply declares that "it shall be no defense that the insured committed suicide," in a suit upon such policy. In Logan v. Fidelity & Casualty Company, 146 Mo. 114, 47 S. W. 948,

¶ 1. Suicide as a defense to action on life insurance policy, see notes to Insurance Co. v. Florida, 16 C. C. A. 623; Casualty Co. v. Egbert, 28 C. C. A. 284.

the Supreme Court held that said section of the statute applies to an accident policy on life, as well as to an ordinary life insurance policy.

As this statute is in derogation of the common-law right of defense, it is not to be extended beyond the letter and spirit of the statute. It does not undertake to declare that under an accident policy, involving a great variety of accidents resulting in death, as does the policy in question, parties may not stipulate for the payment of a specified sum in the event of death resulting from suicide. It simply declares that the fact of suicide shall constitute no defense to the suit. It is to be presumed that the term "defense" was employed by the Legislature in its ordinary and natural import. By express provision of the state statute (section 4160), it is declared that, in the construction of statutes of this state, unless such construction be plainly repugnant to the intent of the Legislature or the context of the same statute, "words and phrases shall be taken in their plain or ordinary or usual sense; but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." In law, "defense" is "that which is offered and alleged by the party proceeded against in an action or suit as a reason in law or fact why the plaintiff should not recover or establish what he seeks; what is put forward to defeat an action." Black's Law Dictionary. "The denial of the truth or validity of the complaint. A general assertion that the plaintiff has no ground of action." Bouvier's Law Dictionary.

To say that when the defendant insists that, on the face of the very contract sued on, its liability in case of suicide is limited to $500, is some defense, and therefore is in contravention of the term "it shall be no defense," is, with all due respect, to juggle with mere words, without regard to the meaning. The term "it shall be no defense" is grammatically the equivalent of "it shall not be a defense." It means no more and no less. In law, it means that the given fact of death by suicide shall not bar an action on the policy. The statute does not undertake to say that parties making a contract of insurance shall not agree upon the amount or compensation to be paid by the insurance company in the event of death resulting from suicide. Why parties to such contract may not agree upon a stipulated amount to be paid in case of death resulting from suicide, as well as death resulting from an accident on a railroad car, or occurring in a burning building (which under this policy is made double the amount of the principal liability), is not apparent. As said by the court in Baltimore R. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560:

"The right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

"No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." Shaw v. Railroad Company, 101 U. S. 565, 25 L. Ed. 892.

In Hadden v. Collector, 5 Wall. 107–111, 18 L. Ed. 518, the court said:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

So in Scott v. Reid, 10 Pet. 524–527, 9 L. Ed. 519, the court said:

"Where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

The only limitation in the language of the statute in question is that, in case of death resulting from suicide, it shall constitute no defense against liability on the policy; that is to say, it shall not defeat a right of recovery to the extent of the sum stipulated for in the policy. The innovation, in short, made by the statute, was to cut off a defense based upon the fact that the assured committed suicide, without undertaking to interfere with the right of contract between parties sui juris as to the extent of liability in case of death resulting from the specific cause.

The purpose of fixing in the caption of the policy a principal liability of $5,000 becomes evident, under a policy like the one in question, which provides that, in case of certain physical disabilities resulting from accidental causes, there shall be a specified amount per week. Under such provision, if there were no principal liability expressed, as the disability would be continuous, as in case of the loss of a hand or foot or an eye, the recovery might run on without limit during the life of the insured, and in the aggregate far exceed the sum of $5,000, the principal sum.

The Supreme Court of this state has not construed the statute in question in the particular here involved. The Logan Case, supra, does not bind or control this court, except in so far as the question involved in that case was determined by the Supreme Court, which was simply whether or not the section of the statute above quoted applies to the instance of death by suicide on an accident policy, as well as to other life insurance policies. Under the well-recognized rule that the language employed by courts in construing statutes can have no binding effect in other litigation, beyond the essential matter considered and determined in the former case, any discussion by the court in the Logan Case must be restrained to the fitness of the matter under consideration.

The decision of the Court of Appeals of this state in Keller v. Travelers' Insurance Company, 58 Mo. App. 557, is not binding upon this court, as it is not a court of the highest jurisdiction in the state. It is not maintainable that the statute in question establishes any public policy of the state, beyond its expression; that is, that suicide shall constitute no defense against liability of the company on an ac-

cident insurance policy. As already suggested, the statute does not undertake to declare that an insurance company may not issue a policy of insurance by which the parties agree, in case of death resulting from suicide, what the amount of recovery shall be. I cannot perceive why the Legislature should deem it contrary to the public policy of the state to permit the insured to agree with the insurance company by contract that, in the event of death resulting from a voluntary act of suicide, what amount should be paid by the insurer. Looking at the language of the statute, and taken in its legal, technical sense, in my humble opinion nothing more was intended than that, in view of the fact that insurance companies under like policies had successfully interposed as a complete defense against any liability that the insured had taken his own life, hereafter no such defense should avail to defeat a recovery. As the Legislature has gone no further in the assertion of the state policy, the courts ought not to undertake by mere judicial assertion to extend the operation of the statute.

In reply to the suggestion that the foregoing construction of the statute would authorize a practical evasion of its spirit, by recognizing the right of the contracting parties to limit the amount of recovery to $1, it should be enough to say that illustrations are often dangerous in the construction of statutes. It is sufficient for the court to decide the particular case on trial. It is hardly conceivable that a party aware of his rights under the statute—and the law presumes him to be cognizant thereof—would consent to accept as compensation for such loss the sum of $1; and, if he should, it would be for the court to decide whether such inconsequential sum was not a practical evasion of the spirit of the statute. The sum of $500, provided for in this case, is a substantial sum; and as the pleading of the contract in question, voluntarily entered into by the parties, goes merely to the question of the amount of the recovery, and not to defeat a recovery, my conclusion is that the plaintiff is only entitled to recover the sum of $500.

WASHBURN-CROSBY CO. v. WILLIAM JOHNSTON & CO., Limited.

(Circuit Court of Appeals, First Circuit. October 13, 1903.)

No. 466.

1. APPEAL—REVIEW—ERROR NOT AFFECTING RESULT.
The liability of a defendant, a carrier, for the loss of goods by fire, depended on its negligence after their receipt. The jury were instructed that, as matter of law, under the evidence, there had been a delivery to it of a portion of the goods sued for; and the evidence showed that the goods were all together, and the question of negligence was the same as to all. There was a general verdict for defendant. *Held*, that such verdict was necessarily based on a finding that defendant was not negligent, and that any error in the rulings or instructions on the question of the delivery of the remaining portion of the goods was without prejudice to plaintiff.

2. SHIPPING—EXEMPTIONS BY BILL OF LADING—BURDEN OF PROOF.
Where bills of lading exempted the carrier from liability for loss or damage to the goods while on wharf, awaiting shipment, by fire or flood "not happening through the fault or negligence" of the carrier, to entitle the shipper to recover for such a loss he has the burden of proving that it occurred through the carrier's fault or negligence.

3. SAME—CONSTRUCTION OF BILL OF LADING.
A clause in a bill of lading providing that merchandise on wharf, awaiting shipment or delivery, shall be at shipper's risk of loss or damage by fire or flood, must be given the meaning the language plainly expresses, and is applicable where the goods were burned after being placed on the wharf, but before shipment.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Henry M. Rogers and John Lowell, for plaintiff in error.

Addison C. Burnham (Carver & Blodgett, on the brief), for defendant in error.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

BROWN, District Judge. This is a writ of error to review the rulings of the Circuit Court in an action at law for the recovery of the value of certain flour shipped at Minneapolis on what are known as the "Western Transit Company bills of lading." The goods were "to be carried to the port of East Boston and thence by Johnston line of British steamships to the port of London, England." They were destroyed by fire on September 4, 1895, at Pier 1 of the Boston & Albany Railroad at East Boston, Mass.

Clause 9 of the bills of lading is as follows:

"Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by fire and/or flood, not happening through the fault or negligence of the owner, master, agent, or manager of the vessel."

The jury were instructed that, upon the evidence, there had been a delivery to the defendant carrier of 1,500 sacks of flour. The question whether there had been a delivery of the remainder of the flour (10,300 sacks) was submitted to the jury.

¶ 2. See Carriers, vol. 9, Cent. Dig. § 725.

Various exceptions were taken by the plaintiff to the rulings of the court on the question of delivery, but these are immaterial, and do not require consideration, since we are of the opinion that the record discloses a general verdict in the defendant's favor on the issue of negligence.

As there was a direction that 1,500 sacks had been delivered, as these and the sacks whose delivery was in dispute were similarly situated on the pier, and as the evidence as to negligence related to the entire lot, without distinction between the 1,500 sacks and the 10,300 sacks, the verdict was a direct finding that the defendant was not proved to have been negligent as to the 1,500 sacks which had been delivered; and this finding as to a part of an entire lot of goods similarly placed shows conclusively that the plaintiff could not have been harmed by any rulings as to the delivery of the 10,300 sacks.

Whether the jury found in the plaintiff's favor on the question of the delivery of the 10,300 sacks of flour does not appear from the record. If they did, this availed the plaintiff nothing, since the jury must also have found that the defendant was not negligent. If they did not, the plaintiff was not harmed by any rulings which assisted in this result, for, had the finding been the other way, the defendant must still have prevailed on the issue of negligence. Tweed's Case, 16 Wall. 505, 517, 21 L. Ed. 389; Brobst v. Brock, 10 Wall. 519, 528, 19 L. Ed. 1002; Walker v. Fitchburg, 102 Mass. 407.

A further assignment of error is:

"That said court erred in charging the jury that, to recover in this suit, the plaintiff must show by the burden of the case that this loss was occasioned by the negligence of the defendant."

We are of the opinion that the instruction is supported by the weight of authority. Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; Railroad Company v. Reeves, 10 Wall. 176, 189, 190, 19 L. Ed. 909; Clark v. Barnwell, 12 How. 272, 13 L. Ed. 985; Crowell v. Union Oil Co., 107 Fed. 302, 46 C. C. A. 296.

While in the present case the exemption is of "loss or damage by fire and/or flood, not happening through the fault or negligence of the owner, master, agent, or manager of the vessel," and in Transportation Co. v. Downer the exemption was of "dangers of lake navigation," we are of the opinion that the latter case cannot be distinguished by the fact that the present exception contains the express words, "not happening through the fault or negligence of the owner," etc. A general exemption of fire, as a matter of construction, is limited to cases not happening through negligence. Therefore there is no substantial difference between a clause in which the limitation is implied by legal rules of construction, and a clause in which the limitation appears in express language. Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 181, 183, 184, 186, 23 L. Ed. 872; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 415, 10 Sup. Ct. 365, 33 L. Ed. 730; Compania de Navigacion La Flecha v. Brauer, 168 U. S. 104, 123, 124, 18 Sup. Ct. 12, 42 L. Ed. 398.

We are also of the opinion that the court properly refused the request for an instruction that clause 9 of the bill of lading is inopera-

tive and void as applied to the facts of this case. The contention that this clause is applicable only to water-borne goods is inconsistent with its express terms, and that the merchandise was on the wharf awaiting shipment is not disputed. We see no justification for construing this clause as applicable only to merchandise held by the steamship company as warehouseman. Such is not the import of the language, according to its natural and usual interpretation.

Upon the whole case, we find no error of the Circuit Court which calls for a reversal of the judgment.

The judgment of the Circuit Court is affirmed, the defendant in error to recover costs in this court.

FIDELITY TRUST CO. v. NEW YORK FINANCE CO.

(Circuit Court of Appeals, Third Circuit. September 15, 1903.)

No. 25.

1. TRUSTS—UNSUCCESSFUL ATTEMPT BY SETTLOR TO REVOKE—RIGHTS OF CREDITORS.
   Where an active trust created by a voluntary conveyance of property to a trustee by a deed which gives future beneficial interests in the principal of the fund to others than the settlor, although reserving to him a present interest, has been sustained as valid and irrevocable by the Supreme Court of the state in a direct attack thereon by the settlor, one who became a creditor of the settlor long after the deed took effect, in the absence of evidence of fraud in the creation of the trust, cannot take the corpus of the trust fund in execution through garnishment proceedings in satisfaction of a judgment founded on such subsequent debt, but can subject to the payment of his judgment only the income reserved and payable to the settlor.
2. GARNISHMENT—RIGHTS AND STATUS OF CREDITOR.
   An execution attachment against a garnishee has no greater effect than to place the attaching creditor in the same relation to the garnishee as that previously occupied by the judgment debtor.
3. SAME—DEFENSES BY GARNISHEE—GARNISHMENT OF TRUSTEE.
   In garnishment proceedings against a trustee, vested with the legal title to the trust property and charged with active duties with respect thereto, to subject the corpus of the property, in which beneficiaries other than the settlor have an interest, to the payment of a judgment against the settlor, the garnishee may set up any defense, legal or equitable, which it might make against the settlor, and it is competent for it to show that the judgment was obtained through collusion between the parties for the purpose of defeating the trust.

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

Wm. M. Stewart, Jr., and R. C. Dale, for plaintiff in error.

Russell Duane, for defendant in error.

Before ACHESON, Circuit Judge, and BUFFINGTON and KIRKPATRICK, District Judges.

ACHESON, Circuit Judge. On the 26th day of June, 1895, by deed executed on that date and duly recorded at Philadelphia, George Van Hook Potter transferred to the Fidelity Trust Company (here the plaintiff in error) certain mortgages and other securities, of the

value of $66,550, in trust to invest and reinvest the same, to collect and receive the income therefrom, and pay the net income quarterly to the said George Van Hook Potter during his life, so that the same should not be assigned or anticipated by him, nor be subject to or liable for his debts, and without liability to execution, attachment, or legal process of any kind; and in trust on his death to pay the principal to such persons as he might by will appoint, and, in default of such appointment, to his issue then living, "and should there be then living no issue of the said George Van Hook Potter, then to pay, transfer and set over the principal of the said trust estate to Marie B. Potter and Blanche Van Hook Potter, in equal shares." By this deed George Van Hook Potter, with respect to the sum of $12,000, reserved the right, by writing under his hand and seal, to alter and revoke the trusts thereby declared; but it was expressly stipulated that, except as to such sum of $12,000, the trust thereby created should be irrevocable. The trust thus imposed was duly accepted by the Fidelity Trust Company on the date of the deed. As to the sum of $12,000, Potter exercised his power of revocation, and that money was paid to him in divers amounts between the date of the deed and July 15, 1897. By deed poll bearing date June 9, 1899, Potter undertook to revoke and annul the deed of trust above mentioned. He then filed a bill in equity in one of the courts of common pleas of Philadelphia to have the deed of trust declared revoked. The court, however, being of opinion that the settlement effected by the deed of June 26, 1895, was not and could not be revoked, dismissed the bill. From that decree Potter took an appeal to the Supreme Court of Pennsylvania. That court affirmed the decree dismissing the bill, holding that the trust in question was valid and irrevocable. Potter v. Fidelity, etc., Co., 199 Pa. 360, 49 Atl. 85. In its opinion, delivered on May 13, 1901, the Supreme Court of Pennsylvania said:

"There was no evidence of fraud, imposition, or mistake, and there is no room for doubt that the deed, when executed, expressed the deliberate intention of the settlor. Although a young man just coming into possession of his estate, he was fully capable of understanding what he did, the reason for it, and its effect. He took ample time, after the subject of the creation of a trust was first suggested to him, to consider it before acting, and he had the advice of his mother and of his attorney. Clearly there was no misapprehension of facts, nor of the legal effect of the deed. The trust was an active one, and by its express terms irrevocable, and there has been no failure of the purpose of the settlement. * * * The rule is that a voluntary settlement will be sustained and enforced in favor of the beneficiaries, unless it is shown that it was procured by fraud or imposition, or executed under a misapprehension of the facts or of the law. This case is within the rule."

On January 29, 1902, George Van Hook Potter executed, at Philadelphia, a voluntary confession of judgment to the New York Finance Company (here the defendant in error) for the sum of $60,000, under which judgment was entered in the Supreme Court of the state of New York, for the county of New York, on the 31st day of January, 1902. The confession of judgment contains the following statement over the signature of the defendant Potter:

"This confession of judgment is for a debt now justly due to the said plaintiff from me, for money loaned to the said defendant at various times,

to wit: Seven thousand ($7,000) dollars on June 20, 1899; the further sum of seven thousand ($7,000) dollars on June 19, 1900; the sum of forty thousand ($40,000) on January 28, 1902; and the agreed sum of six thousand ($6,000) dollars for services rendered since June 20, 1899, to date."

Upon this judgment an action was brought in the court below by the New York Finance Company against George Van Hook Potter, and a judgment for $60,828.89 obtained against him on April 22, 1902, for want of an affidavit of defense. On the same day an attachment execution on the judgment was issued summoning the Fidelity Trust Company as garnishee.

Upon the trial of the issue in the attachment proceeding, the garnishee offered to show by specified evidence that the confession of judgment by George Van Hook Potter, the defendant, to the New York Finance Company, the plaintiff, entered in the Supreme Court of the state of New York, the record of which forms the basis of the judgment upon which the attachment issued, was obtained by collusion between Potter and the New York Finance Company, with the fraudulent intent upon the part of Potter to accomplish in this indirect manner the revocation of the deed of trust executed by him to the Fidelity Trust Company, which deed had been declared irrevocable by the Supreme Court of Pennsylvania, but the offer was overruled. By direction of the court the jury found a general verdict for the plaintiff, and that the plaintiff have satisfaction of its judgment for $60,828.89 against George Van Hook Potter out of the securities held by the Fidelity Trust Company, as trustee under the trust deed of George Van Hook Potter, subject to the point of law reserved by the court, viz., "whether, under all the evidence, the court should have directed a verdict for the plaintiff for any less sum, or a verdict for the defendant." Subsequently the court entered judgment for the plaintiff upon the verdict.

As we have seen, in a direct attack by the settlor, Potter, upon this trust, the Supreme Court of Pennsylvania sustained the deed of trust, adjudging it to be valid and irrevocable. The fundamental question then arising upon the facts appearing in this record is whether one who became a creditor of the settlor long after the trust deed went into effect, in the absence of any evidence of fraud, can take in execution, in satisfaction of a judgment founded on such subsequent debt, the corpus of the trust fund, when the trust deed gives future beneficial interests in that fund to persons other than the settlor. This question, we think, must be answered negatively, upon principle and authority. In Re Greenfield's Estate, 14 Pa. 489, 501, the Supreme Court of Pennsylvania, speaking by Mr. Justice Bell, said:

"Settlements like that before us, reserving a present interest in the creator of them, and carrying a future benefit or bounty to other designated parties, are very usual. If fairly made and carried into effect, uninfluenced by fraud or circumvention, they cannot be subsequently impeached, as is shown, among other determinations, by our case of Reese v. Ruth, 13 Serg. & R. 434."

It is now the firmly established doctrine in Pennsylvania that such a voluntary settlement is not impeachable by subsequent creditors not at the time of the settlement contemplated, and against whom no

fraud was intended. Snyder v. Christ, 39 Pa. 499; Harlan v. Maglaughlin, 90 Pa. 293; Best v. Smith, 193 Pa. 89, 92, 44 Atl. 329, 74 Am. St. Rep. 676. In Fellow's Appeal, 93 Pa. 470, 475, the court said:

"The title of a trustee under a deed of trust is complete and irrevocable by the settlor, although the transaction be purely voluntary. Hill on Trustees, 82. Nor does the fact that the grantor reserved an interest during life in the proceeds of the property, and gave a future benefit to other persons named, give an implied right of revocation. Reese et al. v. Ruth, 13 Serg. & R. 434; Eckman v. Eckman, 68 Pa. 460. It controverts no rule nor policy of law, but executes the intention of the grantor. Lewin on Trusts, 137."

In Pennsylvania it is no longer open to question that, if the intention of the grantor at the time he delivers a voluntary deed of trust is to part with the legal title, the trust, in the absence of fraud, will be enforced in favor of the beneficiaries, even though their enjoyment of the estate is postponed until after the death of the grantor in the deed, and notwithstanding he has reserved to himself an interest for life in the trust estate. Wilson v. Anderson, 186 Pa. 531, 40 Atl. 1096, 44 L. R. A. 542; Rynd v. Baker, 193 Pa. 486, 44 Atl. 551.

In the present instance the two specifically named beneficiaries, Marie B. Potter and Blanche Van Hook Potter, have vested interests in the principal of the trust fund; and while it is true that their interests are not presently enjoyable by them, and may be defeated should George Van Hook Potter die leaving issue, or should he exercise his reserved power of appointment by will, yet by no act of Potter other than his exercise of that power can the interests of these beneficiaries be divested. Perry on Trusts, § 250; Farwell on Powers, 474; Hopkins v. Jones, 2 Pa. 69, 70. The Supreme Court of Pennsylvania has decided that Potter has no general dominion over this trust estate, and that the settlement he made is enforceable in favor of the beneficiaries. Potter v. Fidelity, etc., Co., supra. The views expressed by that court in its opinion, we think, lead irresistibly to the conclusion that this attaching creditor cannot reach the corpus of the trust estate, but can subject to the payment of its judgment only the income reserved and payable to the settlor (Potter). We find a ruling to such effect in the analogous case of Andress v. Lewis, 17 Wkly. Notes Cas. 270.

Upon the undisputed facts, it seems to us that the New York Finance Company must be regarded here as claiming through George Van Hook Potter, and that, as against this garnishee, that company has no higher rights than Potter himself had. The execution attachment, we think, had no greater effect than to place this attaching creditor in the same relation to the garnishee as that occupied by the judgment debtor before the attachment was laid. Baldwin's Estate, 4 Pa. 248. An attachment execution is authoritatively declared to be an equitable assignment of the thing attached; a substitution of the creditor for the debtor to the latter's rights against the garnishee. Reed v. Penrose, 35 Pa. 214.

The present case is clearly distinguishable from Mackason's Appeal, 42 Pa. 330, 82 Am. Dec. 517. The deed of trust there was for the use and benefit of the settlor during his life, and on his death for the use and benefit of his appointees by will, and in default of such

appointment for the use and benefit of those entitled to his estate under the intestate laws. There was no named beneficiary other than the settlor. To all intents and purposes, the settlor continued to be the beneficial owner of the entire estate. It did not appear that there was any reason for the execution of the deed of trust except to protect the settlor's property from his future engagements. Indeed, the sole design, as found by the court, was to give to the settlor the full enjoyment and complete equitable ownership of his property, and at the same time protect it from his creditors. Moreover, the deed creating that trust contained no provision against its revocation. And, finally, the contest there arose after the settlor's death, and was between his creditors and his appointee by will. Here we have an active trust which the Supreme Court of Pennsylvania, in a contest between the settlor and the trustee, has sustained and declared to be irrevocable by the settlor and enforceable in favor of the beneficiaries.

The discussion might well end here. But, if not necessary, it seems to be proper, to notice briefly the assignment relating to the rejection of evidence. The offer, in substance, was to show fraud and collusion between the parties to the confessed judgment touching it, and the attachment proceeding under it, to overthrow this trust. This garnishee is not a mere stakeholder, but a trustee in possession of the trust property, clothed with the legal title, charged with active duties, and responsible to beneficiaries. The purpose of the proceeding was to seize the corpus of the trust property held by the trustee. A stranger to a judgment may attack the same for fraud and collusion when the enforcement of such judgment would be prejudicial to his pre-existing rights. Freeman on Judgments, § 335; Rhoades v. Selin, 4 Wash. C. C. 715, 721, Fed. Cas. No. 11,740; Esty v. Long, 41 N. H. 103. We think it was competent for the garnishee to show that the attachment was a nullity as against the corpus of the trust estate by reason of the fraud and collusion alleged and proposed to be shown. Even if this defense could be regarded as an equitable one, it was not for that reason inadmissible here. Schuler v. Israel, 120 U. S. 506, 510, 7 Sup. Ct. 648, 30 L. Ed. 707. In that case Mr. Justice Miller, in delivering the opinion of the court, after stating the right of a garnishee to set up any defense against attachment process which he could have against the debtor in the suit for whose property he is called upon to account, said:

"And, as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defenses in this proceeding which he would have in either a court of law or a court of equity."

We add, in conclusion, however, that, independently of the rejected offer, the case, upon the unquestioned facts, in our view, was with the garnishee as respects the principal of the trust fund, and that only the income thereof reserved to Potter was bound by the attachment.

The judgment of the Circuit Court is reversed, and the case is remanded to that court for further proceedings in accordance with the views expressed in this opinion.

FRAER v. WASHINGTON.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1903.)

No. 1,836.

1. INDIAN LEASES—EFFECT OF CURTIS ACT.
Act June 28, 1898, c. 517, 30 Stat. 495, known as the "Curtis Act," which gives the owner of improvements on a lot in the Indian Territory a preferred right to purchase the same after it shall have been appraised, did not affect the obligation of a white man, who was at the time of its passage in possession of a lot under a lease from an Indian, to restore possession to the lessor on the termination of the lease in accordance with its terms.

2. LANDLORD AND TENANT—RIGHTS OF LANDLORD—ACTION OF UNLAWFUL DETAINER.
A lessor who stipulates to pay the lessee the value of improvements made by him at the expiration of the term does not thereby disable himself from bringing an action of unlawful detainer, where the tenant at the end of the term refuses to accept the payment tendered or to surrender possession, and cannot be required to first bring a suit in equity to compel the lessee to accept such payment.

3. SAME—STATUTE OF INDIAN TERRITORY.
Mansf. Dig. § 4174 (Ind. T. Ann. St. 1899, § 2854), in force in the Indian Territory, which provides that an action by a landlord to recover possession of the premises on account of nonpayment of rent shall abate on a tender of the rent due by the tenant before judgment, has no application to an action to recover possession unlawfully withheld by the tenant after the term has expired.

In Error to the United States Court of Appeals in the Indian Territory.

C. L. Herbert, E. A. Walker, and H. M. Cannon, for plaintiff in error.

C. C. Potter, C. B. Potter, and W. D. Potter, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. This case originated in the Indian Territory, and comes to this court on a writ of error from the Court of Appeals of that territory. The record discloses that J. C. Washington, the defendant in error, is a member of the Chickasaw tribe of Indians, and a resident of the Indian Territory, and that on January 1, 1898, he leased to James Fraer, the plaintiff in error, who is not a member of any tribe of Indians, a lot of land 25 feet in width by 140 feet in depth, which fronted on Main street, in the town of Marietta, within the Indian Territory. By the terms of said lease the lessee acquired the right to occupy the demised premises for the term of one year from and after January 1, 1898, with the right to renew the lease for another year at the expiration of the first term. The lease contained a provision to the effect that the lessor, Washington, could only repossess himself of the demised premises on the expiration of the lease by paying to the lessee, Fraer, the value of the improvements which the lessee had made on the demised premises, and that upon making such payment he should be entitled to the

possession of the property. The complaint which was filed by Washington, who was the plaintiff below, was in the form of an action of unlawful detainer, and alleged, in substance, that at the expiration of the year 1898 Fraer, the lessee, declined to renew the lease for another year; that the value of the improvements erected by him during his term was the sum of $700; that on January 2, 1899, he had tendered to Fraer, the lessee, the sum of $800 in payment for his improvements, which was a sum more than they were worth, but that the defendant had declined to accept the sum tendered, and was wrongfully, unlawfully, and forcibly detaining the possession of the property, and refusing to permit the plaintiff to enter upon the same. Washington further alleged that after the refusal of the defendant below to re-rent the premises he had given the defendant written notice to vacate the same and surrender the possession to the plaintiff. The complaint also contained a tender of the alleged value of the improvements and an offer to pay the sum tendered into court. The trial below, which was before a jury, resulted in a verdict and judgment in favor of the plaintiff, which judgment was affirmed on appeal by the Court of Appeals in the Indian Territory. The judgment complained of is to the following effect: That the plaintiff, Washington, have and recover from the defendant, Fraer, the lot above described, situated in the town of Marietta, in the Chickasaw Nation, and that the money theretofore deposited by the plaintiff to pay for the improvements which had been made on the demised premises by the lessee be delivered to him.

The principal contention on the part of the plaintiff in error is to the following effect: That an act of Congress approved June 28, 1898, after the lease now in question was executed (30 Stat. 495, c. 517), operated to destroy all of the lessor's contractual rights under the lease, and to extinguish whatever interest, possessory or otherwise, he may have had in the demised premises when the lease was executed. In other words, it is insisted, in substance, that, although Washington, the lessor, may have been lawfully in possession of the demised lot on January 1, 1898, pursuant to the right of occupancy accorded to Indians by the tribes to which they belonged, and may have been induced to surrender such possession to the lessee for the term of one year, in consideration of the latter's promise to pay a stipulated rent, and to restore the possession to the lessor at the end of the term, provided he was paid the value of all improvements which he might erect in the meantime, yet the subsequent passage of the act of Congress on June 28, 1898, commonly called the "Curtis Act," not only released the lessee from all of his promises made to the lessor, but operated to vest the lessee with whatever rights and privileges incident to possession would have belonged to the lessor had he not been induced to relinquish his possession to the lessee. This claim is based primarily on sections 15 and 16 of the Curtis act (30 Stat. 500, 501) and certain paragraphs of an agreement between the United States and the Choctaw and Chickasaw Indian tribes, commonly termed the "Atoka Agreement," which is set forth in the act of Congress, and as therein amended was ratified. 30 Stat. 505, 508.

The fifteenth section of the act in question, after providing for the appointment of a commission to survey and lay out town sites within the territory occupied by the Chickasaw, Choctaw, Creek, and Cherokee tribes of Indians, and to make plats thereof, further provided, in substance, that all town lots should be appraised by said commission at their true value, excluding improvements; that separate appraisements should be made of all improvements thereon; that no such appraisement should be effective until approved by the Secretary of the Interior; and that in case of disagreement by the members of the commission as to the value of any lot the Secretary of the Interior might fix the value thereof. It was further declared in the same section that "the owner of the improvements upon any lot other than fencing, tillage or temporary buildings, may deposit in the United States Treasury, St. Louis, Missouri, one half of such appraised value; ten per centum within two months and fifteen per centum more within six months after notice of appraisement, and the remainder in three equal annual installments thereafter, depositing with the Secretary of the Interior one receipt for each payment and one with the authorities of the tribe and such deposit shall be deemed a tender to the tribe of the purchase money for such lot." The same section of the act further provided, in substance, that, if the owner of such improvements on any lot failed to make deposit of the purchase money in the manner aforesaid, then such lot might be sold in the manner provided in the act for the sale of unimproved lots, and that lots which were not improved should belong to the tribe, and should be appraised, and that, after the approval of the appraisement by the Secretary of the Interior and due notice, should be sold to the highest bidder at public auction, by the commission, for not less than their appraised value, unless otherwise ordered by the Secretary of the Interior. Following these provisions, which are found in the fifteenth section of the act, the sixteenth section declared, in substance, that it should be unlawful for any person, after the passage of the act, to receive for his own use or for the use of any one else any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber or any other kind of property whatsoever, "or any rents on any lands or property belonging to any one of said tribes or nations in said territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever," and that all royalties and rents thereafter payable to the tribe should be paid, under such regulations as might be prescribed by the Secretary of the Interior, into the treasury of the United States to the credit of the tribe to which they belonged.

We feel constrained to hold that the Curtis act did not affect the rights of the parties to this litigation in the manner asserted and above stated. When the lease was executed, Washington, the lessor, being a member of the Chickasaw tribe of Indians, had the right to occupy the demised premises according to the customs and usages of his tribe. Fraer, the lessee, on the other hand, not being a member of any Indian tribe, had no such right. He had at that time no interest in the lot, either present, future, or contingent, such as a court of law would recognize or enforce; and after the execution of the lease

he could only uphold his right of occupancy, if at all, by virtue of the provisions of the lease which he had succeeded in obtaining. By accepting the lease and entering thereunder as a tenant of the lessor, he certainly admitted the lessor's right of occupancy, and, according to well-established rules of law, should be estopped from denying it or challenging the lessor's power to make the lease. We fail to perceive upon what ground the Curtis act can be said to have released the lessee from his promise to surrender the possession of the demised premises to the lessor at the end of his term, pursuant to his agreement. The act contains no express provision that tenants who had made improvements on leased property should be so released from their engagements, and we are not inclined to insert such a provision by construction. It is true that the act concedes to the owner of improvements upon any town-site lot the preference right to purchase the lot after the town site has been surveyed and platted and the lots have been appraised, on making certain specified payments within a certain period; but it does not appear in the present instance that any of these acts have been done, or that the time has arrived when a purchase can be effected. If it has arrived, it is by no means clear that the lessee is the owner of the improvements which he made during his term. The lease did not provide that the improvements made by the lessee should be esteemed his property, but only that "said property shall be delivered to said Washington upon his paying or satisfying said James Fraer or his assignees for all improvements put thereon while the same was so rented to said James Fraer." In other words, the lease secured to the lessee the right to retain possession until the lessor had reimbursed him for moneys expended in making improvements. In view of the known situation in the Indian Territory it may be that the lessor, being a member of the Chickasaw tribe, and entitled to occupy the lot in controversy, put the lessee in possession in the expectation that he would make certain improvements for the benefit of the lessor and practically at his expense, so as to entitle the lessor to purchase the lot, when the town site had been located and surveyed and the lot had been appraised, according to the plan outlined in the Atoka agreement, which had been executed before the lease was signed. In the absence of an express provision in the lease severing the improvements from the realty and declaring that they should be and remain the property of the lessee, it may well be that they became a part of the freehold according to the general rule that one who erects a permanent structure on land makes it a part of the land. It is unnecessary, however, on the present occasion, to determine who, within the meaning of the Curtis act, is the owner of the improvements that have been erected by the lessee, so as to entitle him, when the proper time arrives, to purchase the lot. The question now at issue is whether the Curtis act, as soon as it was passed, relieved the lessee from his promise to restore the possession of the lot to the lessor at the end of his term on being reimbursed for his improvements. This question, in our judgment, should be decided in the negative. It is certain, we think, that Congress did not intend that white men who had obtained temporary possession of town-site lots or land in the Indian Territory from Indians by

means of leases should make use of the possession so acquired to secure a fee-simple title to the demised property to the exclusion of Indian lessors to whom they had covenanted to restore the possession. Yet this would be the result if the effect of the Curtis act be as contended by the plaintiff in error. We are of opinion that the obligation of the lessee to restore possession remained the same after the passage of the Curtis act as before, and that nothing would free him from his contract obligation to surrender the possession of the demised premises to his lessor, save, perhaps, a purchase of the lot under the provisions of the Curtis act, after an appraisement thereof, should he be allowed, on application to the proper authorities, to make such a purchase. This court has heretofore held, in substance, that the Atoka agreement did not have the effect of annulling or abrogating all existing leases of town lots situated in the Choctaw and Chickasaw Nations. Ellis v. Fitzpatrick, 55 C. C. A. 260, 118 Fed. 430. The same view has been taken by the Court of Appeals in the Indian Territory. Ellis v. Fitzpatrick (Ind. T.) 64 S. W. 567, 568; Kemp v. Jennings, Id. 616. Moreover, we are advised that the Department of the Interior has ruled that, until town lots are disposed of by the commission appointed pursuant to the provisions of Act Cong. June 28, 1898, c. 517, 30 Stat. 495, "valid contracts made by parties for renting lots are not affected by said act." This ruling was made by the department in response to an inquiry whether the Curtis act absolved an occupant of a town-site lot, who had rented the same from an Indian, of his obligation to pay rent; and, while the ruling in question is not an authoritative exposition of the law, yet it is entitled to great consideration as expressing the views of that department of the government which is charged with the administration of the Curtis act, and has doubtless given all of its provisions careful consideration, besides being fully acquainted with the conditions now existing in the Indian Territory.

Another subordinate question which is presented by the record is whether Washington, the lessor, can maintain an action of unlawful detainer on the state of facts disclosed by his complaint, all of which, as we must presume, were established to the satisfaction of the court and jury, or whether he should have proceeded in equity to compel the lessee to accept payment for his improvements and convey them to the lessor. It seems to be urged by the plaintiff in error that the lessor should have obtained such a decree before suing in unlawful detainer. With respect to this question we conclude that there was no occasion for first seeking the aid of a court of equity. The question of possession was the only one involved in the case. When the lessee's term ended and the full value of the improvements made by him was tendered, and he declined to accept the sum tendered or to surrender possession of the demised premises pursuant to his covenant, his possession was thenceforth wrongful; in other words, he became guilty of an unlawful detainer. We do not understand that an ordinary lessor, who simply agrees with his tenant to pay him for any improvements made on the demised premises during the term, thereby disables himself from bringing an action of unlawful detainer, provided the tenant, at the end of his term, refuses to accept pay-

ment for his improvements and insists on holding possession. The effect of such an agreement in a lease is not to give the tenant an interest in the land which can only be divested by the decree of a court of equity, but rather to impose on the lessor another condition, to wit, the duty of paying for the tenant's improvements, or tendering payment therefor, before he can be restored to possession. If the question last noted was raised in the lower court in such a form that it may be considered here, we think it was rightly decided.

The final contention on the part of the plaintiff in error is based on section 4174 of Mansfield's Digest of the Statutes of Arkansas (Ind. T. Ann. St. 1899, § 2854), which provides, in substance, with respect to suits brought by a landlord to recover possession of property on account of the failure of his tenant during his term to pay rent, that, "if the defendant before judgment is given in such action, either tenders to the landlord or brings into court where the suit is pending all the rent then in arrears and all costs, all further proceedings in the action shall cease." It is claimed that about a year after this action was instituted the plaintiff in error offered to deposit in court a sum sufficient to pay the rent of the demised premises at the rate of $25 per year for the years 1898, 1899, and 1900, and asked to have the suit abated, which request was denied. The motion to abate the suit, the evidence in support of the motion, and the order made thereon are not made a part of the bill of exceptions, as they should have been to obtain a review of the trial court's action on appeal. Dietz v. Lymer, 10 C. C. A. 71, 61 Fed. 792. But, in any event, the section of Mansfield's Digest which is invoked has no application to a suit like the one at bar, where an action is brought against the tenant, not to recover possession during the term for nonpayment of rent, but to recover the possession of property unlawfully withheld by the defendant after his term has expired. In the latter class of cases, to which the suit at bar belongs, the statute invoked has no application.

No sufficient reasons have been shown for the reversal of the judgments below, and the same are accordingly affirmed.

SMEETH et al. v. PERKINS & CO., Limited, et al.

(Circuit Court of Appeals, Third Circuit. September 15, 1903.)

No. 32.

1. PATENTS—CONSTRUCTION OF CLAIMS—STATEMENTS OF PREFERABLE MODE OF CONSTRUCTION.

Features of construction which the specification of a patent recommends or describes as preferable do not thereby become essential parts of the patent or limitations of the claims.

2. SAME—INFRINGEMENT—BOSH-PLATES FOR BLAST FURNACE.

The Scott patent, No. 452,618, for bosh-plates for furnaces, is valid (excepting claim 6), and covers a meritorious invention, the essential feature of which is to provide separate recesses in the furnace wall in which the bosh-plates are set, and from which they can be removed freely, being so independently set as not to be affected by the expansion or contraction of the wall. Except as to claim 7, the claims are not lim-

ited to bosh-plates constructed internally with a tortuous water passage, but cover any plate having a water passage extending through it for the passage of a current of water. Claims 1 to 5 so construed, and *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

James I. Kay, for appellants.
Marshall Christy and Wm. L. Pierce, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. This is an appeal from the decree of the Circuit Court dismissing the complainants' bill in equity, brought for an alleged infringement of letters patent No. 452,618, dated May 19, 1891, for an improvement in bosh-plates for furnaces, granted to James Scott, and of which the complainants in the bill became owners.

The specification of the patent states that the "invention consists of an improvement in the setting of bosh-plates in the wall of a blast furnace and in an improved construction of the bosh-plates themselves"; that heretofore, for the purpose of preventing the corrosion and destruction of the walls of a blast furnace, caused by the intense heat in the furnace, "it has been customary to employ hollow plates built in the furnace wall, and provided with water connections, by which streams of water through the plates may be maintained," but that in the operation of the furnace these plates frequently crack, and permit the water to leak from them, with injurious effects particularly mentioned; that the broken plate must be removed as soon as the leak is ascertained and located, but that a great amount of labor is required to remove it, "since it necessitates the digging it out from the brickwork of the furnace," which weakens and injures the furnace structure, with loss of time, etc.; that heretofore it has been generally supposed that the reason for the breaking of the plates was that they were burned out by the heat of the furnace, and great care has been taken to keep up a constant stream of pure water, and to construct the water passages so that they should not be clogged by sediment, which would render them more liable to be burned"; that the inventor (Scott), however, has "discovered that the breaking of the plates has been caused not so frequently by burning as by the manner in which they have been set in the furnace wall," the practice having been to build them directly in the wall, with the bricks bearing on them from above and at the side and in intermediate spaces, so that when the brickwork expands and moves by reason of the heat of the furnace it strains the bosh-plates, and frequently breaks or cracks them. The specification and drawings describe and show the bosh-plates of the patent arranged in several horizontal series around the bosh of the furnace, the plates being made tapering in width and thickness and curved transversely on their upper surfaces so as to have a general wedge shape, and they are set in arched recesses built for their reception in the furnace wall.

The function of the arches, it is stated, is to support the furnace wall over the recesses so that they shall not cave in when the bosh-plates are removed, and so that the plates may be taken out and replaced easily without other rebuilding than luting the intervening space with clay. The boshes, it is said, should be of somewhat less dimensions than the recesses. It is stated that by thus setting the bosh-plates the wall of the furnace may expand and contract freely without crushing the plates and causing them to leak. A number of the plates of each series, it is stated, "are connected by pipes, 12, the outlet of one being connected with the inlet of the next, as shown in Fig. 2, so that the water may pass in succession through the plates"; and that, when it is desired to remove any of the bosh-plates, its inlet and outlet pipes are uncoupled, and then, because of the tapering shape of the plate, it may be drawn out from its recess. To replace the plate it is set again in its recess, luted with clay, and the water pipes reconnected. It is stated that the facility of removal and replacement of the bosh-plates which this improvement affords is of especial benefit in that it enables a leak to be located in case for any reason one should occur.

After this general description of the invention the specification contains the following clause:

"The preferred internal construction of the bosh-plates is illustrated in Figures 6 and 7. Each consists of a hollow plate having water inlet and outlet openings, 8 and 9, a partition, 10, forming a passage leading to the rear of the plate from the opening, 8, and cross-diaphragms or baffle-plates, 11, which cause the water to travel in a circuitous course between the back of the plate and the opening, 9. A very efficient cooling action is thus afforded by the plate."

The claims of the patent are as follows:

"(1) In combination with a furnace, a water-cooled bosh-plate set in a recess in the furnace wall, from which it is removable freely, said bosh-plate having a water passage extending through it for the passage of a current of water, and inlet and outlet pipes, substantially as and for the purposes described.

"(2) In combination with a furnace, a water-cooled bosh-plate set in an arched recess in a furnace wall, from which it is removable freely, said bosh-plate having a water passage extending through it for the passage of a current of water, and inlet and outlet pipes, substantially as and for the purposes described.

"(3) In combination with a furnace, a water-cooled inwardly-tapering bosh-plate set in a recess in the furnace wall, from which it is removable freely, said bosh-plate having a water passage extending through it for the passage of a current of water, and inlet and outlet pipes, substantially as and for the purposes described.

"(4) In combination with a furnace, a water-cooled bosh-plate set in a recess in the furnace wall, from which it is removable freely, and provided with a surrounding casing or layer of clay, said bosh-plate having a water passage extending through it for the passage of a current of water, and inlet and outlet pipes, substantially as and for the purposes described.

"(5) In combination with a furnace, a series of encircling water-cooled bosh-plates, set in recesses in the furnace wall, from which they are freely removable, said bosh-plates having water passages extending through them for the passage of water currents, and inlet and outlet pipes, substantially as and for the purposes described.

"(6) In combination with a furnace, a series of encircling water-cooled bosh-plates set in arched recesses in the furnace wall, from which they are

freely removable, and a band encircling the furnace at the arches, substantially as and for the purposes described.

"(7) A hollow bosh-plate having at the front end an inlet opening and an outlet opening, a passage, 10, which extends to the rear of the plate from one of said openings, and cross-diaphragm, 11, which extend alternately from opposite sides within the bosh-plate partially across the interior cavity thereof, forming a tortuous passage in said cavity leading from the passage, 10, to the second of said openings, substantially as and for the purposes described."

In disposing of this case the Circuit Court regarded the patent as valid (excepting the sixth claim), and stated that in actual practice the device of the patentee had proved to be "highly useful." With these views we are in agreement. Here we content ourselves with saying that upon an attentive examination of the proofs we find no reason to doubt either the validity of the patent (excepting claim 6) or the great merit of the invention it disclosed.

The principal question involved in this appeal relates to the construction to be given to the patent, and particularly to its first five claims, which the court below held the defendants had not infringed. As respects interior construction, the court, in its opinion, said that the patentee proposed to change the old form of bosh-plate to a plate "constructed internally with a tortuous water passage." Now, it is true that the specification shows and describes an internal construction of the bosh-plate whereby the water passing through it is given a "circuitous course," by means of diaphragms or baffle-plates placed in the cavity of the bosh-plate; but the specification expressly states that this is "the preferred internal construction," and this specific form is the subject-matter of claim 7. The terms of the other claims are quite different from the terms of the seventh claim. The bosh-plate called for by the claims from 1 to 5, inclusive, is described as "having a water passage extending through it for the passage of a current of water, and inlet and outlet pipes." There is no call in these claims for a "tortuous water passage," and no intimation that the water is to "travel in a circuitous course." The expressed purpose of the water passage is for "the passage of a current of water" through the bosh-plate. The cooling of the plate is what is aimed at, and this object is effected whether the water passes through the interior cavity of the bosh-plate from the inlet pipe opening to the outlet pipe opening by the natural and unobstructed course or travels in a circuitous course produced by interposed diaphragms or baffle-plates. The patentee, indeed, conceived the latter method to be preferable, but features of construction which the specification of a patent recommends or describes as preferable do not thereby become essential parts of the patent, or limitations of the claims. Sewall v. Jones, 91 U. S. 171, 185, 23 L. Ed. 275; Krajewski v. Pharr, 105 Fed. 514, 518, 44 C. C. A. 572.

In Winans v. Denmead, 15 How. 330, 341, 14 L. Ed. 717, the court said that:

"While it is undoubtedly true that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, although they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise."

In Klein v. Russell, 19 Wall. 433, 466, 22 L. Ed. 116, the rule was laid down that in construing a patent "the court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language he has employed."

This specification states that it has been "customary to employ hollow plates built in the furnace wall, and provided with water connections, by which streams of water through the plates may be maintained," but that, by reason of the plates being solidly set in the brickwork, they were frequently cracked and broken by the expansion and contraction of the furnace wall. The avoidance of this evil was the main object of the invention. The inventor's remedy, as disclosed with much fullness in his specification, was to provide in the furnace wall separate recesses in which the bosh-plates could be set, and from which they could be removed freely. This was the substance of the invention. Such was the view which finally prevailed in the Patent Office, as we shall soon see. The special internal form of bosh-plate whereby the water is given a circuitous course is altogether subordinate. It is explicitly declared to be only the preferred construction, and it is covered by a specific claim.

We are not able to see that by the proceedings in the Patent Office the first five claims of the patent were limited to a tortuous water passage in the interior of the bosh-plate, or to any structural water passage formed within and extending through the cavity of the bosh-plate. The facts, as disclosed by the file wrapper, are these: In the original application for the patent the claims from 1 to 5, inclusive, described the plate simply as "a water-cooled bosh-plate." This description, of course, included water-cooled bosh-plates in whatever way the cooling was effected by the use of water; for example, by using jets of water or spraying with water, as in the patent to Jones, No. 205,274, which the examiner cited against the application. The applicant then amended by inserting in the claims the words, "Said bosh-plate having a water passage extending through it for the passage of a current of water, and inlet and outlet pipes." It will be perceived that a tortuous water passage is not here mentioned, nor is any structural water passage extending through the bosh-plate, and independent of its cavity, hinted at. The passage of a current of water through the cavity of the bosh-plate is what was required for the cooling, and this, it seems to us, is what the amendment naturally implies. That the applicant and the Patent Office both so understood this language appears, we think, on the face of the file wrapper. The introduction of the words "and inlet and outlet pipes" in the amendment has significance. The function of these pipes is stated in the specification thus: "A number of the plates of each series are connected by pipes, 12, the outlet of one being connected with the inlet of the next, as shown in Fig. 2, so that the water may pass in succession through the plates." The passing or circulation of the water through the cavity of the bosh-plate, we think, is the thing contemplated and expressed in the amended claims.

Upon a second rejection of all the claims an appeal was taken to the examiners in chief, who reversed the primary examiner. Their

decision, upon which the patent issued, contains this pregnant passage:

"The essence of the alleged invention is the setting of the bosh-plates in the furnace wall so as to be removable freely therefrom, and so independent of the wall as not to share in its expansions and contractions. The claims have varying degrees of limitation, and claim 7 turns on a specific construction of bosh-plate."

"In Strobel's patent, cited, the bosh-plates are built 'ring-like into the bosh-wall of the furnace.' They are also air-cooled."

"Jones has no bosh-plates proper, cooled by a water circulation through the same, but open iron boxes, set into the brickwork of the furnace, and cooled by sprays of water directed upon their inner surface."

"Ellicott's patent is cited to meet claim 7, but it does not show appellant's specific construction of bosh-plate, nor do we deem it to be so suggestive thereof as to preclude invention. We find patentability, and reverse the examiner's decision."

Our construction of the amended claims by no means gives them the broad scope which the original claims had. The rejected claims covered a water-cooled bosh-plate in whatever way such cooling was accomplished. The amendment limits the claims to a bosh-plate cooled by the passage of a current of water through the same. We are unable to concur in the view of the court below that the defendants' bosh-plate does not come within the terms of the amended claims. We think it does. The water enters the defendants' bosh-plate by the inlet pipe and flows under pressure through the interior cavity of the plate to the outlet pipe. The plate therefore has a water passage extending through it for the passage of a current of water. So much even the defendants' expert admits. Confessedly, the defendants' bosh-plate is set in a recess in the furnace wall, from which it is freely removable.

As to the sixth claim, it is enough to say that we think the court below was right in holding it invalid.

The decree of the Circuit Court dismissing the bill is reversed, and the cause is remanded to that court, with direction to enter a decree in favor of the complainant in accordance with the views expressed in this opinion.

L. E. WATERMAN CO. v. LOCKWOOD.

SAME v. LOCKWOOD et al.

(Circuit Court of Appeals, First Circuit. October 23, 1903.)

Nos. 446, 448.

1. PATENTS—INVENTION—FOUNTAIN PENS.
   The Waterman patent, No. 307,735, claims 1 and 2, for an ink duct for a fountain pen, consisting of a groove in a bar for conducting the ink from the reservoir to the point of the pen, are void for lack of patentable invention.

2. SAME.
   The Waterman patent, No. 293,545, for an ink duct for a fountain pen, the novel feature consisting of longitudinal fissures in the sides or walls of the groove for conducting the ink to the pen, *held* not infringed as to claims 1 and 2, and void for lack of patentable invention as to claim 3.

Appeals from the Circuit Court of the United States for the District of Massachusetts.

For opinions below, see 123 Fed. 300, 303.

Fred C. Hanford (Walter S. Logan, on the brief), for appellant.

Oliver R. Mitchell, for appellees.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. These two appeals were argued together. In each case the patent expired after the bill was filed in the Circuit Court, so that, if the complainant prevailed, there could be, at the most, only an accounting. No. 446 arises on patent No. 307,735, dated on November 4, 1884, issued to Lewis E. Waterman on an application filed on June 28, 1883, and on patent No. 293,545, dated on February 12, 1884, issued to Mr. Waterman on an application filed on September 19, 1883. No. 448 is limited to patent No. 293,545. Patent No. 307,735 purports to be for new and useful improvements in fountain pens, and the claims in issue are 1 and 2, as follows:

"(1) An ink duct for a fountain pen, consisting of a groove in a bar on the side next the pen, extending throughout its entire length on the same plane, and communicating with the ink reservoir, for conducting the ink from the reservoir to the point of the pen.

"(2) An ink duct for a fountain pen, consisting of a groove in a bar extending throughout its entire length in the side which is to be next the pen and on the same plane, and communicating with the ink reservoir, and of gradually decreasing depth from the end which enters the reservoir to the end near the point of the pen."

The learned judge who heard the case in the Circuit Court says that claim 1 appears to be for nothing more than a groove or gutter for taking ink from the reservoir to the point of the pen, and that claim 2 is different from claim 1 only in the additional unpatentable element of gradually decreased depth. As to both claims the learned judge in the Circuit Court found no novelty. Using that expression to signify that neither claim contained patentable invention, we agree with him. The proposition is so plain that we need add nothing to this observation.

There are only three claims in patent No. 293,545, all of which are in issue, and which are as follows:

"(1) An ink duct for a fountain pen, consisting of a bar having a longitudinal groove formed in its surface and one or more longitudinal fissures in the side or sides of said groove, substantially as set forth.

"(2) In a fountain pen, the combination, substantially as hereinbefore set forth, of a barrel or ink reservoir, a tube connected therewith, an ink duct supported within said tube, and consisting of a bar having one or more longitudinal grooves formed in that portion of its surface which is in proximity to the pen, with one or more longitudinal fissures in the side or sides of said groove or grooves, and a pen secured between said tube and ink duct.

"(3) A fountain pen having an ink duct provided with one or more longitudinal fissures formed in its walls for facilitating the passage of the ink through said duct."

Claim 3 is only a restatement of the claims in patent No. 307,735, and is disposed of by our observations in regard to them. With

reference to the other claims there has been much discussion before us about capillary attraction. It appears from the record that the matter of capillary attraction has been in the minds of several persons engaged in the art of making fountain pens, both previously to Waterman and since. However, neither the record nor the propositions submitted to us by the parties develop anything with reference thereto on which we can rely. There is no proof of any scientific investigation of the operation of the various fountain pens in this respect, and no witnesses have been produced of the scientific training and education requisite to enable us to give value to their opinions. Moreover, capillary attraction appears only incidentally, and in such way that it cannot be said that the inventor relied thereon. The specification first speaks of "the downward flow of ink by gravity and through the action of capillary attraction in the act of writing." Capillary attraction is thus so coupled with gravity that it seems inconsequential, and suggests no definite conception. But, whatever may be said, it is overruled by what appears later in the specification, as follows:

"The narrow slits or fissures, ee, which are made in the groove, d, and which extend deeper into the feed-bar, C, than the bottom of the groove, d, serve to facilitate the downward flow of the ink which first follows these narrow channels, and thus the descending column of ink is kept on that side of the groove, the ascending column of air keeping on the other side of the groove."

Therefore it is plain that the present case cannot be said to involve any peculiarity arising in the direction of capillary attraction. The true theory of his pen, so far as appreciated by the patentee, can probably be said to be as follows: The fissures are so located, as shown by figure 2 attached to the specification, that they lie on the under side of the groove when the pen is being used. Consequently, we may well understand that the ink, while flowing to the pen, naturally follows the fissures, and leaves the groove open for the ascent of the air to the ink fountain. Of course, unless air is admitted to the ink fountain, the pressure of the atmosphere would keep the ink from descending. In other words, there is merely a simple arrangement to permit the access of sufficient air to the fountain to balance the pressure of the external air.

There are in the arts, and, indeed, in the common uses of life aside from the arts as technically understood, so many methods of conducting fluids and of balancing the external pressure of the atmospheric air, that there is left very little room for invention in reference thereto; so that any invention of this kind must be regarded as narrow, and limited to the details pointed out. Therefore these claims must have a strict construction, even if the common methods, to say nothing of the arts, left the patentee anything as to which he could claim invention. The learned judge who heard these cases in the Circuit Court found that no respondent infringed, because all the respondents used separable reeds instead of fissures. The respondents' methods of conducting fluids seem to have been known extensively for indefinite lengths of time. The only exception is the exhibit known as "A^1." The difficulty of the complainant's case

as to this, however, is that twice it admits that this exhibit is not "strictly within the terms of claims 1 and 2," although it is said that it is within claim 3. That claim, as we have already said, is void; and therefore it follows that the respondents could not have infringed any valid claim.

On the whole, we conclude that claims 1 and 2 of patent No. 307,735, and claim 3 of patent No. 293,545, are void, and that claims 1 and 2 of the last-named patent were not infringed. Therefore the following judgments will be entered:

In No. 446—

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

In No. 448—

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

DECECO CO. v. GEORGE E. GILCHRIST CO.

(Circuit Court of Appeals, First Circuit. September 29, 1903.)

No. 465.

1. PATENTS—INFRINGEMENT—DEFENSE OF ANTICIPATION.
   That the device of a patent was in part anticipated by a foreign patent will not constitute a defense to a suit for infringement, where it contains a patentable improvement over the foreign device, and defendant has used the improvement.
2. SAME—INVENTION—ELIMINATION OF PARTS.
   The mere simplification of a mechanical device, when of a substantial character, by the elimination of parts which have long been in use, and are expensive and burdensome in character, may amount to invention.
3. SAME—INFRINGEMENT—WATER-CLOSETS.
   The Frame and Neff patent, No. 425,416, for a water-closet, discloses at least such an improvement upon the device of the Mann English patent, No. 577 of 1870, and that of the Buick patent, No. 383,038, as to amount to patentable invention. Claims 1, 3, and 4 considered, and *held* infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Frederick P. Fish and Marcus B. May, for appellant.

John R. Bennett, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity, based on an alleged infringement of the first, third, and fourth claims of letters patent No. 425,416, captioned for a "water-closet," issued to Robert Frame and Charles A. Neff under date of April 15, 1890, on an application filed on December 23, 1887. The Circuit Court dismissed the bill, and the complainant appealed.

¶ 2. See Patents, vol. 38, Cent. Dig. § 25.

The claims are as follows:

"(1) In a water-closet, the combination, with a bowl, of a siphon composed of an inverted-U-shaped pipe having communicating receiving and discharging limbs, the inner wall of the latter being provided with an integral abrupt projection for deflecting the water dropping thereon, said bowl being the only opening through which air or water is supplied, substantially as set forth.

"(2) In a water-closet, the combination, with a bowl, of a siphon composed of an inverted-U-shaped pipe having communicating receiving and discharging limbs, the inner wall of the latter being provided with an integral abrupt projection for deflecting the water dropping thereon, and an air channel leading from the top of the U-shaped pipe, one end opening into the bowl in a substantially vertical plane, substantially as set forth.

"(3) In a water-closet, the combination, with a bowl, of a siphon composed of an inverted-U-shaped pipe, the discharging limb of which is provided with a deflecting projection on its interior surface, substantially as set forth.

"(4) In a water-closet, the combination, with a bowl, of a siphon composed of an inverted-U-shaped pipe, the discharging limb of which is provided with a deflecting projection on its inner surface, said discharging limb being curved forward under the bowl, substantially as set forth."

The specification alleges that the patentees "invented a new and useful improvement in water-closets," which it states more particularly as follows:

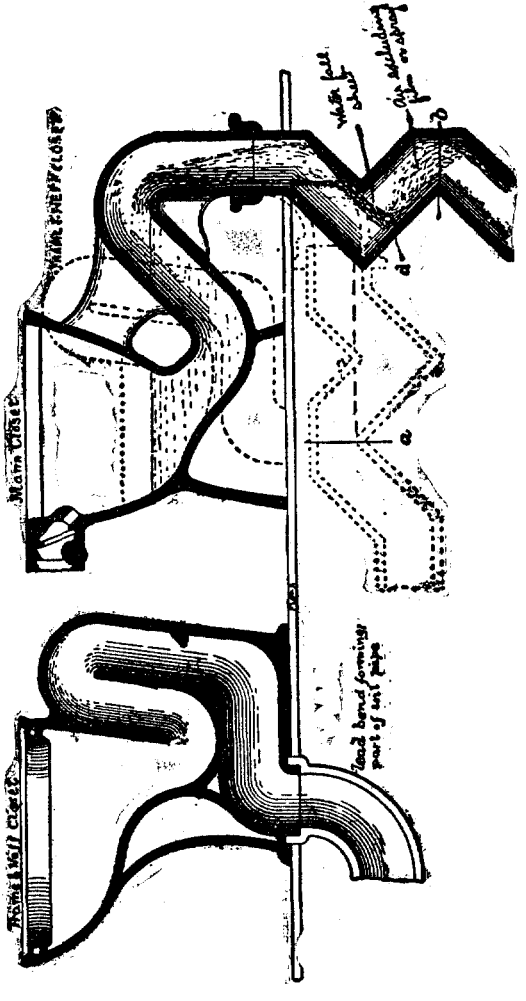
"Our improvement relates to the construction of water-closets, urinals, slop-hoppers, etc., which hold water at a fixed level, being the level of a permanent overflow point, to be discharged on additional water entering the bowl, by siphonic action; and it consists of a new and improved device for inducing this siphonic action."

The specification also describes some incidental improvements, to which we need not refer.

It must be admitted that, for various reasons which it is not necessary to detail, siphonic action is regarded as the most useful method of operating water-closets; and it is, moreover, apparent that the long arm of the siphon, which is also the discharging limb of the bowl of the water-closet, must be free from all obstructions to a quick, full, and powerful vent. One other thing is apparent, namely: As is too commonly the case in patent litigation, the supposed state of the art is shown principally, if not entirely, by the introduction of prior patents. Nevertheless, enough can be gathered from what appears in the record to make it evident that a water-closet working successfully on the siphonic method, and yet of that compact construction which permits a convenient setting in place, and also diminishes the opportunity of those accidents, arising from continuous use, inherent in the complicated construction which the siphonic method is expected to minimize, had long been sought for in the practical art, but had not been thoroughly accomplished until by the ingenuity of the inventors to whom the patent in litigation was issued. It is also apparent that the device of Frame and Neff went into immediate and extensive use, and has ever since so continued, and that this arose not from merely fanciful and temporary causes, but by reason of intrinsic merit. Indeed, on the whole, the record fully sustains the presumption of patentability which arises from the issue of the patent, so that we have no occasion to examine any question except that of alleged anticipation by a British patent issued to John

R. Mann in 1870, No. 577, and by a United States patent issued to David D. Buick on May 15, 1888, No. 383,038.

The best method of approaching the question of alleged anticipation by Mann is to insert herein a copy of the complainant's exhibit, laying side by side diagrams of the respective devices. The dotted lines shown in this exhibit, and also the text, should be disregarded, as they are not found in the drawings attached to Mann's patent. Otherwise this exhibit reproduces each device with substantial accuracy, so far as this case is concerned:



While it cannot be denied that the Mann device was in fact operative on the siphonic method, yet it is entirely plain, both from the drawing and from the record, that Mann's closet was awkward, inconvenient, and perhaps impracticable for proper adjustment in ordinary plumb-

ing, and that it offered many points of developing weakness as the result of customary household use. Also it was probably too sluggish for satisfactory venting. Therefore it is easy to perceive why it was not adopted by the trade, as it was not, and easy to anticipate that it would not have been.

On the one hand, in Packard v. Lacing Stud Company, 70 Fed. 66, 67, 16 C. C. A. 639, we explained why, under some circumstances, a prior device cannot be rejected as an anticipation, although it has not been perfected into a practical and merchantable machine. On the other hand, the entire topic of inventive suggestions which have not been put into useful operation, including what is commonly known as "paper patents," is a difficult one, so that in each case a practical rule of judicial determination can rarely be worked out, except by a thorough and keen analysis of all the surrounding circumstances. Perhaps the matter has never been put more clearly than in the conclusion of a discussion as to the well-worn topic of who was entitled to the credit of the practical discovery or invention of the use of anæsthetics, found in Park's History of Medicine (2d Ed.) p. 312, as follows:

"Sir James Paget has summed up the respective claims of our four contestants in an article entitled 'Escape from Pain,' published in the Nineteenth Century for December, 1879. He says: 'While Long waited, and Wells turned back, and Jackson was thinking, and those to whom they had talked were neither acting nor thinking, Morton, the practical man, went to work, and worked resolutely. He gave ether successfully in severe surgical operations, he loudly proclaimed his deeds, and he compelled mankind to hear him.' As Dr. Morton's son, Dr. J. W. Morton, of New York, says, when writing of his father's claim: 'Men used steam to propel boats before Fulton, electricity to convey messages before Morse, vaccine virus to avert smallpox before Jenner, and ether to annul pain before Morton.'"

This contains a line of observation which is ordinarily just and practical, and which, if applied to the present case, would probably enable us to dispose of the alleged anticipation by Mann without further consideration. It is not now necessary, however, to go into this difficult topic.

The learned judge who decided this case in the Circuit Court apparently laid stress on the proposition that the respondent could not defend itself against a suit for infringement brought by Mann, provided Mann's patent were in vigor in this country. Even if this were true, and even if the complainant, also, were in a similar position with reference to Mann, it would not necessarily be decisive of this case. This litigation is not with Mann or with Mann's patent, but it is in favor of those who, in the most adverse view for them, have improved on Mann, so that, if the improvement amounts to invention, the respondent, if it has used the improvement, cannot shield itself behind Mann.

There may be, and there probably is, an underlying suggestion applicable to both Mann and the present inventors which is fundamental, and which was first put to use in this art by the former. We are lacking, in this case, any explanation of the operation of either device by any scientific person, capable of applying and making clear the laws of pneumatics and hydraulics, each of which sciences are

here involved in an occult manner. We are safe in assuming, however, that, when water falls through and out of a space wholly or partially confined, it takes with it a certain portion or the whole of the inclosed air, and leaves either an atmosphere more or less rarefied or a vacuum. Both Mann and the present inventors made use of this fact in connection with the vent of the bowl, which, for the present purposes, is the longer limb of the siphon, for the purpose of starting siphonic action. Mann found no method of accomplishing this, except by the multiplied zigzag which the exhibit repeated by us discloses. He does not state the principle of the operation; but, notwithstanding the claim made by respondent's counsel, which is partially, if not entirely, supported by the opinion of the learned judge in the Circuit Court, it is apparent that what he in fact devised was a completion of a confined space by the creation at the lower border of it of a water plug, caused by the crowding together by the zigzags of the rushing body of water which first came over from the bowl. The claim of the respondent is that, both in Mann's closet and in the closet in litigation, the confined space was completed partly by such clogging and partly by a film of spray. In the absence of the scientific explanation which we say is not in the record, we are unable to find this proposition proved; but it is not essential whether it is or not, so far as the present suit is concerned, although it might be in the supposed case of a suit brought by Mann against the present complainant. There can be little question that in Mann's closet the substantial element was the clogging or the water plug, though this may have been supplemented by a film or films of spray; but in the complainant's closet the film of spray was assumed by the inventors to be the substantial thing, and, if there be any water plug, it is only incidental. However, as we have said, none of these propositions, as to which, in the absence of proper scientific testimony, we can reach only probable conclusions, prove to be essential.

Frame and Neff, in their specification, say as follows:

"G is a restriction in the course of the discharging-limb for the deflection of water flowing through this limb. It may be a ring or rim, or it may consist of one or more projections on the same horizontal plane, or with one higher than the other. The upper surface or surfaces may be on a horizontal or an inclined plane."

Again, they say, as to the water descending through the discharging-limb, that "a part of it strikes upon the restriction, G, is deflected across its aperture, and forms a film or spray, which partially confines the contained air above it in the siphon." This "restriction, G," is what is described in claim 3 as "a deflecting projection." The respondent bases a criticism on the word "restriction" in the specification, although it does not run into the claim; but that such a criticism is not justified, and that the word "restriction" should not have been run into the claim, is clear from the fact that the extract we have made from the specification shows that, instead of a ring inside of the discharging-limb, one or more projections were supposed to be sufficient. It cannot be doubted that Frame and Neff had no conception of restricting the area of the discharging-limb with a view of producing a clogging or water plug, and it is also plain

that their conception was simply to create a film, without any such diminution of the area. Certainly, whether what they did resulted in merely a film, or partly in a film and partly in a clogging, they succeeded in their substantial conception, which was to produce rarefied atmosphere sufficient to induce siphonic action without obstruction to the full venting of the bowl, and with a combined quickly acting and full-discharging result. Not only did they simplify what Mann produced, but they simplified it to a substantial extent, and in such way as to render practicable a compact construction, suitable for modern plumbing. They produced a quicker siphonic action, because it is plain that the film of spray, or whatever resulted from the flowing water impinging upon a rim or projection, would be immediate, while they left an unobstructed vent in the discharging-limb of the bowl. Thus they not only acccomplished simplification, but, with that, they produced such improved results as converted the Mann device from an unmechanical closet, unsuitable for modern plumbing, sluggish, and not a practical success, to one compact, adapted to modern plumbing, quick, and free in its action, and apparently in all respects satisfactory to the trade.

As we have already indicated, it is not impossible that Frame and Neff introduced an entirely new method of action, which might perhaps be called a process, by substituting a film instead of a water plug as a substantial element, and that they thus so differed from Mann that he did not anticipate them, and that they could not be said to infringe, if, as supposed by the Circuit Court, his patent were in full vigor in the United States when theirs was applied for. But as we have already said, in the absence of scientific proofs throwing clear light on these propositions, we think it suitable to support more fully the view which we have suggested, that what Frame and Neff did was, in any event, an improvement on Mann, of such a character as to rise to invention, and therefore sufficient in the present litigation. It cannot be denied that a mere simplification of a very substantial character, disposing of parts which have long been in use, expensive and burdensome in their nature, and which the trade has found no method of dispensing with, may amount to patentable invention. To obtain absolute simplicity is the highest trait of genius. Hobbs Manufacturing Company v. Gooding, 111 Fed. 403, 406, 49 C. C. A. 414.

In Richards v. Chase Elevator Company, 159 U. S. 477, 486, 16 Sup. Ct. 53, 40 L. Ed. 225, the opinion in behalf of the court says that the omission of an element in a combination may constitute invention, if the result of the new combination be the same as before. The context shows that this conditional qualification was intended to indicate that the result should be at least as effective as before. In that particular case it appeared that the omission of the element referred to was attended by a corresponding omission in the functions of the device. It was also held, at page 487, 159 U. S., page 54, 16 Sup. Ct., 40 L. Ed. 225, that the entire combination was a mere aggregation, so that in any event there was no invention. In National Company v. Hedden, 148 U. S. 482, 489, 13 Sup. Ct. 680, 37 L. Ed. 529, it was held that the omission of a feed roll did not, in

that particular case, involve invention, in view of the fact that the same function had been accomplished previously, although not so perfectly, and although it was said on page 490, 148 U. S., page 684, 13 Sup. Ct., 37 L. Ed. 529, that the new machine was capable of doing more work, and at less expense. Like all cases involving the question of invention, these turn on their special circumstances. Lawther v. Hamilton, 124 U. S. 1, 6, 8 Sup. Ct. 342, 31 L. Ed. 325, related to a patent which was accepted as one for a process. It might as well have been taken out for a machine, but, however this may be, so far as the question we now have before us is concerned, it is unimportant whether for a process or for a machine. There the only claimed invention was the omission of certain muller stones in a machine for obtaining the oil from flax seed. The court held that this was a "real improvement." It went further, and held that the result was a new process. Either view of that case—that is to say, that the omission of the muller stones was a mere improvement, or that it resulted in a new process—fits either view of the case before us. The decision is explained in Crescent Brewing Company v. Gottfried, 128 U. S. 158, 167, 9 Sup. Ct. 83, 32 L. Ed. 390, where it was distinguished from the case then before the court, on the ground that the omission of the muller stones produced more oil and better oil cake; that is to say, there was not only a simplification of the mechanism, but a better result. It is entirely plain in each aspect, for the reasons we have stated, that in these particulars the case at bar is stronger in behalf of the complainant than was Lawther v. Hamilton. It certainly contains marked elements which are not found in Richards v. Chase Elevator Company, nor in National Company v. Hedden. Here we not only have simplicity, but a result which first produced a satisfactory, practical water-closet, operating on the underlying principle common to Mann, on the one side, and to Frame and Neff, on the other, and this result accomplished by what was clearly marked ingenuity.

This leaves us to consider the alleged Buick anticipation, which is apparently easily disposed of. If Mann made use of a water plug, instead of the spray claimed by Frame and Neff, so much the more did Buick. In his specification, referring to the drawings, he says that a certain number represents a contraction in the delivery pipe of the bowl, by which its area is reduced; and he adds, "In practice, I reduce the diameter of a four-inch pipe to about two inches, leaving the pipe full size above and below." He also says: "The rush of the water practically seals the contracted part, even if the area of said part be greater than the combined areas" of the inflow pipes, "so that no air can pass up," and the contents of the bowl are siphoned out. Reducing the diameter of a four-inch pipe to about two inches diminishes the efflux three-fourths. This probably obstructed "the rush of the water" even more than Mann did. There is a serious contest over the question whether Buick did, in time, precede Frame and Neff; but we need not trouble ourselves with that, because it is thus made plain that he was proceeding on the principle on which Mann proceeded, and had some of Mann's essential faults in an aggravated form. So that, although he testified that his closet

gave satisfaction wherever it was used, yet it is apparent that it was never adopted to any considerable extent, and long ago ceased to be on the market. It is enough to say that Frame and Neff improved on both Mann and Buick, even if in a slightly different manner as to each.

The substance of Frame and Neff's invention is covered by claim 3. This claim introduces no unnecessary element to embarrass the court in considering the question of infringement. Therefore in touching on that question we limit ourselves to it.

An inspection of respondent's closet shows clearly that it is so merely a colorable imitation of Frame and Neff as to need no discussion. The fact that it is an infringement follows by necessary implication from the testimony of respondent's expert. He starts with an erroneous criticism, based on the word "restriction," which we have already considered. Proceeding from that, he classes Frame and Neff with Mann, stating that their device now in suit "will positively choke the discharging-limb by restricting its cross-area." We have shown that, in the particular of restriction, Frame and Neff differed from both Mann and Buick, and therefore respondent's expert is mistaken in his premises. He then proceeds, "It is evident that the defendant's closet does not have any such restriction, nor any projection on the interior surface of the discharging-limb, but, on the contrary, has the same area throughout its entire length." It is the "same area" in the same way only that Frame and Neff have the "same area" throughout the entire length of the discharging-limb. It has the projection of Frame and Neff, although in a colorable form; and it operates in the same simple way as Frame and Neff, and secures the same result, whether Frame and Neff produce only a spray, or produce a spray with an incidental choking of water. Rejecting, therefore, the premises with which this expert begins, and whatever he has introduced that is clearly erroneous, the result is that he indirectly shows that the two devices before us are practically the same, and produce the same substantial result. But, indeed, without this testimony, it is, as we have already said, too palpable from a mere inspection that the respondent built with the complainant before its eyes to need even what we have said on this topic.

Claim 1 and claim 4 differ from claim 3 in merely nonessential matters. While, according to strict rules of law, two distinct claims for the same substantial matter, differing only in nonessentials, cannot both be sustained, yet, out of regard to the frailty of human methods of expression, and the variety of views among different legal judicial tribunals as to the construction of instruments of the character of letters patent, and conceding, also, the difficulty of always correctly defining what one's invention really is, the practice has become settled to allow the same substantial invention to be stated in different ways, very much as the same cause of action, or the same offense intended to be covered by indictment, are permitted to be propounded in different counts, with a general verdict on all of them.

The decree of the Circuit Court is reversed; the case is remanded to that court, with directions to enter a judgment for the complainant below; and the appellant recovers its costs of appeal.

HOLMES v. SOUTHERN RY. CO. et al.

(Circuit Court, W. D. North Carolina. September 29, 1903.)

1. REMOVAL OF CAUSES—PREJUDICE AND LOCAL INFLUENCE.
Section 2 of the judiciary act of 1887–88 (Act March 3, 1887, c. 373, 24 Stat. 553, Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509]), authorizes the removal of a cause on the ground of prejudice or local influence by any one defendant who is a citizen of another state, although joined with another defendant who is a citizen of the same state with plaintiff, and although there is no separable controversy.

On Motion to Remand to State Court.

Smith & Valentine (Stanyarne Wilson, on the brief), for the motion.
Moore & Rollins, opposed.

SIMONTON, Circuit Judge. The action in this case was brought in the superior court of Henderson county, and service was had on the defendants. On 18th March, 1903, the Southern Railway, one of the defendants, filed its petition in the Circuit Court of the United States at Asheville, praying the removal of the cause into the said Circuit Court on the ground of prejudice and local influence. Hearing the petition, the court granted the order, and the cause was thereupon removed into this court, the order bearing date 30th March, 1903. In September, 1903, the plaintiff gave notice of a motion to remand the cause, which motion came on to be heard on 25th September. The ground upon which the motion is based is that it appears by the record that the Asheville & Spartanburg Railway Company, one of the defendants, is a corporation of the state of North Carolina, of which state the plaintiff is a citizen and resident; that, there being thus citizens of the same state on both sides of the record, the cause cannot properly be in this court, and must be remanded. It will be noticed that the order removing the cause issued out of the Circuit Court of the United States. It may well be doubted if the order can now be reviewed and revised by another judge sitting in court or at chambers. Crotts v. Southern Ry. Co. (C. C.) 90 Fed. 1; Parks v. Southern Ry. Co. (C. C.) 90 Fed. 3. The order, however, was based on an application ex parte, and was based upon the ground of local prejudice. The present motion takes no issue on this ground. It calls the attention of the court to the want of diversity of citizenship, and on that ground practically challenges the jurisdiction of the court. Besides this, under the removal act (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), if at any time it appears to the court that it is without jurisdiction of a cause, it must forthwith remand it. Ayres v. Wiswell, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693. Under the law as it formerly stood there could be no removal of a cause from the state court to the federal court unless all the necessary parties on one side are citizens of different states from those on the

¶ 1. Prejudice or local influence as ground for removal of cause to federal court, see note to P. Schwenk & Co. v. Strang, 8 C. C. A. 95.
See Removal of Causes, vol. 42, Cent. Dig. § 123.

other. Myers v. Swann, 107 U. S. 546, 2 Sup. Ct. 685, 27 L. Ed. 583; Am. Bible Society v. Price, 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70; Cambria Iron Co. v. Ashburn, 118 U. S. 54, 6 Sup. Ct. 929, 30 L. Ed. 60; Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399. It is manifest, however, that this rule did not effect the end proposed in the removal of causes. Congress sought to secure to the citizen of another state that impartial trial and unbiased verdict which possibly he could not obtain in the state courts by reason of local influence or prejudice. To this end he could remove his cause to the federal court. But if his right to remove was defeated by the fact that the plaintiff has associated with him as defendant a citizen of the plaintiff's state, and he should be forced to trial in the state court notwithstanding the local prejudice or influence, not only would he be put at great disadvantage, and exposed to wrong, but his codefendant, by reason of his association, might also be damnified. So, when Act March 3, 1887, c. 373, 24 Stat. 552, corrected in Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], was passed, amending the law in important particulars, Congress, evidently seeing this imperfection, provided that any defendant could have his cause removed from a state court if he could satisfy the Circuit Court of the United States that prejudice or local influence existed against him. Now, this act repeals and supersedes all existing acts on that subject. 18 Enc. Pleading & Practice 242, tit. "Removal of Causes," and cases quoted. The same authority asserts that, although one of the Circuit Courts (in Eighth Circuit) holds that, notwithstanding this act of 1887, the law has not been changed, according to the weight of authority any one defendant being the citizen of a state other than that in which the suit is brought, who is jointly sued with other defendants citizens of the same state with the plaintiff, may remove the suit for prejudice or local influence, even though there is no separable controversy between the plaintiff and the removing defendant. Very many cases are quoted sustaining this statement. The question has never been passed upon by the Supreme Court of the United States. In the absence of a decision from this authoritative court, the conclusion reached by Judge Dillon in his well-known and learned work on the Removal of Causes can well commend itself. At section 48, in the fifth edition of his work, Judge Dillon says:

"In regard to the parties entitled to remove a cause on the ground of prejudice or local influence the act of 1887 is in one respect much stricter than was the statute of 1867 [Act March 2, 1867, c. 196, 14 Stat. 558]; for the last-named act extended the right to the nonresident party whether he be plaintiff or defendant. The new law confines it to the nonresident defendant only, in pursuance of the general policy of denying the right of removal to plaintiffs altogether. But in another respect the act of 1887 is much more liberal than its predecessor; for whereas the law of 1867 required that in cases where there were several defendants all must possess the requisite citizenship (that is, none of them must be citizens of the same state with the plaintiff), and all must join in a petition to remove the cause on the ground of local prejudice, now the act of 1887 extends the right to any defendant possessing the requisite citizenship. 'Nor can the right of removal thus given to any defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include all the defendants and so be denied to any unless all have such citizenship.' Deady, J., in Fisk v. Henarie (C. C.) 32 Fed. 417."

It follows, of course, from this that the nonresident defendant may remove the cause on this ground, irrespective of the action of his co-defendants, and it is not necessary that all should join. It is further to be remarked that the right of removal under this clause is not confined to cases where there is a separable controversy between the plaintiff and the defendant seeking the removal, as such cases are provided for by clause 3 of section 2 of the act and the proviso in clause 4 (24 Stat. 553 [U. S. Comp. St. 1901, p. 509]) in relation to remanding as to resident defendants when the parties can be separated refers only to a remand after the suit has been removed by the nonresident defendant.

It has been also held (and, we think, rightly) that the provision for a removal by any defendant on the ground of local prejudice is not unconstitutional, although by virtue of the removal the Circuit Court obtains jurisdiction of the entire case, which may include controversies between the plaintiff and other defendants who are citizens of the same state with him. Whelan v. R. Co. (C. C.) 35 Fed. 849; Fisk v. Henarie (C. C.) 32 Fed. 417. Nothing need be added to this reasoning.

The motion to remand is refused.

BUNEL v. O'DAY et al.

(Circuit Court, W. D. Missouri, S. D. October 6, 1903.)

No. 179.

1. COMPROMISE OF SUIT—VALIDITY.

A compromise of suit between imputed brother and sister, where the question of legitimacy of the sister is involved, because of its scandalous character is such a proper subject of domestic adjustment as to invite the favor of the court. If free from fraud, no matter how unjust the defendant may have regarded the charge, or what different result subsequent developments might probably produce, it should stand. The value consists in the release from an uncertain position, with its anxieties, from apparent danger, and from inevitable expenses and trouble. Such compromises are especially favored by the courts when of the nature of family settlements.

2. SAME—DUTY OF COUNSEL—EQUITABLE RELIEF.

While it is the duty of counsel acting as guardian ad litem for a defendant to advise with and safeguard his client as far as he can in the matter of a compromise agreement, yet when such client, on the approach of her majority, without the connivance or concurrence of her counsel, separates herself from him, and enters into a compromise agreement with her adversary brother, neither law nor the ethics of the profession require that her counsel should go out and hunt her up and thrust his advice upon her; and where at the time of the consummation of the compromise agreement, when she had attained her majority, he admonishes her of the effect of her act, and she nevertheless enters into such agreement, she has no claims upon a court of equity to interfere.

3. SAME—ADVERSARY COUNSEL.

The adversary counsel has a right to advise and assist his client to the most advantageous compromise in his behalf, provided he neither makes, nor causes to be made, to the adverse party, any false statement of fact, with a view of inducing such compromise in reliance upon the truth of such statement. He has the right to deal with the adversary at arm's length.

4. SAME—UNDUE INFLUENCE BY THE MOTHER.
When one of the questions in suit is whether or not the defendant is the daughter of a former husband of the mother, the fact that the mother, both prior to and during the pendency of the litigation, may have stated to the daughter, in anger, that she was not born in lawful wedlock, and such imputation may have been among the inducements influencing the daughter to compromise the suit, such fact would not warrant the court in vacating the compromise without a judicial inquiry and ascertainment as to whether such imputation was true or false.

5. IMPEACHMENT OF LEGITIMACY.
The rule of law that when the marriage relation is once proven to exist nothing shall be allowed to impugn the legitimacy of the issue, short of proof of facts showing it to be impossible that the husband could be the father, is not a conclusive presumption, but is one that disappears when the truth appears. The proof to repel it is as to the degree.

6. COMPROMISE—SUFFICIENCY OF MEMORANDUM CONTRACT—CONSTRUCTION.
Where a part of the consideration to be paid by complainant for such compromise was the sum of $10,000, to be placed with a named trust company, the interest thereon to be paid to the defendant during her natural life, the fact that the written memorandum of such undertaking does not express the consideration therefor nor fix the time when such deposit should be made does not render it nonenforceable. The consideration can be shown by parol, and the law would imply that the deposit should be made in a reasonable time, according to the surrounding circumstances; besides, the cause being yet pending in a court of equity, the court has plenary power, as a condition to the recognition of the operation of the settlement, to require the deposit to be made in a given time; and where the beneficiary of such deposit, before a reasonable opportunity has been afforded the complainant to make such deposit, gives notice of the repudiation of the entire compromise agreement, she cannot complain that such deposit was not promptly made or could not be enforced.

7. FOREIGN JUDGMENT—SUIT TO SET ASIDE—JOINDER OF THE HUSBAND.
The fact that the husband is joined with the wife as a codefendant in a suit in equity to avoid the effect of the judgment of a foreign court, adjudging her to be equally entitled with the complainant to a share in a certain trust fund, and to recover from her and her curator the property, real and personal, obtained by them under such alleged fraudulent judgment, does not require that he should join her in a compromise agreement, or in an answer confessing the bill, as under the Missouri statute she is as to such property a feme sole, and as such can be sued alone, either at law or in equity.

8. SAME—CROSS-BILL.
Where, pursuant to the terms of such compromise agreement, the defendant wife conveys certain real estate to the complainant and other real estate to complainant's counsel in payment of his fees, the request of the defendants to file in the original suit a cross-bill bringing such counsel for the first time into the litigation, seeking to set aside such compromise and deeds as having been fraudulently obtained, is denied, as not being properly within the office of a cross-bill.

9. ATTORNEY'S DUTIES.
The conduct of lawyers and retainers thrusting themselves into litigious strife, by becoming largely interested in the result, animadverted upon by the court.

(Syllabus by the Court.

¶ 5. See Bastards, vol. 6, Cent. Dig. § 5.

¶ 6. Sufficiency of expression of consideration in memorandum within statute of frauds, see note to Choate v. Hoogstraat, 46 C. C. A. 183.

In Equity.

F. S. Heffernan, for complainant.

W. D. Tatlow and Allen & Rathbun, for defendants.

PHILIPS, District Judge. The complainant brought suit in equity in this court to avoid, for fraud and perjury in its procurement, a decree rendered by the Supreme Court of New York City, state of New York, in a suit brought at the relation of the New York Life Insurance & Trust Company (hereinafter for convenience called the trust company), by which it was adjudged that the defendant Mary was a legitimate child of one Charles Emile Bunel, deceased, father of complainant, and as such legitimate child was entitled to share equally with the complainant in a certain trust fund held by said trust company, created by the father of said Charles Emile Bunel for the benefit of said Charles and his heirs at law, the said Charles having died.

The bill of complaint charges that said Mary was in fact a child begotten in illicit intercourse between the mother of said child and one Alfred Earles, who has since married the mother of said child. The bill alleges that in October, 1884, in a suit instituted early in that year by said Charles Emile Bunel for divorce from the said mother, he was divorced from her on the ground of her illicit cohabitation with said Alfred Earles, resulting in the birth of said Mary, after trial of the issues of fact in said suit; that while complainant was a minor of tender years he was taken by his foreign guardian to France, in Europe; and that, when said trust company filed a bill in equity in said Supreme Court of New York City for the ascertainment and determination of who were the beneficiaries of said trust, certain named parties in southwestern Missouri, where said Charles Emile Bunel and his former wife had resided, organized a conspiracy for the purpose of having it made to appear that said Mary was the legitimate child and heir of said Charles Emile Bunel, and was therefore entitled to share in said trust fund, and to that end they confederated with the mother, Mrs. Earles, and with the counsel and guardian ad litem of the said complainant in said suit in the Supreme Court of New York City, and by false and perjured testimony, concocted and gotten up by the conspirators, deceived, mislead, and imposed upon the said court, whereby it was led into rendering the judgment declaring that the said Mary was the lawful heir of said Charles Emile Bunel, and entitled as such to an undivided equal part of said trust fund with the complainant; that under and by virtue of said judgment a large amount of money and property had passed into the hands of one John O'Day, as the curator and guardian of said Mary, then a minor of tender years, who was appointed such curator and guardian by the probate court of Greene county, Mo.

The supplemental bill of complaint charges that said John O'Day, as curator aforesaid, was guilty of waste and misappropriation to his own use of a large amount of property ostensibly belonging to his ward, for which he had not accounted; that, on the death of said John O'Day, his son, the defendant John O'Day, Jr., had been appointed by said probate court the successor as curator and guardian

of said Mary, and that he as such curator and guardian had come into and yet holds the possession of a large amount of property, personal and real, so coming to said Mary as aforesaid. The bill seeks to have said Mary and said last-named guardian and curator enjoined from further availing themselves of said fund and property, and for an accounting with the curator, and for general relief.

During the pendency of this litigation, and after both the complainant and said Mary had attained their legal majority, to wit, on the 16th day of October, 1902, the complainant and said Mary reached a compromise agreement of said litigation, by which said Mary was to and did file her answer herein, under oath, admitting the material allegations of the bill. In consideration of said agreement of compromise the complainant conveyed to said Mary a life interest in 93 acres of land on the Boulevard near the city of Springfield, Mo., estimated to be of the value of $9,300, and the home that said Mary now lives in, in the city of Springfield, and an obligation on complainant's part to deposit for her use and benefit the sum of $10,000 in said trust company, the said Mary to draw semiannually the interest thereon during her natural life, and also assumed the payment of certain indebtednesses of the said Mary.

On the 12th day of November, 1902, she filed with the clerk of this court a motion, in the nature of a petition, for leave to withdraw her said answer, and for leave to file an answer, tendered with the motion, denying the allegations of the bill, and for leave to file a cross-bill, also tendered, against the complainant and his counsel, Mr. Heffernan, to set aside and vacate certain deeds made in execution of the terms of said compromise. It appears from the file-mark of the clerk that this answer and so-called cross-bill were filed with the clerk in vacation; but, as this was done without leave of court, these filings should be stricken therefrom by the clerk.

The said motion refers to the cross-bill, which charges, in effect, that said compromise agreement was procured by certain fraudulent deceptions and misrepresentations, referred to hereafter in this opinion. The court referred this matter to a special examiner, by consent of parties, to take the evidence bearing on these issues, and to report the same to the court, which has been done. This evidence is distressingly and unnecessarily voluminous. It contains a mass of irrelevant and incompetent matter, which would be unendurably burdensome on the court to point out in detail. The abstracts of the evidence furnished by the respective counsel were so partial, unintelligible, and unsatisfactory that, in justice to himself and the parties, the court took upon himself the labor of reading the nearly 700 typewritten pages covered by this evidence, which labor has consumed much of the court's summer vacation. The court cannot refrain from observing that one remedy for this growing evil in taking testimony in such cases would be to dispense with stenographers, and to require the lawyers to write out their multiplied and repetitious questions and answers, inculcating the useful lesson that expedition is a virtue in judicial inquiry.

1. The sole question for determination by the court is whether or not the answer filed by the defendant herein, and the compromise

agreement out of which it grew, were induced by reason of the imputed conduct of the complainant and others acting for and in concert with him, within the settled rule that the undue influence must be such "as amounts to overpersuasion, coercion, or force, destroying the will power." Tibbe et al. v. Kamp et al., 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; Riggin et al. v. Board of Trustees of Westminster College et al., 160 Mo., loc. cit. 579, 61 S. W. 803; Wood v. Carpenter et al., 166 Mo., loc. cit. 481, 66 S. W. 172.

2. It is charged on behalf of the defendant that she was deceived by false statements made to her by her counsel and guardian ad litem, Judge Robertson. It is claimed that after this court, at the October term, 1902, overruled the demurrer interposed by the defendants to the bill of complaint, that accidentally meeting her on the street near the court building he informed her that the judge of the court had decided her case against her, and that she understood, as far as this court was concerned, the case had gone against her on the merits. Judge Robertson's testimony respecting this occurrence was that he simply informed her of the fact that the judge had overruled the demurrer; that in answer to her inquiry as to "What does that mean?" and "How does it leave it?" he informed her that it simply meant "that we have got a lawsuit on our hands, and we will have to go to work and take the evidence and try the case on its merits"; that while he was explaining to her and her husband, in effect, that they would have to prepare for trial, and could possibly get ready for it by the next April term of court, Henry Kee, her husband, said, "Well, by God, there was a shorter way than that to settle it;" that he asked him what he meant by the remark, to which he made no reply, and that he (Robertson) inferred therefrom that they were going to try to effect a compromise, and he then said to them, "If you are anticipating a compromise of this matter, don't compromise without letting me know anything about it, for I expect that I can get better terms on a compromise than you can;" that they drove away, and he saw no more of them until the day of the compromise. Little importance can be attached to the testimony of Henry Kee respecting this incident, for the reason that he places the interview as occurring after the compromise agreement had been effected, because he says they discussed the terms of the compromise, and he fails to corroborate the version of his wife. The court accepts Judge Robertson's version of this incident, because of the court's knowledge of him, and especially for the reason of the internal improbability of her story. Judge Robertson had pressed the demurrer with zeal and ability, and when it was overruled in open court, in the presence of the bar, the matter of the time for the filing of defendants' answers was discussed, and the order then made by the court overruling the demurrer granted leave to the complainant to amend his bill and to file a supplemental bill asking for injunctive relief, and granting leave to the defendants "to file answer herein on or before the 1st day of December, 1902, and that complainant reply thereto on or before the 15th day of December, 1902." It is utterly incredible that Judge Robertson should immediately thereafter, on meeting his client just outside of the court room, tell her that the court had decided the case on the

merits against her. Her assertion that the complainant afterwards told her the case had been decided against her by the court is contradicted by the complainant, and is unenforced by any other fact or circumstance in the case. That the action of the court in overruling the demurrer precipitated and influenced the completion of the compromise is probable and natural; and that the act of the complainant in urging a compromise, as he had a right to do, if he employed the adverse ruling of the court, was but argumentative, as the defendants then apparently stood confronted with a long, tedious, annoying, and expensive litigation. Few compromises of distasteful and distressing litigation would stand if the employment of such persuasive argument were held sufficient to avoid them.

3. Another contention of the defendants is the charge that Judge Robertson corruptly betrayed the interests of his client for a consideration of $1,000, to be paid by the complainant on the completion of the compromise; that, instead of loyally advising and counseling his client in the premises, he joined with the complainant and his counsel, Mr. Heffernan, in a scheme to deceive, to persuade the defendant Mary into the apparent amicable adjustment of the litigation. The evidence, to my mind, utterly fails to warrant this grave charge. The court finds, from the moral strength of the testimony, that prior to the action of the court in passing on the demurrer the matter of the compromise had been instituted between the complainant and Mary. It progressed without the knowledge, counsel, or concurrence of Judge Robertson. The defendant Mary did not even advise him of its pendency. His knowledge of the negotiations came to him from Mr. Heffernan; and when so advised thereof he protested to Mr. Heffernan against its terms, and asserted that she should have better terms. When he was finally advised by Mr. Heffernan that the compromise agreement had been reached between the parties, without his advice or concurrence, he held claims against the defendant Mary for moneys advanced by him from time to time to meet the urgent demands of herself and husband, amounting to about $400 or $500, in addition to his fees for professional services in defending the suit, and he insisted that he must be protected therein, and suggested that he thought, comparing his services with like services by other lawyers in like cases, that he ought to have at least a fee of $3,000. Mr. Heffernan then informed him that as part of the compromise agreement the complainant was to assume certain of Mary's indebtednesses, and that he was willing to assume the payment to Robertson of $1,000, but no more, against which Robertson again protested as insufficient, and asserted that he would hold his client for the balance. There is nothing of a tangible nature in the evidence to warrant any fair mind in finding that this $1,000 was in the nature of a bribe, to induce the acquiescence of Robertson in the settlement. He accompanied Heffernan, his client, and the notary public when they went out to the home of the Earles to execute the papers effecting the compromise agreement.

It is insisted by counsel for said Mary that it was the duty of Judge Robertson, when he learned of the pending compromise, to have sought out his client, and advised, counseled with, and safeguarded

her in the matter. The court does not understand that when a headstrong and wayward client does not go to the office of her attorney for counsel, but separates herself from him at a distance in the country, without notifying him or inviting his counsel, that the ethics of the legal profession demand that he should go and hunt her up, and thrust upon her, uninvited, his interference and counsel. That he should have accompanied the parties to the Earles home, in the country, when informed that the settlement was to be consummated, was reasonable and perfectly consistent with professional integrity. He was interested in protecting himself against loss of the money he had advanced Mary, in sole reliance upon her holding the property involved in the pending suit, as well as to look after the matter of his fees for professional services.

Mr. Heffernan, in conformity with information conveyed to him by his client of the terms of the settlement, had prepared and taken with him, out to the Earles home, the answer to be filed by Mary and the deeds conveying the real estate, as he understood the terms of the settlement to require. When the papers were handed to Mary to be read Judge Robertson asked her to go into an adjoining room with him, and his testimony is, and is credited by the court, that he asked her if she understood the purport and effect of the answer; that she was now of age; that if she made that answer she would thereby admit her bastardy, and that her acts would be binding on her, and she would give up all her interest in the estate as the heir of Charles Emile Bunel, etc.; to which she answered, in substance, that she had been in litigation since she was six or seven years old, and she was tired of it, and knew what she was doing or was satisfied with the arrangement. Law and ethics exacted nothing more of her counsel. She had agreed with her adversary without seeking Judge Robertson's advice or accepting his admonition.

The matter of Judge Robertson's fee was discussed in the open at this convention. On the refusal of the complainant to assume the payment of more than $1,000 thereof Robertson acquiesced, and the complainant then paid him $100 thereon, and stands bound for the remaining $900.

4. Further prejudice is sought to be excited against Judge Robertson by reason of the fact that he thereafter filed an answer to the bill on behalf of Henry Kee, without his knowledge or direction. After the answer, signed and sworn to by the defendant Mary, was delivered to Judge Robertson as their counsel of record, without more, he drew an answer on behalf of Henry Kee, which merely stated that the defendant did not desire to answer further in said cause than to say he was willing that the prayer of the bill be granted and decree rendered accordingly, and filed both answers on the same day. In the first place, as Judge Robertson assumed that the compromise made was understood by and agreeable to his clients, he further assumed that it was but in execution of the terms of the settlement that this formal answer should be filed by the other defendant. In the second place, under the statute of this state, the real estate and personal property in question was the separate property of the defendant Mary, and she held it as a feme sole, the personal property never hav-

ing been reduced to possession by the husband, Henry Kee. Section 4340, Rev. St. Mo. 1899. Under the same statute (section 4335) the wife, as to this property and this proceeding, was a feme sole, capable of transacting business on her own account, of contracting and being contracted with, "to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued, at law or in equity, with or without her husband being joined as a party." Therefore, as to the suit in equity, Henry Kee was a mere figurehead—a nonessential. The answer of the defendant wife, in legal effect, eliminated him from the contest. As she was the sole party in interest, when she confessed the bill Judge Robertson, in recognition of the maxim that "the sprout savors of the root and goes the same way," assumed that Henry Kee followed his wife out of court.

5. In respect of the imputation cast in the so-called cross-bill upon the conduct of Mr. Heffernan in this transaction, it may be observed, in the first place, that all of the testimony intended to show the manner of his getting into the relation of counsel for complainant in this litigation, and what fee he was to receive, and what methods he may have sought to employ to win the suit, and the like, are entirely foreign to the issues on trial. The question here involved is, did he, in subserviency to his client, employ means in bringing about the compromise agreement such as a court of equity ought to denounce as deceptive and fraudulent, so as to entitle the defendant to have the original litigation reinstated and the statu quo re-established between the parties? As counsel for complainant, it was his right and duty to assist his client to any advantageous adjustment which a court of equity would not pronounce to be vicious. While the law would not permit him to deceive the adversary litigant by any representations as to fact or law known to him to be false, or regardless as to whether false or true, or to employ means designed or calculated to mislead or deceive her, with a view to obtaining an unreasonable and unfair advantage, yet as he was not her legal adviser, and she knew he was adversary in the litigation, he was under no obligation in law to consult her interests, or to disclose to her any information in his keeping as the confidential adviser of his client. He had a right to deal with the adversary at arm's length.

The evidence shows, to the satisfaction of the court, that Mr. Heffernan did not see or confer with the defendant Mary in person before the day of the consummation of the compromise agreement. He made no false statement or representation to her to influence the settlement. While it can well be inferred from the attending circumstances that he was advising with and kept informed by his client respecting the progress and details of the compromise negotiations between him and said Mary, I fail to find from the evidence that he advised or counseled his client or other person to make any false statements or give any false assurances to her. At the time and place of the consummation of the settlement he made no representation nor used any persuasion, so far as the evidence shows, to induce or overpersuade her to execute the deeds and the answer there presented. The whole of the transaction there was conducted in the open, in the

presence of the family and the parties. The evidence clearly enough shows that the answer and deeds were handed to her for examination, and that she looked over them and had opportunity to read them entire, and expressed herself as familiar with the contents and as satisfied therewith. She swore to the answer, and acknowledged before the notary public in due form that she was familiar with the contents of the deeds.

6. There was one conspicuous circumstance connected with the incidents of the transfer of the properties there made which persuades the conclusion that she not only understood what she was doing, but that she exercised her independent judgment. When one of the deeds from the complainant to her, conveying a certain piece of property, was given her to read, she looked over it, and at once said she did not want that property; that she was to have, or wanted in lieu thereof, the 93 acres of land on the Boulevard, near Springfield; and, after a controversial colloquy between her and the complainant respecting this matter, he finally acceded to her preference; whereupon Mr. Heffernan informed her that the 93-acre tract was subject to a mortgage of $5,000 or more, and therefore was not so valuable to her as the real estate expressed in the deed as it was prepared. Notwithstanding, she insisted on the change, and thereupon Mr. Heffernan, at the table, drew up the deed for the 93-acre tract of land. The sequel would justify the inference that she either possessed some inside information, or that she builded wiser than she knew; for the defendant John O'Day, Jr., in his deposition herein testified that that mortgage was held by his father, John O'Day, the former curator and guardian; but as a matter of fact it was a satisfied mortgage, which he retained as was his custom, although satisfied, and that it was never intended to be enforced against the property. So that this property was much more valuable than the piece complainant understood she was to have.

There is another circumstance connected with the incidents of that day's transactions confirmatory of defendant Mary's freedom of judgment. In discussing the matter of the $10,000 consideration, she suggested that she wanted that arranged just as in the case of a like fund the complainant was to settle on their common mother, which was to be placed by the complainant with the said trust company, the interest thereon to be paid her during her natural life, as it would secure to her a comfortable or certain income. This was accordingly so arranged.

After the papers were duly executed by the respective parties they separated in apparent peace and concord. The notary public took the deeds to town, and after appending the proper certificates of acknowledgment, with his seal of office, he delivered them to Mr. Heffernan, and the answer was then turned over to Judge Robertson, who, on the same day, filed it in the clerk's office. Mr. Heffernan filed for record in the recorder's office the deeds made to the complainant, and the deeds made by him to his mother for her home place, and the deed taken by Heffernan in satisfaction of, or as security for, his fees. The deeds to the defendant Mary, after their due

certification by the notary public, were turned over to Judge Robertson as her counsel for her use and benefit.

7. Mrs. Earles. It is charged by the promoters of this proceeding that the defendant's mother, Mrs. Earles, confederated with complainant to coerce this settlement. What did she do, as disclosed by the evidence, which the court should undo? Her testimony is that she in no way or manner employed any persuasion or influence on Mary to make this compromise. The utmost to be gathered from Mary's entire deposition is that her mother had at some time or another intimated or suggested to her that she was not the child and heir of Charles Emile Bunel. Conceding this statement to have been made by the mother, the evidence shows that it was not of recent date. Whatever may justly be said in reprobation of the conduct and character of this unfortunate and weak woman, Mrs. Earles, there are some circumstances connected with the relation between her and this daughter calculated to enforce the belief that there was a skeleton in the closet of her domestic life, which she disclosed to this daughter by suggestion long anterior to the institution of this litigation. This wayward girl, when she was only 15 years old, against the wishes of her mother, eloped with Henry Kee, himself a minor, to Oklahoma territory, where they were married. Crediting the unsupported testimony of the defendant, on their return home her incensed mother intimated to her that she was not the child of Charles Emile Bunel, and that she and her husband were thereby induced, as a peace offering, to convey to the mother the home where the mother and her husband, Alfred Earles, lived, the same place conveyed to the mother as a life estate by the complainant as a part of the compromise agreement. Mrs. Earles made oath to the bill of complaint herein, in which said illegitimacy of Mary is charged. Therefore, if it be conceded that Mrs. Earles repeated this information to the daughter, and advised the settlement, can that fact suffice to annul the compromise? Certainly not, unless the court is to assume that the fact claimed to have been stated by Mrs. Earles was false, and made by her for the purpose of coercing the settlement. How can the court say it was a false statement in advance of the judicial inquiry and ascertainment which is the substratum of the bill of complaint? The groundwork of the petition for divorce between Charles Emile Bunel and the mother of the defendant Mary was the charge of adultery with Alfred Earles, the fruit of which was the defendant Mary. This issue was found for the husband, and it was adjudged by the court that the allegation was true. With knowledge of the fact, which Mary claims was communicated to her by her mother just after her marriage, and prior to the institution of the present suit or any negotiations respecting a compromise, that her mother conceded her illegitimacy, and that, therefore, a great wrong had been perpetrated upon the legitimate infant child while in France, how can it be found by the court that the reassertion of the charge by the mother pending the negotiations for a settlement, if it be conceded, should vitiate the compromise? The very attitude of the mother, as disclosed by the bill of complaint, should rather be held to have well warranted the defend-

ant in avoiding the possible result of the suit, which might, if successful, leave the defendant Mary penniless.

8. There is no foundation in truth for the charge that the defendant Mary was inveigled from her home in Springfield out to the house of the Earles, the better to influence her in the matter of the compromise. The evidence shows that Mary had been ill with fever at her home in Springfield for some time. Aside from Mrs. Earles' testimony, the defendant's own sworn statement, as detailed by her unassisted lips to her attorney in a petition filed by her for divorce from her husband, just after the consummation of the compromise, showed that Mary was alone in this illness, shamefully neglected by the indifference of her husband, who the evidence clearly shows to have been a mere proletary—a shiftless pensioner upon this inheritance of his wife; and that Mrs. Earles, no matter what may have been her past sins, yet had left within her breast a burning spark of motherhood, which took her to the bedside of her sick child, where she kindly and assiduously ministered to her needs, while the husband indulged his passion for vagabondism. As soon as Mary was able to be moved, with her approval, she was taken to her mother's home for recuperation. The negotiations for a compromise of the suit had been conducted between her and the complainant evidently to a tangible understanding prior to this illness, awaiting the attainment of her legal majority for its consummation.

9. The Divorce Suits. It is claimed for Mary that as a part of the scheme to get her more completely under the influence of the Earles, and the control of her property, she was overpersuaded by them and others in the scheme to institute divorce proceedings against her husband. The records show that during her short married life, of about three years, she had brought three separate actions for divorce. As two of them were anterior to the negotiations for a compromise, it cannot be maintained that they had any effective connection therewith. The burden of proof in this as throughout the present controversy rests upon the defendant. She is not corroborated in this assertion by a single witness or attendant circumstance. The attorneys who brought the last two of these suits testified that in person she detailed to them the inculpatory facts alleged in the petition. Not only this, but the specifications of ill treatment, neglect, and general worthlessness charged against the husband bear internal evidence of having proceeded unaided from the mind of the wife. They disclose, with particularity, acts of meanness and ill usage on the part of the husband, occurring in the inner circle of their domestic life, which persuasively indicate that they must have come alone from the wife. She did not possess imagination enough to invent these details, and it would be remarkable that she could retell them by mere rehearsal inspired by another mind. All these petitions were sworn to by her in the explicit and solemn form prescribed by the statute, as follows: "This affiant makes oath and says that the facts stated in the above petition are true according to the best knowledge and belief of the plaintiff, and that the complaint is not made out of levity or by collusion, fear or restraint, between the plaintiff and defendant, for the mere purpose of being separated from each other, but in sincerity

and truth, for the causes mentioned in the petition." Does she regard such oaths as mere "wafer cakes"? If so, what respect can this court have for her testimony in this case? After solemnly swearing to such serious charges against her husband, that she could go back to his bed rather evidences a lack of moral sense on her part, and the overruling power and influence of the husband over her. It can very well be understood why the husband, Henry Kee, should take her back and hold her, as he was a mere pensioner upon her income. The uncontradicted evidence is that when the last petition was drawn, after she was of legal age, she was distinctly advised by her counsel that the former grievances complained of had been condoned by her subsequent cohabitation with her husband; whereupon she detailed to her attorney the other acts of outrage upon her by her husband, recently committed, and protested that she would never again return to him as she had done heretofore. The compromise had then been consummated, and she was under no coercion. The testimony of Judge Robertson is that there had been mutual criminations and recriminations between this couple. Within a short time prior to said October term of this court, 1902, the husband had charged her with acts of infidelity—undue intimacy with other men. Yet within three days after the last suit for divorce was filed she and her husband were found in the hands of the defendant O'Day, as hereinafter detailed, and the divorce suit was again discontinued. What regard can the court have for her uncorroborated statements?

10. I am persuaded from the evidence in this case that the present controversy would never have come to plague this court and the public had the defendant John O'Day, Jr., not interposed, inspired, and fostered this further litigation. As the testimony discloses, serious charges were preferred against the first curator, the father of the defendant John O'Day, Jr., for malversation in office as curator—of having committed waste and misappropriation of the proceeds of the property belonging to his ward, for which an accounting had been demanded. As soon as the compromise settlement came to his ears, the defendant O'Day conveniently met Mary Kee and her husband, and, after suggesting to them his conception that they had fared badly in the settlement, he conducted them to a lawyer of his choosing, who is conducting this contest on behalf of the defendants. The mailed hand of O'Day at once appears in the contest on the 20th day of October, 1902, when the Kees were conducted to his attorney, and a hard and fast contract was drawn up by O'Day's attorney and executed by the defendants, releasing and acquitting, with repetitious particularity and most comprehensive legal terminology, the O'Days from any and all claims and demands, of whatsoever character, on account of the curatorship of John O'Day, Sr. The consideration expressed therefor was the sum of $900, to be paid to the said Mary in monthly installments of $75 each. The following excerpt from the cross-examination of John O'Day, Jr., is significant: "Finally she [meaning Mary] came over and her husband came afterwards—no, I believe they came together—and we made arrangements where I was to let her have nine hundred dollars, or enough money to prosecute this case. * * * She talked about an attorney, and asked

me about Mr. Allen, and I told her that Mr. Allen was a very good attorney, and could be depended on—what he said. She said that she had had so much dealing with corrupt lawyers she was a little 'leary.' I told them they need not be afraid of Mr. Allen, and so I took Mr. Allen over that evening, and that is when these contracts were made—that evening or the next evening after that these contracts were drawn up."

11. In passing, it is not impertinent to say that it comes with little grace of consistency for the defendants to suggest in argument that the complainant obtained an unconscionable advantage over the defendant Mary in the settlement, in obtaining an assignment of any claim she had against her curator for waste and misappropriation, when this contract of release obtained by John O'Day, Jr., shows that he estimated the matter at $900, doled out in payments of $75 per month, and to aid in maintaining further contests between the complainant and Mary. The evidence also shows that on the day he met with the Kees he furnished them with money, and as soon as he got the contract drawn up for the release of his father's estate, and he knew the lawyers had also obtained a written contract from her by which they were to receive one-third of all that was recovered in this proceeding, he spirited Mary and her husband away in a closed carriage, at the hour of midnight, and sent them to another county, and tried to deceive the complainant's counsel as to their whereabouts. The money to support the present litigation has been furnished by the defendant O'Day. When the court read this branch of the evidence respecting the execution of said two written contracts, one in favor of O'Day and the other of the lawyer, two thoughts occurred: One was with what little consistency can the defendant's counsel claim, as they do in the tendered cross-bill, that when the defendant Mary executed the compromise agreement and the answer she was so debilitated and weak in body and mind that she was incompetent to make such agreement, while within three days thereafter they had her execute the important and extremely technical contracts which were to absolve John O'Day, Sr.'s, estate from liability for his curatorship, and to pass one-third of the estate which might be recovered in the litigation to the lawyer. The other reflection was, how much shall it profit the defendant Mary in the end should this motion be sustained?

12. No professional mind can read the examination of the defendant Mary by her counsel without the impression that she was testifying rather on a theory constructed for her than on facts known to her. The questions were most leading and suggestive, and after a fashion made the testimony more that of the questioner than the party interrogated. When on cross-examination she was carried out of this theoretical field she frankly stated that the terms of the settlement were satisfactory to her if the $10,000 had been paid. The evidence shows clearly enough that her dissatisfaction with the arrangement respecting this $10,000 originated after the settlement, and was produced solely by the suggestions of the parties who got into this case in the interest of the O'Days. When questioned respecting this matter, she said that the complainant had never made her a promise

he did not fulfill, except the one respecting this $10,000; that the memorandum did not say when it was to be paid; whereupon the following questions and answers were made: "Q. Did you have any idea that he was not going to do that right off? A. I didn't at the time until I came to town. Q. Who told you? A. Several different ones—Mr. Allen told me for one. * * * He said it didn't say when he was going to do it." The evidence also shows that the arrangement respecting this $10,000, as expressed in the memorandum, was discussed by and with the defendant Mary at the time the memorandum was so drawn. Judge Robertson testified that he distinctly advised her that she would not be able to check on this $10,000 fund at will, and that she could only draw the income, and that it was said in the course of the conversation that her husband could not get hold of it to squander it, and she said that she understood it, and was satisfied to have it fixed that way, just as the like arrangement for $10,000 for the benefit of her mother. The written memorandum is in words and figures as follows:

"October 16, 1902.

"I give to my half-sister, Mary Earles Kee, the use of ten thousand dollars for and during her natural life, the money to be deposited with the New York Life Insurance & Trust Company of New York City. She is to draw the interest on same during her natural life.

"[Signed] H. Bunel."

As the memorandum does not express any consideration therefor, it is perfectly competent to show by parol what the consideration was; and, likewise, as the contract on its face does not purport to express the whole contract, that can be supplied by parol. The very circumstances under which this memorandum contract was given are such that the law itself would imply that the money should be deposited with the trust company in a reasonable time. It does not lie in the mouth of the defendant Mary to complain that this money was not deposited. Before the complainant, under the circumstances, had a reasonable time in which to go to New York and make such deposit, within three days of the completion of the compromise agreement, she repudiated the whole transaction, and employed counsel to avoid and set it aside, thereby notifying the complainant that she would not accept this money. How can she then complain that it was not deposited? One cannot complain that a tender was not made after notifying the obligor that he will not accept. Under such conditions, the law would not exact that the complainant should have made the deposit of $10,000 with the trust company, in fulfillment of the provisions of the contract when he would lose the benefit of the use thereof, while the defendant was litigating with him, as the trust instrument would have required that the interest thereon should be paid to Mary.

Moreover, the parties are in a court of equity, and the court has jurisdiction both of the parties and the subject-matter; and in the exercise of its plenary power for administering exact justice it can and will protect the defendant against any possible loss respecting this $10,000, by requiring the complainant, within a specified time, after the defendant Mary shall have filed with the clerk of this court her written notice of her willingness to accept the settlement, to deposit

said fund with the trust company. The court will retain jurisdiction of this controversy until such indemnity is given or said sum is so deposited. This is all that the defendant can in conscience exact.

13. It is suggested in argument by counsel for the defendant that the bill of complaint does not state a cause of action on its face, for the reason that it discloses the fact that during the period of gestation, prior to the divorce between Charles Emile Bunel and his then wife, he had the means of access to her, and the law presumes the legitimacy of Mary. Without stopping to discuss the legal effect of such fact on the compromise, it is sufficient to say that the bill does not disclose a state of facts on which the presumption of legitimacy arises. The rule of law, founded on the public policy, of maintaining the integrity and sanctity of the domestic relation, is that, when the marriage relation is once proven to exist, "nothing shall be allowed to impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father." Patterson v. Gaines et ux., 6 How. 550, 588, 12 L. Ed. 553. This rule is expressed by Judge Sanborn in Adger et al. v. Ackerman et al., 52 C. C. A. 577, 115 Fed. 133, as follows: "Once a marriage is proved, nothing can impugn the legitimacy of the issue short of proof of facts which show it to have been impossible that the husband could have been the father." The bill, as already shown, not only alleges that on a trial of the issue joined between Charles Emile Bunel and his then wife it was alleged, proved, and adjudged by the court that the defendant Mary was the offspring of an adulterous intercourse between the wife and Alfred Earles, but it is also alleged that said allegation is true, and that when said Mary was begotten the evidence would show that Charles Emile Bunel was impotent—physically incapable of an act of procreation—and that from and after September, 1883, the period within which said child could have been begotten in lawful wedlock, the husband was away from the wife, living several miles from her, and that he did not at any time thereafter have access to her person. As the presumption in question is not a conclusive presumption, it is one that would disappear when the truth appeared. The rule of law only imposes upon the party impeaching the legitimacy the burden of establishing the impossibility of procreative intercourse. No matter, therefore, what the proximity of the husband to the wife, if in fact he was impotent the presumption of his paternity would fall. Equally so, no matter what the possible means of access were, it would be competent for him to show by indubitable evidence that as a matter of fact he had no intercourse with her. In other words, it would be simply a question for the court as to the degree of such proof, within the rule, to satisfactorily overcome the presumption of legitimacy. Whether or not the testimony of the physician referred to in the bill of complaint as to the fact of impotency would be reliable cannot affect the averment of the bill. Although "a country doctor," as contemptuously described in counsel's brief, he might be as good a judge of the instrumentalities of procreation as the city doctor.

14. It is a wholesome rule of law, equally founded in sound public policy, that an amicable compromise of a litigation of the character

of this should be favored by the courts. No matter if, on further investigation or subsequent development, it should appear that the defendant knew at the time that the demand was not well founded in law or in fact, it would not affect the validity of the compromise. If fairly obtained, it should stand. "The value consists in the release from an uncertain position, with its anxieties, from apparent danger, and from inevitable expenses and trouble." Bishop on Contracts (1887) § 57; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588; Flannagan v. Kilcome, 58 N. H. 443; Little v. Allen, 56 Tex. 133; Allen v. Bucknam, 75 Me. 352; Wehrum v. Kuhn, 61 N. Y. 623; Troy v. Bland, 58 Ala. 197; Jones v. Rittenhouse, 87 Ind. 348.

This rule is especially applicable to family agreements and settlements, which is expressed as follows in 12 Am. & Eng. Enc. of Law (2d Ed.) p. 875:

"Family agreements and settlements are treated with especial favor by the courts of equity, and equities administered in regard to them which are not applied to agreements generally, and this on the ground that the honor and peace of families make it just and proper to do so. Accordingly, it has been laid down as a general rule that a family agreement entered into upon the supposition of a right, or of a doubtful right, though it afterwards turns out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties."

And the general rule is that the court will not inquire into the adequacy or inadequacy of the consideration, for the reason that it is enough to support the agreement that there was a doubtful question and the compromise was deliberately made. Smith v. Smith, 36 Ga. 191, 91 Am. Rep. 761; Owen v. Hancock, 1 Head, 573; Bellows v. Sowles, 55 Vt. 391, 45 Am. Rep. 291; Naylor v. Winch, 1 Sim. & S. 555. Had this compromise settlement been consummated during the minority of the defendant Mary, it would have been the duty of the court to carefully scrutinize it and sedulously guard and protect her interests; and even though it was not consummated until after her legal majority, and she was sui juris, it would be the duty of the chancellor to see that it was free from fraud and intended imposition.

15. While the court may not, as it should not, shirk from any duty, however burdensome or unpleasant, in administering justice and right between the parties, no matter how reprehensible their conduct and character may be, yet no judicial eye can scan this record without discerning the low state of morals of the two principal contestants, and applauding, at least, their judgment in putting an end to the strife by adjustment out of court. And this court cannot refrain from giving expression to the conviction, deepened by the exhibitions of prodigality and depravity of the contending parties, that often no greater misfortune can befall children than great riches cast upon them by gifts and inheritance. The intended beneficence of the father of Charles Emile Bunel in creating the trust estate in question has proven but a curse to the beneficiaries. Neither of these children, as their testimony shows, submitted to the labor of acquiring an education. They seem to have spurned the honors and dignities which come from labor. The boy has been content to be a mere parasite, to exist in idleness, and rot out in wantonness and riot;

while the girl, aspiring to a share in the bounty of the trust, has grown up with a roving fancy and unstable habits, illiterate and wayward, contemning parental authority and respect, eloping when a mere child and marrying a mere boy, who, in thoughtlessness, has eaten only the bread provided through the wife's access to the claimed inheritance. And in this case this condition of affairs is aggravated by its demoralizing effect upon lawyers and hungry retainers, who became so largely interested in the spoils of the controversy that their personality is thrust conspicuously into the case. As to the O'Days, while charging Heffernan with getting on two sides of the controversy, as respects them the evidence presents the spectacle of the brother of the defendant O'Day standing in with Heffernan and claiming a share of his large fee as counsel for the complainant, while aiding by his testimony the interests of his father's estate, of which he is a beneficiary heir, by trying to aid his brother in the attempt to upset the compromise settlement. And after the disclosure of the contract obtained by the defendant O'Day from the Kees, by which he obtained the release of his father's estate from accountability for the alleged devastavit and misappropriation of the ward's estate, he essays in his deposition to palliate his situation by saying he is nevertheless now willing to account to the ward for any wrong of his father's; while Mr. Heffernan, in his deposition, concedes that he overgrabbed in the amount of property he obtained from his client for his fee, and expresses a willingness to make restitution.

16. The cross-bill proposed to be filed herein by the defendants Mary and Henry Kee makes F. S. Heffernan a party thereto, for the reason that the deeds executed in pursuance of the agreement in part placed the title to some real estate in him. A cross-bill is in the nature of a defense, and can only be filed between parties to the original suit. It cannot bring in new parties into the controversy. "The original bill and cross-bill are but one cause. It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit. * * * A cross-bill to make new parties is not only improper and irregular, but wholly unnecessary." See Thruston v. Big Stone Gap Imp. Co. (C. C.) 86 Fed. 485; Goff v. Kelly (C. C.) 74 Fed. 327; Lautz v. Gordon (C. C.) 28 Fed. 264; Johnson S. R. Co. v. Union S. & S. Co. (C. C.) 43 Fed. 331; Stonemetz P. M. Co. v. Brown, etc. (C. C.) 46 Fed. 851. The cross-bill, therefore, tendered by the defendants is wholly inadmissible.

The court will form the order of entry hereon requiring the deposit to be made by the complainant of the $10,000 within a specified time after the defendant Mary shall have signified her willingness to accept the same, whereupon the compromise settlement shall stand; the court retaining jurisdiction for such further order, etc., as shall be proper and essential to the ends of justice.

NEW YORK & CUBA MAIL S. S. CO. v. UNITED STATES.

(District Court, S. D. New York. October 21, 1903.)

1. INTERNAL REVENUE—STAMP TAX ON SHIP'S MANIFESTS—CONSTITUTIONALITY.
The provision of War Revenue Act June 13, 1898, c. 448, § 25, 30 Stat. 461, which imposes a graduated stamp tax on manifests for clearance of the cargo of any ship, vessel, or steamer for a foreign port, is in violation of the constitutional provision prohibiting the laying of a tax or duty on articles exported from any state, and void. The manifest is an essential part of the ship's papers, required by law, and without which foreign commerce cannot be carried on by sea, and a tax thereon is equivalent to one on the cargo therein declared.

On Demurrer to Petition.

Curtis, Mallet-Prevost & Colt (Wm. Edmond Curtis, of counsel), for petitioner.

Henry L. Burnett, U. S. Atty., and Charles D. Baker, Asst. U. S. Atty.

HOLT, District Judge. This is a demurrer to a petition in a suit against the United States in this court under the act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], commonly known as the "Tucker Act." The action is brought to recover $240, the amount expended by the petitioner for stamps affixed to manifests of cargoes exported from New York to Cuba in the steamers owned by the petitioner. War Tax Act June 13, 1898, c. 448, § 25, 30 Stat. 461, imposed the following stamp taxes on manifests:

"Manifest for custom house entry or clearance of the cargo of any ship, vessel or steamer for a foreign port. If the registered tonnage of such ship, vessel or steamer does not exceed three hundred tons, one dollar. Exceeding three hundred tons and not exceeding six hundred tons, three dollars. Exceeding six hundred tons, five dollars."

The petition alleges that such tax on manifests violated the provision of the Constitution of the United States that "no tax or duty shall be laid on articles exported from any state." The sole question raised by the demurrer is whether such provision is unconstitutional.

The United States Supreme Court decided, in the case of Fairbank v. United States, 181 U. S. 283, 45 L. Ed. 862, that the stamp tax imposed by the same act on foreign bills of lading was, in substance and effect, equivalent to a tax on the articles included in the bill of lading; that it was therefore a tax or duty on exports, and was unconstitutional.

I am unable to see any difference in principle between a stamp tax on a manifest and a stamp tax on a bill of lading. A manifest is a declaration of the entire cargo; a bill of lading is a declaration of a specific part of the cargo. A manifest is essentially a summary of all the bills of lading. If there is any distinction, it seems to me that the constitutional prohibition of a tax on a foreign bill of lading applies with still greater force to a tax on a manifest. Previous to the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) there was, so far as I am aware, no statute of the United States requiring bills of lading to be given. They were uni-

versally given, but they were a mere matter of business convenience, and were based exclusively on contract. The statutes of the United States, however, have always required that a sworn manifest be furnished by the master upon the clearance of any vessel from this country for a foreign port. Rev. St. U. S. § 4197 [U. S. Comp. St. 1901, p. 2840]. A manifest is one of the ship's papers which must be presented to the collector upon the entry of any vessel into the United States. Rev. St. U. S. § 2790 [U. S. Comp. St. Supp. 1903, p. 1869]. It is a part of the ship's papers, essential, on all voyages, for the protection of the ship and the owners of the cargo, which it is the duty of a master to take on board and carefully preserve. 2 Parsons on Shipping, 3. A voyage made without the regular ship's papers is presumably illegal. In case of a seizure in time of war, the absence of ship's papers is presumptively an adequate ground for condemnation. 2 Parsons on Shipping, 476. Prize cases, when no claimant appears, are ordinarily heard upon the ship's papers and the evidence taken in preparatory. 2 Parsons on Shipping, 473. Any concealment or spoliation of ship's papers is a fact of great weight in prize cases. 2 Parsons on Shipping, 475. In short, while a bill of lading is ordinarily merely a convenient commercial instrument, a manifest of the cargo is absolutely essential to the exportation of property in vessels at all. Congress could absolutely put an end to any exportation whatever by a sufficiently high tax on manifests, if it had the power to impose such a tax. If, therefore, a stamp tax on a bill of lading is a tax upon the property exported, a stamp tax on a manifest seems to me to be still more clearly such a tax.

Moreover, in the dissenting opinion in Fairbank v. United States, supporting the view that a tax on a bill of lading was a tax on a paper or document, and not on the property exported, much stress was laid on the fact that the tax imposed by the act on a bill of lading was an unvarying amount (10 cents upon each bill), irrespective of the value of the property. The opinion states: "If Congress had graduated the stamp duty according to the quantity or value of the articles exported, there might have been ground for holding that the purpose and the necessary result was to tax the property, and not the vellum, parchment, or paper on which the bill of lading was written or printed." Page 317. The provision of the act imposing a tax on manifests did graduate the stamp duty, to a certain extent, according to the capacity of the ship to increase the quantity or value of the articles exported. If the registered tonnage of the ship did not exceed 300 tons, the tax was $1; if it exceeded 300 tons, and did not exceed 600 tons, it was $3; and if it exceeded 600 tons, it was $5. Without laying too much stress, however, upon this consideration, I think that the essential character of the stamp tax on manifests was that of a tax on exports, in the same sense in which a stamp tax on a bill of lading was a tax on exports.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer within 20 days.

UNITED STATES v. MORRIS et al.

(District Court, E. D. Arkansas, E. D. October 9, 1903.)

1. CIVIL RIGHTS—POWER OF CONGRESS TO PROTECT—CONSTITUTIONALITY OF STATUTE.

Congress has the power, under the thirteenth constitutional amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of such rights is solely because of race or color; and section 1 of the civil rights act (Rev. St. U. S. § 1978 [U. S. Comp. St. 1901, p. 1262]) is within such power.

2. CONSPIRACY—PREVENTING EXERCISE OF CIVIL RIGHTS.

A conspiracy between two or more persons to prevent negro citizens from exercising the right to lease and cultivate land, because they are negroes, is a conspiracy to deprive them of a right secured to them by the Constitution and laws of the United States, within the meaning of Rev. St. U. S. § 5508 [U. S. Comp. St. 1901, p. 3712].

On Demurrer to Indictment.

W. G. Whipple, U. S. Atty.

O. N. Killough, Quarles & Moore, and L. C. Going, for defendants.

TRIEBER, District Judge. The defendants are indicted for a violation of the provisions of section 5508, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3712]; the specific charge being that they conspired to injure, oppress, and intimidate certain citizens of the United States, of African descent, in the free exercise or enjoyment of certain rights secured to them by the Constitution and laws of the United States, on account of their being negroes. The right which it is charged the defendants sought to prevent the persons named in the indictment from exercising, on account of their race and color, is the right to lease lands and cultivate them—a right alleged to be guaranteed to them by the thirteenth amendment to the Constitution of the United States and the provisions of section 1 of the act of Congress entitled "An act to protect all persons in the United States in their civil rights and furnish means of their vindication," enacted April 9, 1866 (chapter 31, 14 Stat. 27, digested in the United States Revised Statutes as section 1978; U. S. Comp. St. 1901, p. 1262). The demurrer challenges the constitutionality of both statutes. The constitutionality of section 5508 is no longer open to controversy, its validity having been determined and upheld by the Supreme Court in Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 32 L. Ed. 766; Logan v. United States, 144 U. S. 291, 12 Sup. Ct. 617, 36 L. Ed. 429; Motes v. United States, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

The only question, therefore, left for determination, is the constitutionality of section 1 of the civil rights act of April 9, 1866. Nothing in the Constitution of the United States as originally adopted, or in any of the first twelve amendments to that instrument, adopted shortly after the ratification of the Constitution, would warrant the enactment of this act by Congress. Section 2 of article 4, guaran-

tying to citizens of each state all privileges and immunities of citizens in the several states, merely secures and protects the right of a citizen of one state of the United States to pass into any other state of the Union for the purpose of engaging in lawful business, to acquire and hold property, to maintain actions in the courts of that state, and to be exempt from taxes and excises not imposed by the state on its citizens, free from all discriminations—such discriminations being made by the state in its capacity of a sovereign—but does not apply to acts of individuals. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Ward v. Maryland, 12 Wall. 418, 20 L. Ed. 449; Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

If the power to enact the legislation involved in this proceeding exists at all, it must have been granted by some provision of the last three amendments to the Constitution—the thirteenth, fourteenth, or fifteenth. As the acts contemplated by this statute are those of individuals, as well as of officers in the enforcement of the statutes of a state or in the discharge of official functions, neither the fourteenth nor fifteenth amendment can be relied upon as an authority for it, for it is now well settled that these two amendments have reference solely to actions of the state, and not to any action of private individuals, although it is immaterial whether the state acts by its legislative, executive, or judicial authority. United States v. Reese, 92 U. S. 214, 23 L. Ed. 563; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979.

The power of Congress to enact such legislation must, therefore, be found in the thirteenth amendment, else it does not exist. That Congress assumed that its power was derived from that amendment, and not from either of the later amendments, is conclusively shown by the fact that at the time this law was enacted, in 1866, neither the fourteenth nor fifteenth amendment had been ratified, or even submitted by Congress to the states. The fourteenth amendment was submitted for ratification by resolution of June 16, 1866, and declared a part of the Constitution on July 21, 1868, while the resolution to submit the fifteenth amendment to the states was only passed by Congress on February 27, 1869, and the amendment promulgated as a part of the Constitution on March 30, 1870. The language of the thirteenth amendment differs materially from that used in the two later ones. While the fourteenth amendment provides that "no state shall make or enforce any law which shall abridge," etc., and the fifteenth amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account," etc., the thirteenth amendment declares, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." There is no limitation in that amendment confining the pro-

hibition to the states, but it includes everybody within the jurisdiction of the national government. This distinction in the language of these amendments was fully recognized by the Supreme Court in the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835. Mr. Justice Bradley, in delivering the opinion of the court, said:

"We must not forget that the province and scope of the thirteenth and fourteenth amendments are different. The former simply abolished slavery. The latter prohibited the states from abridging the privileges or immunities of citizens of the United States by depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect of abridging any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. Under the fourteenth, as we have already shown, it must necessarily be and can only be corrective in its character, addressed to counteract and afford relief against state regulations or proceedings." 109 U. S. 23, 3 Sup. Ct. 30, 27 L. Ed. 835.

Congress is, therefore, authorized by the provisions of the thirteenth amendment to legislate against acts of individuals, as well as of the states, in all matters necessary for the protection of the rights granted by that amendment.

Slavery and involuntary servitude being prohibited within any place subject to the jurisdiction of the United States, and Congress being authorized by the second section of the amendment "to enforce this article by appropriate legislation," does that vest it with the power to protect those emancipated from slavery by this constitutional amendment in the enjoyment of such rights as it is charged in the indictment the defendants conspired to deprive them of, or is that power still solely reserved to the states, notwithstanding the adoption of this amendment?

The powers of Congress are limited to such matters as are expressly or by implication granted to it by the national Constitution, that being an enabling instrument, while the Constitutions of the states are limitations upon the power of the Legislatures of the respective states. There can be no doubt that the same power may exist at the same time in the nation as well as the states. Gibbons v. Ogden, 9 Wheat. 1, 235, 6 L. Ed. 23; Passenger Cases, 7 How. 540, 553, 561, 12 L. Ed. 702; Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 613, 627, 18 Sup. Ct. 488, 42 L. Ed. 878. The same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government. Fox v. Ohio, 5 How. 410, 433, 12 L. Ed. 213; Moore v. Illinois, 14 How. 13, 19, 14 L. Ed. 306; United States v. Cruikshank, 92 U. S. 542, 550, 23 L. Ed. 588; Ex parte Siebold, 100 U. S. 371, 390, 25 L. Ed. 717; Cross v. North Carolina, 132 U. S. 131, 139,

10 Sup. Ct. 47, 33 L. Ed. 287. The citizens of the United States resident within any state are subject to two governments—one state, and the other national. Every citizen owes allegiance to both of these governments, and, within their respective spheres, must be obedient to the laws of each. In return he is entitled to demand protection from each within its own jurisdiction. The thirteenth amendment is a great extension of the powers of the national government. In the language of Mr. Justice Swayne in United States v. Rhodes, 1 Abb. 28, 37, Fed. Cas. No. 16,151:

"It trenches directly upon the powers of the states and of the people of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction."

The effect of this amendment on the negro, as stated by the same learned jurist in that case, is "that the emancipation of a native-born slave by removing the disability of slavery made him a citizen without any further act of Congress."

Chancellor Kent defines "citizens" as follows: "'Citizens,' under our Constitution and laws, means free inhabitants born within the United States, or naturalized under the laws of Congress." 1 Kent, Comm. 292. The possession of political rights is not essential to citizenship. Minor v. Happersett, 88 U. S. 162, 22 L. Ed. 627; 6 Am. & Eng. Enc. of Law, 15.

Every citizen and freeman is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are fundamental or natural rights, recognized among all free people. In our Declaration of Independence, the Magna Charta of our republican institutions, it is declared:

"We hold these rights to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

Nor were the framers of the Constitution of this state less emphatic in the expression of their views on this subject, for in the bill of rights of the state of Arkansas it is provided:

"All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and

defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

Can there be any doubt that the right to purchase, lease, and cultivate lands, or to perform honest labor for wages with which to support himself and family, is among these rights thus declared to be "inherent and inalienable"? In Corfield v. Coryell, 4 Wash. (C. C.) 371, Fed. Cas. No. 3,230, decided as early as 1823, Mr. Justice Washington said: "What these fundamental rights are would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads." And thereupon he enumerated, among others, "To take, hold, and dispose of property, either real or personal." While this opinion was delivered by the learned justice in a cause heard by him on the circuit, it has received the approval of the Supreme Court of the United States in numerous cases. Slaughterhouse Cases, 16 Wall. 75, 97, 21 L. Ed. 394; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 762, 764, 4 Sup. Ct. 652, 28 L. Ed. 585; Blake v. McClung, 172 U. S. 239, 248, 19 Sup. Ct. 165, 43 L. Ed. 432.

In Butchers' Union Co. v. Crescent City Co., 111 U. S. 762, 4 Sup. Ct. 657, 28 L. Ed. 585, Mr. Justice Bradley, in a concurring opinion, says:

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again, on page 764, 111 U. S., page 658, 4 Sup. Ct., 28 L. Ed. 585, he proceeds:

"I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

And again, on page 765, 111 U. S., page 658, 4 Sup. Ct., 28 L. Ed. 585:

"But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen."

These extracts were cited with approval and reaffirmed by the Supreme Court in Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832. See, also, the able opinion of Judge Jones in The Peonage Cases (D. C.) 123 Fed. 671.

As is well known, in many of the states in which slavery had existed prior to the adoption of the thirteenth amendment, legislation was enacted in relation to the negroes which practically established a system of peonage but little removed from that of slavery; and owing to the passions and prejudices aroused by the Civil War, and which at that time had not yet been allayed, irresponsible per-

sons would prevent negroes from working or cultivating lands, and the courts of the states were powerless to protect them. It will serve no useful purpose to recite in this opinion the state of affairs then existing, but a review of them may be found in the opinion of Mr. Justice Swayne in United States v. Rhodes, supra, and in the Slaughterhouse Cases, 16 Wall. 36, 70, 80, 21 L. Ed. 394. To prevent these unjust discriminations against the negroes, Congress enacted this civil rights act, intending thereby to protect them in the enjoyment of those rights which are generally conceded to be fundamental and inherent in every freeman. The constitutionality of this act, although it has never been directly passed upon by the Supreme Court of the United States, has been upheld by Mr. Justice Swayne in United States v. Rhodes, supra, and by Chief Justice Chase in United States v. Turner, 1 Abb. 84, Fed. Cas. No. 14,247, in both of which cases its constitutionality was directly involved. Mr. Justice Swayne delivered a very elaborate opinion, reviewing most thoroughly the history of the amendment and the authorities bearing upon the issues involved, epitomizing his conclusions as follows:

"It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the inhabitants of Louisiana and Florida, without reference to race or color, and cannot, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them. It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both houses were the same. This fact is not without weight and significance. McCulloch v. Maryland, 4 Wheat. 401 [4 L. Ed. 579]. The amendment reversed and annulled the original policy of the Constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope than the consequences of a manumission by a private individual. We entertain no doubt of the constitutionality of the act in all its provisions. It gives only certain civil rights. Whether it was competent for Congress to confer political rights, also, involves a different inquiry. We have not found it necessary to consider the subject."

In United States v. Cruikshank, 1 Woods, 308, 319, Fed. Cas. No. 14,897, the question before the court was the constitutionality of the enforcement act (Act May 31, 1870, c. 114, 16 Stat. 140), which Mr. Justice Bradley declared to be unconstitutional, as an unauthorized assumption of power by Congress under the fourteenth amendment, but in referring to the civil rights act, in this cause involved, expressed the following opinion:

"It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and therefore that congress had the power, under the amendment, to declare and effectuate these objects. The form of doing this, by extending the right of citizenship and equality before the law to persons of every race and color (except Indians not taxed, and, of course, excepting the white race, whose privileges were adopted as the standard), although it embraced many persons, free colored people and others, who were already citizens in several

of the states, was necessary for the purpose of settling a point which had been raised by eminent authority, that none but the white race were entitled to the rights of citizenship in this country. As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that Congress had the power, under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race. Conceding this to be true (which I think it is), Congress then had the right to go further, and to enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon them. Without having this power, Congress could not enforce the amendment. It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the thirteenth amendment and the laws thus passed in pursuance thereof. But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the state courts, unless, indeed, the state should deny to the class of persons referred to the equal protection of the laws. Then, of course, Congress could provide remedies for their security and protection. But in ordinary cases, where the laws of the state are not obnoxious to the provisions of the amendment, the duty of Congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

"*To illustrate: If, in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only.*

"To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts."

These views, as well as those expressed by Mr. Justice Swayne in United States v. Rhodes, supra, were approved by the Supreme Court in United States v. Harris, 106 U. S. 629, 640, 1 Sup. Ct. 601, 27 L. Ed. 290.

The allegations in this indictment expressly charge that these acts of the defendants were on account of the parties against whom they were directed being negroes. Prior to the adoption of the thirteenth amendment, it had been determined by the highest court of the land that even a free negro, whose ancestors were imported into this country and sold as slaves, is not a citizen of the United States, and therefore could not sue in the courts of the United States; and, even if made a citizen by the laws of the state of his residence, the rights

thus conferred upon him were limited to that state, and did not entitle him to the privileges and immunities of a citizen in any other state. Scott v. Sandford, 19 How. 393, 405, 15 L. Ed. 691. Chief Justice Taney, in delivering the opinion of the majority of the court, said:

"Each state may still confer them [the rights of citizenship] upon an alien, or any one it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which the word is used in the Constitution of the United States, or entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states."

On page 404 of that opinion (19 How., 15 L. Ed. 691) it is said:

"We think they [negroes] are not [citizens], and that they are not included and were not intended to be included under the word 'citizen' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at the time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."

Under this decision, therefore, a negro, until after the enactment of the thirteenth amendment and the civil rights act of 1866, was, in the language of the court, "so far inferior that he had no rights which the white man was bound to respect." 19 How. 407, 15 L. Ed. 691. Although this opinion was severely criticised at the time, it was never overruled, and was at the time of the enactment of this civil rights act regarded as the law. Based upon this decision, several of the slave-holding states, shortly after its rendition, enacted laws absolutely prohibiting free persons of color from coming into, or, if living there, remaining within, their respective boundaries, upon penalty of being sold as slaves; and, being "descendants of ancestors who were imported into this country and sold as slaves," they could not, in view of the principle established by the Dred Scott decision, invoke the protection of article 4, § 2, of the national Constitution, although by the laws of the state of their residence they might have been endowed with all the privileges possessed by its white citizens. Obviously to remove all doubt as to the status of these people after the adoption of the thirteenth amendment, and to secure to them the rights belonging of right to freemen, Congress enacted this law, declaring all persons born in the United States and not subject to any foreign power to be citizens of the United States, without regard to race or color, and at the same session passed a resolution submitting to the states for ratification the fourteenth amendment, which provides that all persons born or naturalized in the United States shall be citizens thereof. It is therefore beyond controversy that the negro's freedom and citizenship are rights secured to him by the Constitution and laws of the United States, and which, according to the decision in the Dred Scott Case, he did not possess in the absence of such legislation.

The fugitive slave acts (Act Feb. 12, 1793, c. 7, 1 Stat. 302; Act Sept. 18, 1850, c. 60, 9 Stat. 462) were enacted in the exercise of the power of Congress similar to that sought to be effected by this act. By the provisions of that act it was a penal offense to knowingly and willingly obstruct or hinder the owner of the fugitive slave from

seizing or arresting him, or to harbor or conceal such person after notice that he was a fugitive slave. The constitutionality of this act was upheld in Jones v. Van Zandt, 2 McLean, 611, Fed. Cas. No. 7,502, Prigg v. Pennsylvania, 16 Pet. 539, 10 L. Ed. 1060, and Ableman v. Booth, 21 How. 506, 16 L. Ed. 169, as being authorized by article 4, § 2, of the Constitution, which was not as broad as the provisions of the thirteenth amendment. That provision merely provides that:

"No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

The leading case in which this act was sustained by the Supreme Court is Prigg v. Pennsylvania, supra. It was there argued that the act of Congress was unconstitutional, "because it did not fall within the scope of any of the enumerated powers of legislation confided to that body." Mr. Justice Story, who delivered the opinion of the court, in disposing of that contention, said:

"Stripped of its artificial and technical structure, the argument comes to this: That although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress, and they must operate solely proprio vigore, however defective may be their operation; nay, even although, in a practical sense, they may become a nullity from the want of a proper remedy to enforce them or to provide against their violation. If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers or enact laws beyond the powers delegated to it by the Constitution. But it has on various occasions exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end."

All the judges of the Supreme Court concurred in that view; the only point on which there was a dissent being whether, under the constitutional provision, the powers of Congress were exclusive of the states. Shall the courts be less liberal in construing constitutional provisions in favor of freedom than those in favor of slavery?

In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment. In the language of Mr. Justice Field, in his dissenting opinion in the Slaughter House Cases:

"The abolition of slavery and involuntary servitude was intended to make every one born in this country a free man, and as such to give him the right

to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, and to reside in places, where others are permitted to live, would so far deprive him of the rights of a free man, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a free man. The compulsion which would force him to labor, even for his own benefit, only in one direction, or in one place, would be almost as oppressive, and nearly as great an invasion of his liberty, as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." 83 U. S. 90, 21 L. Ed. 413.

That the rights to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable; and a conspiracy by two or more persons to prevent negro citizens from exercising these rights because they are negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of section 5508, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3712].

For these reasons, the demurrer to the indictment is overruled.

BRAUN & FITTS v. COYNE.

(Circuit Court, N. D. Illinois, N. D. January 30, 1899.)

1. INTERNAL REVENUE—OLEOMARGARINE—STATUTORY DEFINITION.
A food product known as "Fruit of the Meadow," composed of leaf lard and beef fat, bathed in salt ice water to take away the fat and lard odor, but not having any ingredient to give it a butter flavor, or coloring matter to give it a butter appearance, although put up and sold in pound packages, is not taxable as oleomargarine, under Act Aug. 2, 1886 (chapter 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]), which is intended to apply only to products made in conscious imitation of butter.

Action to Recover Internal Revenue Taxes Paid.

Harlan & Bates, for plaintiff.
John C. Black, U. S. Atty., for defendant.

GROSSCUP, Circuit Judge. This case is to recover taxes paid upon a product known as "Fruit of the Meadow," which the complainants allege is not taxable under Act Cong. Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], known as the "Oleomargarine Act."

The act itself defines oleomargarine as follows:

"All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, larding, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, larding, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

Oleomargarine is usually made of leaf lard, and beef fat churned in milk and cream, or milk, cream, and butter, to give it flavor, and colored with the vegetable dye annotto. This compound is

harmless, and the law is not intended to prevent its manufacture, but only to tax its manufacture when put up in such way as to be a substitute for butter, or to lead the consumer into the belief that it is butter. The tax practically is upon the product of such manufactures of leaf lard, beef fat, etc., as are made in the conscious imitation of butter. The purpose of Congress was to protect butter as it has commonly been known against outside competitors, under the guise or appearance of butter. The test is this: Is the product a conscious imitation of butter?

"Fruit of the Meadow" is leaf lard and beef fat bathed in salt ice water. The bath takes away the fat and lard odor. There is no mixture of cream, milk or butter to give it a butter flavor, and no coloring matter to give it a butter appearance. It, in no way, steals any of its qualities or appearance from the product of the cow. It is, it is true, a new product, but not related, either in flavor, color, or any of the other instrumentalities of imitation, to the genuine butter.

In my opinion, it is not taxable under the Oleomargarine law. The fact that it is put up in one ponnd packages does not make it a conscious imitation of butter. The manufacturers of butter have no monopoly upon the commercial expedient of one pound packages.

A judgment may be entered for the complainants for the sum of two dollars and costs, the amount of the taxes paid subsequent to the running of the Statute of Limitations.

AMES MERCANTILE CO. v. KIMBALL S. S. CO.

(District Court, N. D. California. September 18, 1903.)

No. 12,437.

1. SHIPPING—CONSTRUCTION OF BILL OF LADING—DELIVERY OF GOODS.
A bill of lading issued by a steamship company for goods to be transported from San Francisco to Nome contained the following clause: "It is expressly understood that the above-mentioned merchandise shall, at the option of said company, be received by the consignee thereof at the vessel's tackle immediately after the arrival of the steamer at the port of destination, or the same may be landed and stored * * * at the expense and risk of the owner, shipper, or consignee. * * * All lighterage * * * between steamer and shore * * * will be at the risk of owner, shipper, or consignee, and also at their expense." *Held*, that the purpose of such provision was to prevent delay or inconvenience to the steamer by reason of the failure of the consignee to receive the goods at the steamer's tackle when ready for delivery, and that when he was ready and prepared to so receive them on the steamer's arrival at her anchorage the company was not authorized by such clause to lighter them at his expense and risk, and an undertaking by it to do the lighterage for a compensation agreed upon after the vessel's arrival constituted a new and separate contract.

2. SAME—CONTRACT FOR LIGHTERAGE—LOSS OF GOODS BY CARRIER.
An agreement by the owner of a vessel to lighter goods which she had contracted to deliver at her anchorage for an agreed compensation, in the absence of a stipulation otherwise therein, imposed on him the obligations of a common carrier, and as such he became responsible for all goods lost or damaged between the vessel and shore, unless such loss was occasioned by act of God or the public enemy.

3. USAGE—EVIDENCE TO ESTABLISH.
Usage is a matter of fact, and not of opinion, and can only be established by proof of a series of acts of a similar character performed at different times by different persons.

In Admiralty. Libel in personam to recover for loss of and damage to merchandise intrusted to respondent as a common carrier.

Page, McCutchen & Knight, for libelant.
Nathan H. Frank, for respondent.

DE HAVEN, District Judge. There are two causes of action set forth in the libel. In the statement of the first it is alleged that the merchandise was delivered to the defendant on board the steamer J. S. Kimball for carriage from San Francisco to the steamer's anchorage at Nome, in Alaska; that upon arrival of the J. S. Kimball at Nome the libelant and defendant entered into a further agreement by which the defendant undertook, for the agreed compensation of $5.50 per ton, to lighter such merchandise from the steamer to the beach; that by reason of the carelessness of the defendant "in and about the discharge of the said merchandise from the said steamer, and the attempted carriage thereof from the said ship to the beach," part of the merchandise was lost, and the remainder delivered to the libelant in a wet and damaged condition. It appears from the evidence that the merchandise referred to was shipped by libelant upon the steamer J. S. Kimball for carriage from San Francisco to Nome, Alaska, under a bill of lading which contained the following, among other provisions:

"Shipped in apparent good order and condition by Ames Mercantile Co., on board the Kimball Steamship Company's steamer J. S. Kimball, * * * lying in the port of San Francisco and bound for Nome, * * * [the goods mentioned in the libel], to be carried at the option of said company upon the said steamer or upon any other of said company's steamers * * * unto the port of Nome; * * * explosions at sea or in port, or from any cause whatever, or any other accidents, literage, disasters, or dangers of the sea * * * excepted; * * * and there, in like apparent good order and condition, to be delivered at the vessel's tackles, unto Ames Mercantile Co. * * * It is expressly understood that the above mentioned merchandise shall, at the option of said Company, be received by the consignees thereof, at the vessel's tackle, immediately after the arrival of the steamer at the port of destination, or the same may be landed and stored or stored in hulks, or put in lighters, or launches, to be selected by the master of the steamer, at the expense and risk of the owner, shipper or consignee. * * * All lighterage from steamer to steamer and/or between Steamer and Shore, of goods named in this bill of lading, will be at the risk of owner, shipper, or consignee, and also at their expense at port of delivery. * * * And the said company is hereby expressly granted the right and option of delivering the merchandise represented by this Bill of Lading to consignee from alongside, or of landing and storing said merchandise either in lighters, hulks, on wharf or in warehouse, immediately upon the arrival of said steamer at the port of discharge of said merchandise without notice to and at the expense of consignee, and in the event of its so landing and storing said merchandise, said company is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause."

¶ 3. Presumptions as to customs and usages, see note to Elevator Co. v. White, 56 C. C. A. 394.

Upon the arrival of the J. S. Kimball at the port of Nome the libelant was ready to accept the delivery of the goods and merchandise at the vessel's tackle, and had arranged with the North Coast Lighterage Company for the lighterage of the same from the steamer to the beach, of which fact the defendant was notified, whereupon the defendant expressed a desire to lighter the merchandise, and offered to do so upon as favorable terms as the libelant had secured from the North Coast Lighterage Company. As a result of this offer it was finally agreed that defendant should lighter the goods from the steamer, and receive for such service $5.50 per ton. Thereafter the goods were placed by the defendant on its lighter, but before they could be landed upon the beach a storm arose, and the J. S. Kimball, with the lighter in tow, steamed for Sledge Island, a short distance from, and more sheltered than, the anchorage at Nome. During the storm some of the goods were lost from the lighter, and those that remained were delivered to the libelant in a wet and damaged condition. It is claimed by the libelant that when the goods were placed on the lighter the weather was threatening, and the sea becoming rough; and that defendant was guilty of negligence not only in discharging the goods upon the lighter under such conditions of sea and weather, but also in not properly securing the goods so discharged, and not protecting the same from the rain and ocean spray. Upon consideration of all of the evidence, my conclusion is that defendant was not negligent in discharging the goods upon the lighter when it did, nor in failing to properly secure and protect the same after they were placed on the lighter. In view of this conclusion it becomes necessary to consider what obligation was assumed by the defendant in lightering the goods. The defendant insists that this service was undertaken under the option given to it by the bill of lading, and that by the terms of such bill of lading the libelant assumed the risk of any loss or damage to the goods arising from a peril of the sea after they were placed upon the lighter. This contention is based upon the following clauses found in the bill of lading:

"It is expressly understood that the above mentioned merchandise shall, at the option of said Company, be received by the consignee thereof, at the vessel's tackle, immediately after the arrival of the steamer at the port of destination, or the same may be landed and stored, or stored in hulks, or put in lighters, or launches, to be selected by the master of the steamer, at the expense and risk of the owner, shipper, or consignee. * * * All lighterage from steamer to steamer and/or between steamer and shore, or goods named in this bill of lading, will be at the risk of owner, shipper or consignee, and also at their expense at port of delivery."

I do not think this language should be construed as authorizing the Kimball Steamship Company to lighter the goods at the expense and risk of the consignee upon the arrival of its steamer at her anchorage at Nome, if the consignee was then able and willing to receive the same at the steamer's tackle when ready for delivery. The obligation assumed by the Kimball Steamship Company under the bill of lading was to carry the goods to the anchorage at the port of Nome, and the libelant agreed to accept them at the end of the steamer's tackle; and, for the purpose of preventing delay or inconvenience to the steamer, if the libelant should fail to accept the goods at the steamer's

tackle when ready for delivery, the clauses in question were inserted giving to the master of the steamer the right in that event to lighter them at the expense and risk of the consignee. But, as stated, the libelant was ready to receive the goods at the steamer's anchorage, and the defendant, not claiming any right to lighter the goods under the terms of the bill of lading, undertook, for what it deemed a reasonable compensation, to lighter the same from the steamer to the beach, under a special agreement made at that time; and its obligation under that agreement is not limited by any stipulation in the bill of lading, under which the goods were carried from San Francisco to the anchorage at the port of Nome. The goods were lightered under the new contract made at Nome, and the parties so understood it, and to that agreement alone must we look to ascertain the obligations assumed by the defendant. By the terms of that contract the defendant undertook to lighter the goods, and stipulated for no exemption, and therefore, in legal effect, took upon itself the common-law obligation of a common carrier, and as such became responsible for all goods lost or damaged between the steamer and the beach, unless such loss or damage was occasioned by the act of God or the public enemy. That a common carrier, in the absence of a special contract limiting his liability, is responsible for all losses except those occasioned by the act of God or the public enemy, is the settled rule of law. The reason upon which the rule is founded is thus stated by Best, C. J., in Riley v. Horne, 5 Bing. R. 217, 15 E. C. L. 549:

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner. He seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they would not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From this liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies."

The defendant sought upon the trial to show a local usage at the port of Nome exempting persons engaged in lightering merchandise from liability for loss or damage to such merchandise occasioned solely by perils of the sea, but the evidence offered was not sufficient to establish such a usage. No witness testified to any instance in which such a usage had been recognized and acted upon by the parties interested, when goods had been lost or damaged by perils of the sea while being lightered to the beach at Nome. Two witnesses stated generally that there was such a usage; but one seems to have based his statement upon the fact that he had previously entered into an agreement with the North Coast Lighterage Company to do lighterage for him, in which it was agreed that the lighterage company was not to be liable for damage or loss of goods while in transit from the ship to the shore; and the other, upon conversation he had had

with persons engaged in the business of lightering, in which he was informed by them that they would not be responsible for loss or damage occasioned by perils of the sea. This evidence is certainly not sufficient to establish a usage. "Usage is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates." Haskins v. Warren, 115 Mass. 535. And in Duer on Ins., vol. 1, p. 182, it is said:

"The existence of a usage, whatever may be the nature of the subject to which it relates, is in all cases a fact; a complex fact, it is true, resulting from a variety and a succession of individual acts, but still a fact, to be proved like all other facts, by the testimony of witnesses speaking from their personal knowledge. It is not created by hypothetical opinions, but by actual practice, and can only be established by a series of acts of similar character and import, performed at different times, by different persons. It is to these acts that the testimony, properly restrained and directed, should be strictly confined, and it is upon their number, uniformity, and notoriety that the weight and value of the evidence depend. Hence, where a witness swears generally that a particular usage exists, yet is unable to state from his own knowledge any instance of its actual observance, his testimony should at once be rejected; and it is only by a strict adherence to this rule that the important distinction between the evidence of opinions and belief and that of fact is possible to be maintained."

See, also, Mills v. Hallock, 2 Edw. Ch. 652; The John H. Cannon (D. C.) 51 Fed. 46; Hall v. Benson, 7 C. & P. 711, 32 E. C. L. 835; Hamilton v. Nickerson, 13 Allen, 351.

It is also alleged in the answer, as a defense to the first cause of action set out in the libel, that an account was stated between the libelant and respondent, "and that the said claim of said libelant for damage and shortage in said libel set forth was then and there by mutual consent between the parties fully settled, and the said respondent fully discharged from any further claim by reason thereof." This defense is not sustained by the evidence.

In relation to the second cause of action set out in the libel, it seems to have been conceded upon the hearing that the defendant is liable for whatever damages the libelant may have sustained by reason of the matters therein charged. It follows from what has been said that the libelant is entitled to recover damages sustained by him by reason of the matters alleged in the libel, and the case will be referred, with directions to ascertain and report to the court the amount of such damages.

TAYLOR GAS PRODUCER CO. v. WOOD.

(Circuit Court of Appeals, Third Circuit. September 15, 1903.)

No. 24.

1. CONTRACT BY CORPORATION—MODIFICATION BY PAROL—QUESTION FOR JURY. Plaintiff, a corporation, sued for royalties under a written contract by which it granted to defendant an exclusive license under a patent, and defendant agreed to pay royalties after three years on not less than a stated number of the patented machines annually. It was admitted that the contract was subsequently modified by parol, but whether the provision requiring the payment of minimum royalties had been abrogated was in dispute. It was shown, however, that plaintiff failed to protect defendant against infringers of the patent, and finally abandoned any attempt to do so, and that, in consequence, defendant had ceased to make the patented article; that he had never paid the stipulated minimum royalty, but had paid on the machines actually made by him, and that such payments had been known to plaintiff's directors and accepted without objection, and no further claim made until eight years after the first of such payments was due. *Held*, that the failure of plaintiff to maintain the validity of its patent and protect defendant as its licensee was sufficient consideration for the modification of the contract claimed by defendant, and that the evidence warranted the submission to the jury of the question whether such modification was in fact made.

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

For opinion below, see 119 Fed. 966.

Alex Simpson, Jr., for plaintiff in error.

Joseph E. Fraley, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and BUFFINGTON, District Judge.

GRAY, Circuit Judge. The plaintiff below, who is plaintiff in error here, brought suit for the alleged infringement of a written contract between plaintiff and defendant, dated September 11, 1890. Under the terms of this contract as written, the plaintiff corporation, being the owner of certain letters patent of the United States and Canada, for improvements in gas producers, granted to the defendant "the exclusive license, right or privilege under the terms and conditions hereinafter expressed * * * to make, and vend to others to be used, gas producers or apparatus for making gas, containing or embodying the inventions described or contained or claimed in the hereinbefore recited several letters patent, or some of them, within and throughout the United States and Canada." In consideration of the grant of this license, the defendant covenanted to pay, from the date of the license and agreement, certain royalties during a period of three years, ending October 1, 1893, graded from $20 to $35, according to the size and capacity of the producers or apparatus to be manufactured. After the said 1st day of October, 1893, these royalties or license fees were to be from $25 to $50. In the third article of said agreement, it is provided as follows:

"Third: That furthermore in consideration of the license aforesaid, the said Walter Wood, party hereto of the second part, hereby agrees to make and sell or cause or procure to be made and sold to others to be used after

the third and during each subsequent year of this license and agreement, not less than one hundred gas producers or apparatus for making gas containing or embodying the inventions set forth or described and claimed in the said hereinbefore recited several letters patent or account for and pay royalty to the said corporation, the Taylor Gas Producer Company, party hereto of the first part, in each and every year after the third from the date of this license and agreement, a royalty or license fees on not less than one hundred gas producers or apparatus for making gas containing or embodying the inventions set forth or described and claimed in the hereinbefore recited several letters patent or some of them, whether that number of gas producers or apparatus for making gas or not has or have been made by the said Walter Wood, party hereto of the second part, or by his procurement or authority during that year."

The defendant acknowledged the validity of each and every of the letters patent, and agreed not to dispute or set up any defense against the validity thereof in any controversy arising out of the license.

It is admitted on both sides that the terms of the original contract, in the matters herein recited, were altered by subsequent oral agreements between the parties thereto and the controversy between them relates to the extent and scope of said alteration. The defendant contends that, shortly after the expiration of the first year in which the minimum royalty clause was operative, the president of the plaintiff corporation, being duly authorized in the premises, agreed with the defendant, who was one of the directors in said corporation, that since the 1st of October, 1893, and thereafter, he was to be charged at the uniform rate of $25 for every apparatus manufactured by or for him, instead of the larger sums stipulated for in the written contract, and that the agreement with reference to a minimum royalty, which was to go into effect on and after October 1, 1893, should be abrogated. That the consideration for this alteration and modification of the original agreement, was the fact that the patents covered by the contract were being constantly infringed, and that the plaintiff corporation had failed, or was unable, to protect them. The plaintiff corporation, on the other hand, contends, and so states in its declaration, that while the terms and conditions of the written contract were acted upon by the defendant until about the 15th day of October, 1894, the said contract was then, by resolution of the board of directors of the plaintiff corporation, and with the consent of defendant, altered and modified, so that the royalty and license fee to be paid by the defendant was reduced to the uniform sum of $25 for each producer made, sold or used by said defendant, but that the stipulation in regard to a minimum royalty remained in force, under which stipulation the defendant was bound to pay said royalty upon 100 producers or furnaces during each calendar year, whether manufactured, sold or used by him, or not.

Upon this view of the contract, as modified, suit has been brought, on which a claim of $10,000 is made for the minimum royalty during the years of 1898, 1899, 1900 and 1901. During this period, the inference is justified, that no producer had been made or sold by the defendant. Both sides agree that the contract as written had, by oral agreement and understanding, been altered and modified so as to substitute a uniform royalty of $25 on each producer manufactured or sold in lieu of the higher graded royalties prescribed in the original

contract, but they disagree as to there being any alteration or abrogation of the minimum royalty clause of the contract. This was the principal question in controversy at the trial, upon which evidence was adduced on both sides. The jury found a verdict for the defendant, whereupon a motion was made for judgment for plaintiff, non obstante veredicto, "in accordance with the stipulation entered into by and between the counsel for the respective parties during the trial of this cause." This stipulation is as follows:

"It is hereby agreed between counsel for plaintiff and defendant that if the court shall upon a review of the entire evidence produced on the trial held November 13, 1902, be of opinion there is not sufficient evidence to submit to the jury the question as to whether or not the cause of the contract in suit relative to the minimum amount of royalties to be paid has been abrogated or waived by agreement of the parties, express or implied, that then the verdict, if for the defendant, is to be changed to a verdict for the plaintiff for the amount claimed as if upon an instructed verdict to the jury to that effect, reserving to each party the right to appeal or writ of error as to the correctness of the ruling of the court on this and all other points in the case. This stipulation is entered into in order to avoid difficulty on the question of practice which forbids a judgment for plaintiff non obstante veredicto despite a finding by the jury for the defendant."

This motion for judgment was refused by the court below, and the single question presented upon this writ of error is, was there sufficient evidence to justify a submission to the jury of the question, whether or not there was a binding agreement to abrogate the minimum royalty clause of the contract in suit? The plaintiff in error makes two main contentions as to this question. First, that there was no sufficient evidence of such an agreement in regard to the minimum royalty; and second, that, if such an agreement were made, no consideration sufficient in law to support it has been shown. All the evidence in the case is embraced in the testimony of two witnesses,—William J. Taylor, president of the corporation plaintiff, and Walter Wood, the defendant, and in the correspondence between them, and in certain minutes of the plaintiff corporation.

The learned judge of the court below, in denying the motion of plaintiff for judgment, non obstante veredicto, said:

"It is true that the minutes of the plaintiff corporation exhibit no resolution of its board of directors, or of its stockholders, directly and in express terms making the agreement in question, but it does not necessarily follow that it was not in fact made, and in such manner as to bind the company. The Court of Appeals for this Circuit, in Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 241, 50 C. C. A. 216, said: 'Undoubtedly the board of directors is generally the governing and controlling body of a corporation. Its policy and conduct within the scope of the purpose of its creation is in the absolute control of such directors. It cannot incur obligations without the consent of such board, or generally without its express authority; but the board of directors can exercise its plenary power by delegating its authority as to certain transactions or classes of transactions to its president or other executive officers, as well as by direct authorization of a particular transaction by express resolution to that effect. A corporation is an intelligent, though artificial person; and, while its board of directors is its controlling mind, it may be bound, like a natural person, by a consent implied by law from a course of conduct permitted and recognized by its governing body.' These observations are pertinent to the present case."

The first year during which the minimum royalty clause would have been operative, ended October 15, 1894. On April 25, 1895, at

a meeting of the directors of the plaintiff corporation, the president of the company reported as follows:

"The question of the validity of the Taylor producer patent is still unsettled, and considerable infringement is still going on."

—And the board of directors thereupon passed the following resolution:

"Messrs. E. B. Coxe, W. J. Taylor, and Walter Wood were appointed a committee for the prosecution of the parties infringing the patents owned or controlled by the company. This committee was also instructed to consider amendments to the contract with R. D. Wood & Co., the terms of which to be held in abeyance owing to the doubt surrounding the patents, and to be modified as may be agreed upon subsequently between the committee and the licensees of the company under the said patents."

Mr. Coxe, a member of this committee, died soon after his appointment, and the subsequent negotiations, pursuant to the authority of the resolution, were carried on between Taylor, the president of the company, and Wood, the defendant. Mr. Wood testifies to the conversations between Taylor and himself, and says:—"It was distinctly understood, and also said by Mr. Taylor, the president of the company, that the question of a minimum royalty was wiped out and ceased." He also testifies that he paid the royalties upon machines actually made by him during the years 1895, 1896, and 1897. The failure of the company to restrain infringement of the patent, seems to have been the chief cause of the dissatisfaction on the part of the defendant, and a confessed inability to maintain the validity, and therefore the value of the patents seems to have been the consideration operating upon those in control of the plaintiff company, to influence them in modifying the terms of the written contract. The defendant's testimony is corroborated by the evidence relating to the conduct of the parties. There is no evidence of any attempt on the part of the company to collect, or even claim, the minimum royalty stipulated for in the original contract until the bringing of the suit in 1902. A considerable correspondence took place in regard to the sums due for royalties at different times, but no allusion is made therein to the minimum royalty, although reference is made in the course of said correspondence, by the plaintiff corporation, to payments in full of all royalties due, which would have been untrue and absurd if there was believed by plaintiff to exist any just claim under the minimum royalty clause. A course of conduct continuously carried on through a period of six years or more, which supports, or is entirely consistent with, the direct testimony of the defendant, that the minimum royalty clause had been abrogated by mutual agreement between himself and Mr. Taylor, president of the corporation, was an important fact for the consideration of the jury, in connection with that testimony. On November 26, 1900, after this course of conduct had been continuously carried on for more than five years, the president reported to the board that the instructions of the board at the last meeting, held October 9, 1896, had "all been practically carried out; that is to say, the royalties for the producers sold in 1895 by the licensees, were lowered to $25 each and settlement made accordingly; and that Mr. Wood accepted the board's proposition to continue to manufacture

the producers, and paid the royalties for the calendar years 1896 and 1897—namely, 19 producers, $25 each, $475."

If the plaintiff's contention be correct, and the agreement for the payment of a minimum royalty was still in force, the royalties paid by Mr. Wood for the years 1896 and 1897 should have been $5,000 instead of $475, which is stated to have been the amount due according to the modified agreement. It must be recollected, also, that for the purposes of this case, the truth of defendant's testimony and all inferences favorable to the defendant which the jury might logically draw from the plaintiff's admissions, or from the minutes, correspondence and conduct of the parties, must be assumed.

The question of consideration must be viewed from the standpoint of the parties at the time the modification of the contract was suggested. In the statement made by the president of the company, as shown by the minutes of October 9, 1895, he speaks of the "unsatisfactory protection the patents afford." Afterwards, in correspondence between the parties, it appears that the president of the plaintiff company had concluded not to further prosecute infringements or defend the validity of the patent, on account of the great expense to be incurred and the doubtful issue of suits to sustain the patents. That the defendant had ground for objecting to be longer bound by the more onerous features of his contract, seems to have been clearly admitted by the action of the board of directors and the president of the company in the premises. The most onerous feature of the contract undoubtedly was the stipulation that, after three years, defendant should pay the royalties on 100 machines, whether manufactured by him or not, and if the jury believed the testimony of the defendant, that this minimum royalty clause had been abrogated by agreement with the president of the company, acting under the authorization of the board of directors, as set forth in its resolution of April 25, 1895, then they were also justified in believing that the defendant was led to relinquish efforts to manufacture under these patents of doubtful validity, by the understanding he testifies to having had with the plaintiff, and that in consequence of that understanding, he put himself in a position in which he would not have put himself, had that clause in the contract been still binding.

We think, on the whole, there was a sufficient consideration to support the modification of the contract, testified to by the defendant, and acted upon by him, and that, whether there was an agreement to so modify the contract, was a question of fact properly submitted to the jury upon the evidence.

The judgment of the court below is therefore affirmed.

WESTERN UNION TEL. CO. et al. v. AMERICAN BELL TEL. CO.

(Circuit Court of Appeals, First Circuit. October 6, 1903.)

No. 398.

1. EQUITY JURISDICTION—SUIT FOR ACCOUNTING UNDER CONTRACT CREATING TRUST RELATION.
By the contract between the Western Union Telegraph Company and the American Bell Telephone Company, dated November 10, 1879, the two corporations consolidated their interests in the telephone business; the first-named corporation transferring its interests to the second-named corporation, which it was agreed should control the combined whole, paying the first-named corporation a certain percentage of all rentals or royalties received. *Held*, that the contract established between the parties a relation in the nature of a trust, which required the American Bell Telephone Company to account and pay according to the principles of equity, and gave a court in equity jurisdiction with reference to the subject-matter in behalf of the Western Union Telegraph Company.

2. CONTRACT—CONSTRUCTION—RENTALS OR ROYALTIES FROM TELEPHONES.
A contract was entered into by complainant and defendant, both being corporations owning patents relating to telephones over which litigation was pending between them, and engaged in operating telephone lines and in leasing telephones for use by others, by which complainant conveyed to defendant all its business, and its patents and rights thereunder, in consideration of which defendant agreed to pay to complainant upon all telephones used in the United States under any license granted by it, unless expressly excepted, "a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of the contract from licenses or leases for speaking telephones." It further provided that certain stated rates were "recognized as the present standard rates of gross royalties or rentals," and that such rates of charge might be increased by defendant at pleasure, but should not be lowered without complainant's consent, any increased rate, while in force, to be taken as the gross rentals or royalties in respect of the telephones for which they were obtained. *Held*, that under the circumstances the phrase "rentals or royalties actually received or rated as paid" covered gross sums received by the American Bell Telephone Company for perpetual or other exclusive licenses under the patents embraced in the contract, for which sums it gave no consideration, except such licenses.

3. REFERENCE—MASTER IN CHANCERY.
The rule of Kimberley v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 761, with regard to special references to masters in chancery, considered.

4. CONTRACTS—CONSTRUCTION.
The rules with reference to the effect to be given to prior negotiations and other extrinsic circumstances, in construing complicated contracts of many years' standing, considered and applied.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 105 Fed. 684.

Josiah H. Benton, Jr., and Rush Taggart (John F. Dillon, on the brief), for appellants.

John C. Gray and Richard Olney (Charles H. Swan, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. There are several parties to the record, and several other parties have been predecessors in title; but, as the sole beneficial issue is now between the Western Union Telegraph Company and the American Bell Telephone Company, we will find it necessary to name only them. The bill was brought for an accounting under a contract dated November 10, 1879, between the Western Union Telegraph Company and corporations in the same interest and the National Bell Telephone Company, the predecessor in interest of the respondent. It was filed on November 16, 1883. Without waiting for a hearing, on May 24, 1886, the case was sent to a so-called master under the following agreement:

"It is agreed that the above-named cause may be referred to the Honorable John Lowell, as master, to hear the parties, report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case."

The reference fell within the rule of Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 761, and of subsequent cases of that class. Frequently such references involve troublesome complications through the fact that they necessitate departures, more or less definite, from the ordinary practice. In the present case, however, no difficulty arises. The complainants excepted to the master's report solely as to questions of law. The respondent took no exceptions. We should explain that there are some findings of the master which take the form of findings of fact, but which are really findings of law, as they arose on the face of the various papers in the case. Therefore, we are not embarrassed on account of the agreement for reference by Kimberly v. Arms or by other cases of that class.

The master found for the respondent, and the Circuit Court sustained his findings, and entered a decree dismissing the bill. We think that we should first make clear what the true issue is. The contract obligated the telephone company, among other things, to account to the Western Union for a certain percentage of rentals or royalties for the use of telephones protected by certain letters patent. At the time of the execution of the contract there were three ordinary methods of using telephones: First, on private lines; second, on lines from one part of a building, or premises, to another part thereof, ordinarily known as "speaking-tube" purposes; and, third, in exchange systems or the like thereof. Then the telephone company not only owned and licensed telephones, but also had certain interests in exchange systems. The master, among other things, reported:

"I am of opinion that by the contract the defendant clearly had the exclusive right to carry on the exchange business, alone or jointly with others, and to receive its profits, paying to the plaintiffs twenty per cent. of the stated rentals."

It is clear that the Western Union had, under the contract, no interest in the exchange business which the telephone company owned, in whole or in part, or in the profits received therefrom, so far as either can be distinguished from considerations for the mere licensing of telephones, or so far as the advantages which came from them to the telephone company came as the result of a contribution by it

aside from that of such mere licensing. It is also clear that when, even after the contract of November 10, 1879, the telephone company had properly acquired any part of an exchange, the complainants had no interest in the subsequent profits which might come therefrom. The position of the complainants before us renders it unnecessary to elaborate these propositions. They put the case on a single issue in the following language, which refers to certain shares of corporate stock which the complainants maintain the telephone company received as part consideration for licenses to rent and use telephones:

"It is in respect to these shares thus received by the Bell solely for exclusive licenses to use telephone instruments under the patents which were by the contract combined in its hands, and by virtue of which contract alone the Bell was able to give such licenses, that this suit seeks an accounting."

This claim is illustrated by the following finding by the master:

"The shares, of which the plaintiffs require one-fifth to be accounted for, were, in nearly all cases, obtained in the way to be presently mentioned, but reference may be had for their terms to the contracts reported herewith. The defendant issued to a corporation a license to use telephones for five years in an exchange to be established by and at the expense of the licensee in a certain place, paying the usual rentals, and reserved the right to take the plant at actual cost, less depreciation at the end of the term, allowing nothing for franchise or good will. These short-term contracts either expired or were surrendered by the licensees, and thereupon the defendant gave them perpetual exclusive licenses for the agreed locality, and received these shares, usually thirty-five per cent. of the entire capital stock, for which it paid nothing except the exclusive perpetual license."

This renders immaterial a considerable portion of the master's findings of the proofs in the record and of the propositions urged on us by the respondent. It especially renders it unnecessary that we should consider the proposition urged by the respondent that there is a substantial distinction between a "rental of telephone instruments" and the "profits of an exchange business," or that we should follow out any elaboration of the definitions and expressions in the contract, showing that the word "telephone" is used therein with the utmost precision. In the same manner, we are relieved from considering the respondent's illustration of its proposition that the contract had no intention that the Western Union "should share in the whole profits due to the telephonic patents," if that expression has any peculiar significance, or the further proposition that it was contemplated that some exchanges would make larger charges, and, consequently, have larger profits, than others. It also renders unnecessary any consideration, at least at this stage of the case, of the peculiar relations of the contracting parties to exchanges at the date of the contract or prior thereto. It is plain that the only question before us is whether the Western Union may share in valuable assets received in lump by the telephone company in exchange in the whole or in part for telephone licenses.

The parties have not urged on us any question of jurisdiction in equity, but it naturally arises in connection with that of the substantial merits of the case. The record shows that the accounting, if the complainants are entitled to it, would be so voluminous and com-

plicated that it would be impossible to take it at common law, unless by the technical action of account, if it would lie. That this fact affords sufficient ground for jurisdiction in equity, whether that action would lie or not, is well settled. Some of the authorities bearing thereon are cited and explained in Fenno v. Primrose (C. C.) 116 Fed. 49. In addition, the nature of the rights vested in the Western Union by the contract in issue here supports this jurisdiction. It will appear that the contracting parties combined substantially all their interests in telephonic patents, to be worked by the telephone company for their joint benefit, certain net results to be shared on an agreed percentage. While this did not create the technical relation of trustee and cestui que trust, it established a quasi trust, such as between copartners, and between the officers of a corporation and the corporation, over which chancery takes jurisdiction.

It is not necessary to set out with great fullness the contract in issue. It has been abstracted in the opinion of the learned judge who heard the case in the Circuit Court, and a general statement of its purview with reference to the topics which bear on the question at bar will be sufficient. The respondent has very well stated its general features in substantially the following language: The Western Union, a well-established corporation with a large capital, controlling continental telegraphing, was also, previous to and at the time the contract was made, carrying on a more or less extensive telephone business. The telephone company, then a comparatively new and small corporation, was wholly engaged in telephones, and, by virtue of its patents, claimed an exclusive right. Numerous suits were pending for a determination of the respective rights under the several telephonic patents owned or controlled by the parties. The Western Union desired to protect its telegraphic business against possible inroads by telephones, and, under those circumstances, a compromise was reached, and this contract was executed. Its principal features are carefully framed provisions for the protection of the Western Union telegraphic system, and a lease and transfer by it to the telephone company of its interests in the telephonic patents, its telephones and telephonic exchanges, with an agreement that the Western Union should receive a certain proportion of the rentals or royalties which should come to the telephone company. It should be added that, as incidental thereto, the telephone company agreed to keep accounts of the number of telephones manufactured, licensed, and put out for use, and of the rentals received therefrom, which should be open to the inspection of the Western Union, for the purpose of ascertaining the "royalties or bonus" coming due under the contract.

The contract is long, and contains a great many provisions, and, therefore, of course, many of its expressions are oftentimes repeated, and not always exactly in the same form. As the contract was made so long ago, it was, perhaps, constructed in the light of facts the common recollection of which is now dimmed, leading to a strong anxiety on the part of one or both parties to the controversy to restore them, for the purpose of sustaining their respective views pro and con. The result of this is a voluminous mass of proofs rela-

tive to prior negotiations, correspondence, and earlier contracts, to which much weight was given by the master and the Circuit Court. Against this the Western Union earnestly objects.

To some extent it is the same with a contract as with a statute. The court upon which rests the burden of construing it, especially if it is ancient and complicated, searches carefully for any scrap which may suggest an interpretation not obvious after a lapse of time. While nothing such can be availed of for the purpose of overruling the intention of the parties as finally incorporated in the executed instrument, yet, as said by Judge Aldrich, in speaking for the Circuit Court of Appeals for this circuit in Church v. Proctor, 66 Fed. 240, 242, 13 C. C. A. 426, an interpretation of writings is to be made "with reference to the subject-matter and the understood situations of the parties." The circumstances under which contracts are executed, and the difficulties of understanding the actual relations with which parties are dealing, vary so much that no absolute rule can be framed as to the methods in which courts may investigate them; but the practice is so liberal that Greenleaf on Evidence, vol. 1, § 282, an authority which we need not go beyond, says that "the rule excludes only parol evidence of the language of the parties, contradicting, varying, or adding to that which is contained in the written instrument." On the other hand, extreme care is required in making investigations into a field beyond what was clearly appropriated, because of the fact that such investigations may not only mislead, but they may draw courts into speculations and doubts more involved than those arising on the face of the contracts concerned.

In the present instance, what is known as the "Ormes Contract," and also the "Outline"—that is, a preliminary draft—and other drafts, have been much relied on by the respondent; but one will be shown to have been based on radically different principles, so far as the problem before us is concerned, while as to the various drafts the chasm between them and the completed instrument is so broad that nothing in the record enables us to bridge it. We will explain this more at length hereafter.

Among other elements, the existence of which is much discussed, is that of exchanges; but their existence is so emphatically recognized by the contract, and so extensively provided for, that whether at the time of its execution there were few or many, whether in use by one party or both, and whether subsequently greatly multiplied or not, must be regarded as in all respects understood and anticipated contingencies. The same is true with reference to nearly all the other incidents which have been brought to our attention with great detail. The recognition of most of them by the contract itself is so positive that it will be necessary for us to refer to them only briefly, if at all, except as they appear therein.

In contemplating the construction and effect of the contract, we must first of all consider that the relations of the parties to it were of the fiduciary character to which we have referred; so that the telephone company, as the sole holder of the joint interests, left in exclusive control thereof, was bound to the underlying rule that neither directly nor indirectly, nor by any artifice whatever, should

the Western Union be deprived of its share in the net profits of the licenses or leases, whatever form they might assume, unless and except as expressly so provided. In Batchelder & Lincoln Company v. Whitmore (C. C. A.) 122 Fed. 355, 361, we illustrated how such fiduciary obligations may arise between others than technical trustees and cestuis que trustent, pointing out that the utmost good faith is required between creditors coming into a composition of a failing debtor. The existence of similar obligations under other circumstances, as between copartners, and also as between officers of a corporation and the corporation, is explained in Pomeroy's Equity Jurisdiction, §§ 157, 1088, and sequence, although it is shown that under such circumstances jurisdiction in equity does not lie to the same extent as with technical trusts. It is also true that, other than with a technical trustee, this contract left a large discretion with the telephone company, and did not bind it to any particular rule of diligence or skill. Nevertheless, this general equity requires it to account with the utmost good faith for what concerns the common interests. This equity is effectual, universal, and unyielding, and we must approach the contract in the light of it, and give the Western Union the full benefit thereof.

The contract in suit took effect as of November 1, 1879, and ran for 17 years. It covered the whole United States, with sundry exceptions, which need not be named here. The Western Union and corporations it represented are described in it as the party of the first part, and the telephone company as the party of the second part. The contract opens with a requirement that the telephone company pay to the Western Union "upon all telephones used in the United States under any license" from the telephone company, "unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid, in accordance with the provisions of the contract, from licenses or leases for speaking telephones." Article 1, par. 1. It then provides for a deduction of certain allowances, which does not trouble us. It then proceeds as follows:

"Concerning the sum which is to be taken as the gross rental or royalty for the purpose of the preceding article, it is declared and agreed" "that ten dollars per annum for each telephone, where only one is used at a terminal or station, and fifteen dollars per annum for a pair of telephones composed of an instrument used for sending and another instrument used for receiving, used at one terminal or station, are recognized as the present standard rates of gross rentals or royalties."

The contract provides that the telephone company may raise the rentals or royalties without conference with the Western Union, but it prohibits the lowering of them without its consent, except as the result of an arbitration, the details of which we have no occasion to explain. It should be said in this connection that the contract makes special provision for telephones which might be exported and sold abroad, but that, aside from this, the uniform practice of both parties to the contract, if not their universal practice, was, and had been, not to sell telephones, but to lease for annual rentals. The master reported that "the rentals had come to be nearly uniform in the dif-

ferent classes of business at about the rates mentioned in the contract." It appears, however, by the answer that the rentals and royalties named in the contract had ever since been the same, with the exception that the price for a pair of telephones had been raised to $20. We do not find that there is any dispute arising out of this fact, but we speak of it because it illustrates a proposition as to which there should be no question made before us. There is no pretense whatever for any claim to the effect that the word "rated," or the word "standard," or any other word or expression in the contract established a fixed license fee, so far as the relations between the parties to this litigation are concerned. Numerous paragraphs, some of which we will refer to hereafter, expressly provide for increasing the rates, and for the Western Union sharing in such increase. The word "standard" could hardly be justly construed as leading in any other direction, and, if it could be, the context would show that it was merely an unfortunately chosen word, overruled by various other portions of the contract.

Every word contained in the following expression in the first paragraph of article 1, namely, "all rentals or royalties actually received or rated as paid," etc., can have, and should have, its full effect. The words "actually received" relate to whatever may come in hand, whether on the basis of the "present standard rates," or from licenses for which more than the "present standard rates" might be paid. Therefore it is useless to contend that the contract contemplated any fixed sum as a maximum which the Western Union must be content with, while, on the other hand, the expression which we have just cited from the first paragraph of article 1 was entirely in its interests, giving it the minimum named license rate, even if the telephone company sold licenses below that rate, except as provided in the contract, and also giving it the benefit of all rentals or royalties received in excess of that rate, whatever the excess might be.

A large portion of the case as submitted to us concerns the meaning of these words "rentals" and "royalties." The respondent claims that they are used interchangeably, and that neither adds anything to the other. The word "rentals" would naturally fall into the contract, because, as we have said, the business had uniformly gone on the basis of a fixed amount for each year for the use of each telephone, and the word "royalties" naturally occurs in any contract of the general character of that at bar. The use of words of this character, which so naturally, and almost inevitably, fall into any contract with reference to patented matters, comes short of requiring any inference of special value. These words appear frequently in the contract; the respondent says 33 times, and states that the contract is not uniform in using both expressions. But departures of this character are frequently of the scrivener only, and, in any view, such a fact is too easily accounted for to meet the effect of the positive language with which the contract opens.

Royalties are commonly understood as meaning something proportionate to the use of a patented device; in other words, a kind of excise. Bouvier's Law Dictionary, "Royalty." In its more ordinary meaning, it would not literally include the shares of stock for which

an accounting is demanded. In some of its uses it is a broader word than "rentals," and yet in other aspects "rentals" is a broader word than "royalties." Rentals in their ordinary signification are not limited as royalties in their ordinary signification; that is, to something proportionate to the use of the patented device. The word "ordinarily" means specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all. We will show before we close that in the present case it is capable of an adaptation to meet in any view the literal construction which the respondent puts on the contract at bar.

On the whole, this expression in the first paragraph of article 1, "all rentals or royalties actually received or rated as paid," is, on any method of construction, whether literal or otherwise, flexible, and favorable to the complainant; but, after all, the fundamental rules of construction which we have said apply to this contract cut under this refined discussion as to the literal meaning of particular words and phraseology. This will appear from a hypothetical case: Admitting that these parties, or any other parties, had stipulated literally and expressly for the payment and receipt of a share of annual rentals, springing out of the use of a patented device covering the entire United States or any limited district, and admitting that under those circumstances the party in whom the title to the patent vested had granted a perpetual license for a gross sum of money, abandoning the collection of annual rentals, or thus, for a like gross sum, had disposed of the entire or partial interest in the patent for the whole or a part of a district served, so that the collection of annual rentals was no longer practicable, either wholly or in part, as the case might be, it would be preposterous to maintain that thereby the party entitled to share was cut off from his rights under the contract. It might well be that the contract could be so framed that he might bring an action in the nature of an action of tort for such disposition of the patented interest, but in no event would his rights be thus limited. Indeed, even at the common law, the precise kind of return described would be regarded as merely illustrative, and an action would lie at the option of the party entitled to share in whatever was in fact realized; and this result would be more marked in a suit in chancery, like this, where the proceeds of a beneficial interest can be followed by the party entitled to that interest, whatever form they take. This rule was fully explained by us in Hutchinson v. Le Roy, 113 Fed. 203, 206, 51 C. C. A. 159, and it is laid down broadly in the following terms in Smith v. Vodges, 92 U. S. 183, 186, 23 L. Ed. 481:

"Where money has been misappropriated, the general rule of equity is that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested or to recover the money."

While the court here speaks of "money," yet this word is only illustrative. Like the other equitable rule to which we have referred, this one is also efficient, far-reaching, and absolute; so that beyond all question, in view of the equitable obligations resting on the telephone company which we have described, and even under the rules of the common law, contracts of this character must be so construed and applied that the portions of the present contract which we have cited

compel the telephone company to account for the shares of stock for which the accounting is asked, under the circumstances stated by the master, precisely as it would be required to account for any gross addition to rentals which it might have received in the form of a sum of money, unless something can be found in the contract which shows that the parties have stipulated otherwise. The underlying equities which we have described are so strong that they are not lightly to be set aside, nor can they be ignored on account of mere inferences ingeniously drawn from circumstances, or from anything except what appears clearly on the face of the contract or what is clearly inconsistent with the operation of its provisions.

At this point it is convenient to say what we need to say as to the Ormes contract. The respondent claims that this was the "basis" of the contract in suit. The master so found, and the Circuit Court sustained this finding. This is a remarkable illustration of the care which we have said should be used with reference to the investigation and application of matters outside of a contract itself. The foundation for this proposition is the testimony of Mr. Forbes, then president of the telephone company, as to a conversation with Mr. Gifford, then one of the counsel of the Western Union. The Ormes contract was completed in August, 1879. It constituted an arrangement between the Western Union, the telephone company, and Ormes, by which Ormes was licensed for several Southern states by both the other parties, and was able, therefore, to cover those states without controversy. Mr. Forbes testifies that he met Mr. Gifford at New York, and the suggestion was then made that the Ormes contract would be a good basis for a settlement for the rest of the country, "to which Mr. Gifford immediately expressed his opinion that it would," following which there was a discussion as to the method of making the suggestion practicable. What this conversation probably meant appears from the testimony of Mr. Gifford. While at the White Mountains, a short time before, he endeavored to arrange with the counsel for the telephone company for a combination of all interests into a joint property, in which each party should have a half share, looking to a corporation for that purpose. This was refused, and those negotiations failed. In other words, when Mr. Gifford assented to the suggestion of the Ormes contract as a basis, it satisfies the proofs to assume that he did it as an expedient in lieu of the proposition which he had made for the combination of the joint properties into a corporation. So far as that particular was concerned, the present contract did follow that with Ormes. While, also, in many details, the instrument before us follows the other, as it inevitably would, yet, as to the only question on this appeal, the principle underlying one is in contrast with that underlying the other. Ormes was the paymaster. He stipulated directly with the Western Union to pay it a fixed annual rental of $1 for each telephone, with a reduction under some circumstances to 75 cents. So far as the Western Union was concerned, he agreed to pay it this fixed license. That was the end of it, and he was under no further obligation to it, legally or equitably. The relations between the Western Union and the telephone company in the Ormes contract were of the simplest character. They, of

course, protected the telegraphic business of the former, but beyond that the telephone company made no stipulations in favor of the Western Union, except with reference to a certain incidental right which the telephone company reserved to increase its royalties as against Ormes, in case of additional cost to itself arising out of improvements. It indeed stipulated that under certain contingencies it would assume the royalties which Ormes agreed to pay the Western Union, but it did this only as a substitute for Ormes. In its essence, the Ormes contract is so far removed from the contract before us that we are unable to find in it any assistance of value.

We will also in this connection dispose of what we have to say with reference to the drafts preceding the contract as executed. First was what is called the "Outline." Precisely in what stage of the negotiations this came in we have not been advised. What purports to be a copy of it was obtained for this record, but a note by the clerk says that it was omitted when the case was printed for the master "because of the difficulty of properly reproducing it." It was covered with pencilings, and was altogether in the most confused and uncertain form. It, however, is plain that it did not contain the parts of the third paragraph of article 2 of the existing contract, which will be found to be necessary to the ultimate determination of the issue before us. The record also contains a paper dated on the 27th of September, 1879, signed by the parties as a memorandum to be replaced by a formal contract to be prepared by counsel. This also fails to contain the most essential part of the third paragraph of article 2; also the seventh paragraph of the same article, which we will explain further on. It is true, for whatever it may be worth, that the substance of this paragraph is found in the general phraseology of the memorandum of September 27th. No clear proposition is based on any of these preceding drafts; and, indeed, none could be, except that the mass of papers in the record relating to the prior negotiations shows that they were in a state of flux till the contract was completed. These extraneous drafts illustrate most vividly a proposition most pertinent to this topic at the outset of any discussion of it, that it sometimes happens that the minds of contracting parties meet on essentials only at the last instant, and this in such way that the final agreement finds no expression except in what was written last of all. On the whole, the contract before us exhibits on its face sufficiently for present purposes the existing condition of things; and, aside from what is disclosed by it and things of common knowledge, the matters which have been so elaborately pressed upon us cannot safely be permitted to change the just construction of what we find in the instrument itself. So far as it goes, it is reasonably clear; and its application to any conditions which its terms do not in fact anticipate must be determined by the fundamental rules of law which we have already explained.

The case as put is one of the receipt by the telephone company of certain shares of capital stock, in addition to the annual rentals for which it has accounted to the Western Union; but it must not be obscured by the nature of the additional assets thus obtained. The case in this respect stands exactly the same as though the telephone com-

pany had received the equivalent of these shares in money, or had immediately converted them into money. For all present purposes, the transaction is to be scrutinized in the light of the fact that all questions as to the nature of the assets received are immaterial. The case stands, therefore, on the propositions of law and equity which we have already stated; that is to say, that the telephone company has received certain assets in addition to rentals by name, which it must account for under the first paragraph of article 1, unless the contract elsewhere clearly permits otherwise.

Not a word in the contract is brought to our attention which expresses such a permission. The respondent's case is built up on inferences, and it therefore rests upon it to show that these inferences so work into the body of the contract as to render it inconsistent with the application of the positive equities which we have said underlie instruments of this character. One proposition urged upon us is that in this long contract, carefully framed, between parties who were competent to provide for contingencies of the character we are considering, the constant use of the words "rentals" and "royalties," and the references to annual rates, must be accepted as a positive exclusion of any other benefit to come to the Western Union. But the mere fact of numerous repetitions, especially in long contracts, does not prove that they are not vain. On this topic we said in Reece Button-Hole Company v. Globe Company, 61 Fed. 958, 960, 961, 10 C. C. A. 194, as follows:

"The ordinary rule that if by a literal construction an instrument would be rendered frivolous and ineffectual, and its apparent object frustrated, a different exposition will be applied if it can be supported by anything in it, requires that words which relate to what may be held nonessentials, however much multiplied, shall not be permitted unnecessarily to control the sense."

Even if a literal interpretation, on the rules insisted on by the respondent, be given effect, it would easily be met by a deduction from what we have already said as to the meaning of the word "rentals" or "annual rentals." That which can be made certain is certain; and, whatever form remuneration takes, if it can be reduced mathematically to a rental, or annual rental, it is sufficient for even the most literal rules of construction. If, for example, in lieu of the "ten dollars per annum," named in paragraph 2 of article 1, the telephone company received, either in shares of stock or money, $100 for a 10 years' license, which seems to have been commonly granted, or $170 for a perpetual license, which would mean the entire 17 years for which the contract ran, either hypothesis readily computes an annual rental of $10, and, if received in advance, it must likewise be accounted for in advance.

But, from what we have already said, it follows that all this is a mere play on words. The course of business at the time the contract was made leads to the just conclusion that the parties thereto were not contemplating the taking of lump sums as a consideration for licensing telephones for the period of the contract or the larger portion thereof; but if the respondent did this, and thus departed from the specific mode of doing business then customary, it nevertheless remained justly chargeable under a true construction of the broad

provisions of paragraph 1 of article 1. The fundamental answer to this proposition of the respondent, therefore, is that it defeats itself, in that it goes so far that it strikes against the foundation of those rules of construction which, as we have already explained, are properly and necessarily applied to all contracts of the character before us, and according to which, as we have said, a description of particular forms of pecuniary returns must be regarded as merely illustrative.

The leading proposition of the respondent is based on one of the master's findings, which must be accepted as a finding of law, and has weight only accordingly. After stating, as we have already said, as a matter of fact, that nothing was paid for these shares of capital stock except an "exclusive perpetual license," he states at another point as follows:

"The defendant considered it was selling its exclusive right to carry on the business, and that in whatever way the value of this right was realized it is the exclusive owner of it; and I so find."

This proposition is made by the telephone company the burden of its case. This word "exclusive" is deduced from paragraph 1 of article 12 of the contract, and paragraph 1 of article 13, in each of which the word "exclusively" appears, as will be shown by the following transcripts thereof:

"The right to all uses of the telephone on wires of a district or exchange system is to remain exclusively with the party of the second part, excepting such temporary suspension of the application of this contract to certain localities as has been already herein provided for."

"The right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming a part of a telephonic district or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under article 14), are to remain exclusively with the party of the second part, and those licensed by it for the purpose."

The respondent says that for success the licensees of the exchanges required not only telephones, but a monopoly; "they"—the licensees—"needed the exclusive right to do business in the district"; and it adds: "This monopoly which the licensees wanted to buy the defendant had for sale, and the defendant sold it to the licensees for a share of their capital stock." The respondent reiterates that the telephone company's contracts of leases, by virtue of which it received sundry shares of stock, conveyed much more than the right to use telephones, because each transaction was an outright sale of its monopoly of the exchange business for the locality concerned.

Thus, the respondent rests its case mainly on the word "exclusively," found in the extracts we have made from articles 12 and 13. But it is clear that for the purposes of this case this word has no legal force.

We must remark incidentally that in this proposition the respondent has worked out a most anomalous result. The forms of licenses in use by the telephone company establish the statement made by the master that it was usual to limit the use of certain telephones to exchange purposes. It is to be noted, however, that the telephone company also had forms of licenses limiting the use to private lines or

to other purposes expressly named therein. It is not necessary to elaborate the terms of these licenses. The anomalous result is that the telephone company claims to take something from the Western Union as the alleged logical sequence of its issuing limited licenses, thus making a part of greater value than the whole. Of course, it is not possible that there could be any such greater value.

Although the telephone company had certain exclusive rights under the contract, as between it and the Western Union any exclusive rights which it granted to its licensees were not the same, but they merely sprung out of them, because it was entirely at the option of the telephone company to grant licenses which contained no feature of exclusiveness. The fundamental and controlling proposition, however, is a simple one. The relations were so complicated that almost every provision of the contract in suit, if not every one, is subject to certain incidental exceptions; but, aside from that, the telephone company held under it a right to issue licenses exclusively for exchange uses independently of any terminology to that effect, precisely as it had a right to grant licenses exclusively for private lines, or for speaking tubes, or for any other special class of uses. So that, so far as this case is concerned, it may well be said, without any limitation, that the telephone company, from the mere force of the contract, as construed by the law, might grant exclusive rights with reference to every use to which the telephone could be put. It was in the power of the telephone company to contract with a corporation in Boston to grant it an exclusive license for that city, for a term of years, or perpetually, subject to a certain inevitable exceptions, for all speaking-tube purposes, or a like exclusive license for all private lines. With reference to each of the same, the telephone company acquired exclusively the same monopoly that it did as to telephone exchanges; but the respondent rests its case on this verbal distinction, and, inasmuch as the distinction is entirely immaterial in this connection, its case falls through.

It is easy to account for the use of the word "exclusively." Probably in no view of the case was it strictly necessary, and it seems to have been used ex majore cautela, balancing the same word as used in behalf of the Western Union. It was one great purpose of this contract to divide, by boundaries as clearly marked as practicable, the telephone field from the telegraphic field, giving the former to the telephone company and the latter to the Western Union. The contract is largely occupied with very careful details and precise conditions intended to accomplish this purpose in a practical way, and so far as possible to anticipate and prevent evasion. At many points it was impracticable to state anything more than general propositions, relying upon their being made practically effective by the general principles time and time again exhibited. Paragraph 1 of article 12, which we have quoted, is the formal beginning of the body of that part of the contract which seeks to effectuate this purpose. It is difficult even for the respondent to speak of articles 12 and 13, except in language describing them as pertaining to the portions of the contract which relate to the "dividing up of terri-

tory." Such was the fact. In the following out of this topic, article 15 directs the telephone company, in at least two places, to turn over to the Western Union "exclusively" messages for transmission by telegraph, so far as it can legally control the same; and many expressions in this division of the contract, including this word, are better adapted to impress the fact that each party was to respect the rights of the other within its peculiar territory, and to aid in securing each other with reference to the good will thereof, than to support the proposition that by any of them the telephone company possessed certain legal rights which it had without them. But whatever may have been the reason for inserting the word "exclusively," it is clear, as we have already said, that it adds nothing to the case before us from the point of the law.

Other portions of the contract strengthen our general conclusion, and some of them lead to it quite positively. As we have already said, paragraph 7 of article 2 was not contained in the memorandum of September 27, 1879, except so far as it may be found in the general language thereof. That reads as follows:

"The party of the second part may increase the established annual rate, either generally or upon telephones used for any particular purpose, or by any particular class of licensees, from time to time, at its discretion, and such higher rates, while in force, shall be taken to be the gross rentals or royalties in respect of the telephones for which they are obtained."

This provides not only for increase of general rates, but specially for "increase upon telephones used for any particular purpose or for any particular class of licensees." This, of course, embraces telephones used for exchanges, and makes no exception arising out of the fact that they may be used under licenses exclusive for certain territories. It makes no distinction for or against licenses of an exclusive character, either for exchange, private lines, or speaking-tube purposes, whether perpetual or for a term of years. It gives no method, and suggests no occasion, for apportioning what may be received in the manner claimed by the respondent so as to make a specific allowance for monopoly or exclusive right. And it distinctly provides that "such higher rates while in force" shall be taken to be the gross rentals or royalties in respect to the telephones for which they are obtained. This language seems to be sweeping, clear, and emphatic, and to leave no room for any such apportionment as is now claimed before us.

The phraseology of paragraph 3 of article 2 is even more specific. That reads as follows:

"Telephones used on exchanges or lines owned in whole or part by the party of the second part, or by auxiliary corporations or organizations in which it is interested, or rented together with lines owned in whole or part by it, or by auxiliary corporations or organizations in which it is interested, shall be rated as paying to said second party the said recognized standard rates, or such other rates as may hereafter be established in accordance with this contract for like uses by parties other than the second party or auxiliary corporations or organizations in which it is interested, less the commissions and allowances provided for by this contract; but whenever the party of the second part is or shall be interested with others in the ownership of such exchanges or lines, the annual rental or royalty actually charged to and re-

ceived from the owners thereof for the use of the telephones, if greater than the rates established as aforesaid, shall be taken to be the gross rental for the purpose of ascertaining the stipulated bonus or royalty."

As we have already said, that portion of this paragraph which begins with the words, "but whenever the party of the second part," was new in the contract as executed, and appeared neither in the "Outline" nor in the memorandum of September 27, 1879. We have already shown that, on a true construction of contracts of this character, the words "rental or royalty," found herein, must stand for and represent any gross sum received for a perpetual license or other interest; and such being the fact, this portion of this paragraph specifically prohibits the telephone company from receiving for telephone licenses any special advantage to itself, whether by shares of stock or money, without apportioning it to the Western Union. It must be admitted that apparently the first portion of the paragraph makes a certain concession in behalf of exchanges or lines actually owned in whole or part by the telephone company. This consideration was undoubtedly yielded to the necessities of the case, arising out of the fact that, where the telephone company had an interest, especially the whole title, the accounts might not, or could not always be kept, so as to show specifically what was a just allowance merely for licenses. This portion of the paragraph, however, is limited to the operation of exchanges after the telephone company becomes interested in them, and it has nothing to do with the acquirement of such interests. Moreover, it is especially guarded, so far as practicable, in order to secure to the Western Union its share of what would be reasonable and just rates proportionate to those paid by other exchanges in which the telephonic company had no interest.

The answer alleges that the practice of the telephone company with reference to the matters covered by this bill was well known to the Western Union, and that until shortly before the commencement of this suit it made no complaint thereof, but, on the contrary, "recognized such course of dealings." This is not in such definite language as to make it clear whether the respondent intended to raise a question of laches or to make the proposition that the Western Union had practically construed the contract as claimed by it. The bill, as we have said, was filed on November 16, 1883, four years from the execution of the contract. The demand by the Western Union on the telephone company for this accounting was contained in a letter of February 26, 1883. Of course, on well-settled principles, the acquiescence of both parties for over three years in the construction of a contract, involving so many elements as this, would be of great importance when a court comes to determine its meaning. Laches is, of course, available when plainly raised by the proofs, even if not set up in the answer. The master finds no facts of a definite character with reference to either of these topics. The respondent, moreover, referred to this line or lines of defenses, whichever it is, in only a brief, indeterminate, and incidental manner. On being specifically inquired of by the court on this topic, nothing more satisfactory in reference thereto was obtained. The

answer does not allege how long the Western Union had known of the course of business which this case develops, and nothing in the findings of the master, or in the proofs brought to our attention, contains anything in that respect. Therefore we are not required to give attention to this phase of the defense.

It is claimed by the respondent that on this bill no relief can be granted according to the case made by the proofs and submitted to the court by the complainants. This point seems to be that to reach the case the bill should have prayed that the contract be reformed, or should have alleged artifice on the part of the telephone company in fraud of complainants. But, in view of the construction and effect which we give the contract, the prayer of the bill, so far as it asks an accounting for the amount and value of assets received for licenses to use telephones, is appropriate to the facts. The prayer, however, asks for an accounting for telephonic appliances, which, of course, is erroneous. It also asks specifically that the shares of stock received by the telephone company, and other incidental matters described in the prayer, be transferred to the Western Union, and that the dividends thereon be also accounted for, with interest on each item. None of these details are within the scope of our present adjudication. The disposition of them will turn on a further investigation to be made by the Circuit Court.

We find nothing in the case which raises any practical issue except the specific matter which we have discussed, and that we find to be limited to certain shares of stock alleged to have been received by the telephone company. We therefore determine that the only issue is the ascertainment as to certain shares of stock received by the telephone company since November 1, 1879, in consideration, in whole or in part, for licenses to use telephones, and as to the incidentals appurtenant thereto.

We exclude from the accounting anything received by the telephone company in any form which was properly the equivalent of what it possessed the day as of which the contract went into effect; that is, November 1, 1879. As, for example, so far as at that time the telephone company had given any license, if there were any such, involved in any contract entitling it at the end of a specific period to receive a surrender of the whole or any part of the plant or other incidents of a telephonic exchange, and so far as subsequent to November 1, 1879, the telephone company surrendered such option and gave a new license, receiving an obligation for the usual rentals or royalties, and certain shares of corporate stock, such portion of such corporate stock as represented the value of the option surrendered pertains to the telephone company, and is not to be accounted for. It may, and probably will, be difficult to make this apportionment; nevertheless, if there are any conditions existing, as we have stated, the apportionment must be made as can be best done. In this connection we repeat that we do not intend hereby to conclude or preclude any questions with reference to dividends or interest, and all such questions are reserved, so far as we are concerned, until the case comes to us again from the Circuit Court, if it ever does.

Of course, the accounting, according to settled practice in equity, will be brought down to as late a period as is practical; and, all parties having already had full opportunity of bringing into the record all facts essential to the final accounting, each must, on such accounting, be confined to the present record, except so far as equity shall require otherwise.

In view of the state of the record thus spoken of, it is probable that we could proceed further, and dispose considerably of the issues involved in the accounting; but the proper practice is that pointed out in Chicago, Milwaukee & St. Paul Railway v. Tompkins, 176 U. S. 167, 179, 20 Sup. Ct. 336, 44 L. Ed. 417. In the form in which this case comes to us—that is, on a general finding against the complainants—it might be impracticable for us to go further into details without doing injustice. However, we are entitled to avail ourselves of the relief which comes from the rule stated in the case just cited.

We have thoroughly considered the very careful reasoning of the Circuit Court in this case, and differ from it only after much deliberation. We have reached our conclusion by holding firmly to the true issue in the case, from which there has been a grave departure, originating with those portions of the master's report which we have cited, and further induced by some of the complainants' exceptions thereto, and by propositions urged by the respondent before us and in the Circuit Court.

The decree of the Circuit Court is reversed, the case is remanded to that court to enter a decree for the complainants for an accounting, and for further proceedings in accordance with our opinion, and the appellants recover their costs of appeal.

ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA v. McADAM.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1903.)
No. 1,833.

1. BENEFIT INSURANCE—FRATERNAL ORDER—ASSESSMENTS ADVANCED FOR MEMBER BY LOCAL BODY.

The Order of United Commercial Travelers of America is a fraternal organization, which, as one of its features, insures its members against death by accident. It has a supreme council, subordinate to which are local councils. Its insurance or indemnity fund is obtained by the supreme council by assessing the subordinate councils $2 for each member whenever the fund becomes insufficient to pay four death losses. Subordinate councils also maintain an indemnity fund, from which such assessments are paid, which is replenished by assessments on their members. The constitution provides that, whenever a member fails to pay his individual assessment when due, he shall forfeit his good standing in the order and his right to indemnity and benefits, and also that at a regular meeting of his council such member shall be suspended from the order and from all benefits derived therefrom, but may be reinstated by vote. *Held* that, construing said provisions together, and in the absence of any prohibition in the constitution, a local council had power in its discretion to keep up its payments to the supreme council on account of one of its delinquent members, and to thus maintain him in good stand-

ing in the order, and that where a council, instead of suspending a member on his failure to pay an assessment, by resolution expressly determined to advance the amounts assessed against it by the supreme council on his account, which was done, and the council continued to treat and report him in good standing until his death, which occurred from an accident shortly afterwards, when it was reimbursed for such advances, the supreme council, which received and retained the assessments made on his behalf, could not deny his good standing as a member, nor avoid payment of the insurance to his beneficiary, on account of his personal delinquency.

2. APPEAL—REVIEW OF FINDING OF FACT.
The finding of a trial court in a suit in equity on a life insurance policy, made on conflicting evidence that the accident which caused the death of the insured did not happen while he was, or in consequence of his having been, under the influence of intoxicating drinks, cannot be reviewed by an appellate court unless a serious and important mistake appears to have been made in the consideration of the evidence, or an obvious error has intervened in the application of the law.

3. RELEASE—CANCELLATION IN EQUITY—UNFAIR SETTLEMENT OF CLAIM.
Complainant's husband was a member of a fraternal order which insured its members against death by accident. At the time of his death, which resulted from an accident, complainant was too ill to attend his funeral, and she remained in an enfeebled and nervous condition for several weeks. A member of the same local body in the order, in whom she had full confidence, was appointed administrator of his estate, and he assured complainant that the insurance due from the order would be paid soon, and in full. While so believing, she was called on at her home by the administrator and three other members of the order, two of whom were officers of the governing body, who told complainant she had no claim against the order, but offered to pay her $1,000 in settlement, and pressed her for an immediate decision. The administrator, when she talked with him apart, said he knew little about the matter, but that the other men probably understood the situation. Being required to decide at once, she accepted the offer, signed a release, and received a draft for $1,000, which, however, she never cashed. It appeared that she knew nothing of the constitution of the order, nor of the truth of the facts stated by its representatives as grounds for their statement that she had no claim, nor was she ever advised before that its validity was questioned. She in fact had a valid legal claim against the order for $6,300. *Held*, that the settlement so obtained by taking complainant by surprise, and by requiring her to act at once without an opportunity to take legal advice or to ascertain the facts, would not be sustained by a court of equity, but the release would be set aside.

Appeal from the Circuit Court of the United States for the District of North Dakota.

George A. Bangs (J. E. Sater, on the brief), for appellant.
Guy C. H. Corliss (J. M. Cochrane, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. At the conclusion of the trial of this case in the lower court counsel for the respective parties stipulated, in substance, that it should be decided upon the pleadings and the evidence; that no point or objection should be urged by either party to the cause as against the other based upon the insufficiency of the pleadings to present the case of the plaintiff or the defense of the defendant; that the case should be decided in the same manner as though the matters of fact established by the evidence had a sufficient foundation in the pleadings; and that the evidence should be con-

strued in the same manner as though the facts which the evidence proved or tended to prove were supported by proper allegations in the pleadings. In view of this stipulation it will be unnecessary to state the issues which were raised by the pleadings in detail. It will suffice to say generally, concerning the nature of the controversy, that Isabelle D. McAdam, the appellee, exhibited a bill of complaint against the appellant, the Order of United Commercial Travelers of America (hereafter termed the "Order"), for the purpose of setting aside a written release of all claims against said order which she had been induced to execute, and for the further purpose of compelling it to pay to her the sum of $6,300 and interest thereon, which she claimed to be entitled to under the constitution of the order by virtue of her husband's having been a member of the same at the date of his death on January 31, 1900. The release which she asked to have canceled was one executed by her on March 26, 1900, whereby she acknowledged the receipt of $1,000 in full settlement of all claims against the aforesaid order by reason of the death of her husband, who, at the time of his death, was the holder of a certificate of membership in the order. The lower court granted the plaintiff all the relief prayed for in her bill; that is to say, it canceled and annulled the aforesaid release, and further decreed that she have and recover from the defendant order the sum of $7,123.26. The present appeal was taken by the defendant order from that decree.

In the lower court it was contended in behalf of the defendant, and the contention is renewed on appeal, that Thomas J. McAdam, plaintiff's husband, was not one of its members in good standing at the time of his decease, and that his wife was not entitled to demand any indemnity from the order for that reason. This is the first question which deserves attention, and the facts pertaining to its determination are as follows: The appellant above named is an Ohio corporation, which transacts business in many states through the agency of what are termed "subordinate" or "local" councils. By its constitution it promises to pay a certain indemnity to its members in good standing who happen to sustain "bodily injury effected through external, violent, and accidental means which alone shall occasion death immediately or within one year from the happening thereof." The fund to pay this indemnity is obtained by the supreme council of the order by assessing subordinate councils. The constitution of the order provides, in substance, that whenever the indemnity fund belonging to the supreme council becomes insufficient to pay four death losses, the supreme counselor of the order shall make an assessment upon each subordinate council to replenish its indemnity fund for a sum not exceeding $2 for each member in good standing of such subordinate councils, which assessment shall be payable within 15 days from its date; and that whenever the indemnity fund of a subordinate council is less than $2 for each of its members, the supreme counselor shall order an assessment not exceeding $2 upon each member of the subordinate council in good standing for the purpose of replenishing its indemnity fund, which assessment shall be payable within 30 days from its date. In case any subordinate council fails to pay an assessment levied upon it by the supreme council, power is given to the

latter council to suspend the subordinate council or revoke its charter. Other provisions of the constitution require each subordinate council to keep the supreme council advised, by proper reports, of the number of its members and the condition of its indemnity fund. The subordinate council to which plaintiff's husband belonged was located at Grand Forks, N. D., and was known as "Grand Forks Council No. 64." He became a member of that council on February 17, 1896. On August 2, 1899, the supreme counselor of the order directed an assessment at the rate of $2 per each member in good standing to be made against each subordinate council, payable in 15 days, and at the same time directed an assessment of the members of each subordinate council at the rate of $2 per person, the latter assessment to be paid to the subordinate council. Further assessments in all respects like that of August 2, 1899, were ordered by the supreme counselor on September 30 and November 20, 1899. These assessments, known as assessments Nos. 46, 47, and 48, were not personally paid by the plaintiff's husband to the Grand Forks Council, of which he was a member, during his lifetime. At the time these assessments were respectively levied against individual members, the indemnity fund in the treasury of the local or subordinate council, to which McAdam belonged, was not less than $2 for each member of that council in good standing. Notwithstanding the fact that McAdam did not pay assessment No. 46 within the time limited, he was treated as a member in good standing and assessed as such when assessment No. 47 was levied. He was treated in the same manner when assessment No. 48 was levied, although he had not paid either of the prior assessments. In point of fact, the subordinate council dealt with McAdam as one of its members continuously until his death, which occurred as the result of an explosion of gas on January 31, 1900. In the meantime it reported him to the supreme council as one of its members, and advanced and paid on his account, out of its indemnity fund, to the supreme council, the several assessments aforesaid, which were made by the supreme council against the subordinate council. The payments so made on his account, as one of its members in good standing, the supreme council has never refunded or offered to refund to the subordinate council, but still retains. On February 3, 1900, after McAdam's death, the three assessments aforesaid, which he had failed to pay personally, amounting to $6.75, were paid to the subordinate council by an agent of the plaintiff, and out of moneys belonging to her, and the sum so paid was accepted by the subordinate council in satisfaction of its claim against the deceased for the money theretofore advanced in his behalf. Prior to the death of the deceased, and on January 13, 1900, at a regular monthly meeting of the subordinate council, a resolution was passed to the effect that the council carry T. J. McAdam and others, who were then delinquent, until the next meeting, and "that the secretary make an effort to get them to pay up." The next regular meeting after the adoption of this resolution was not held, as it seems, until after McAdam's death.

The contention on the part of the appellant that McAdam was not one of its members at the time of his death, or not a member in good

standing, and hence not entitled to indemnity, is based primarily on a provision of its constitution to the following effect:

"Any member who fails to pay his dues and assessments, or any of them when, and as the same become due and payable, shall immediately on the happening of such default, and by virtue thereof, forfeit his good standing in the order; and he, or any person or persons claiming under him and by virtue of his certificate of membership, shall likewise and at the time such default occurs, and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character."

It is insisted, in substance, that this provision of the constitution operated proprio vigore to extinguish McAdam's right to indemnity when he failed to pay assessment No. 46 and the subsequent assessments, Nos. 47 and 48, to the subordinate council of which he was a member, notwithstanding the fact that the subordinate council in due time paid out of its own indemnity fund to the supreme council the amount of the assessments which McAdam should have paid to the local council, and reported him as a member in good standing, and elected to give him credit for the money so advanced, and to treat him in all respects as a member in good standing up to the moment of his death.

We have been forced to conclude that this contention on the part of the defendant company must be unsound. It is apparent that the supreme council has sustained no loss in consequence of the alleged default, because it received the three assessments from the local council in due season, and still retains the same. Its own indemnity fund, out of which all losses like the one in hand are paid, is precisely what it would have been, had McAdam paid the assessments punctually. Moreover, the local council has sustained no loss, because the money which it saw fit to advance has been refunded.

The provision of the constitution above quoted, which is invoked to work a forfeiture of the promised indemnity, is immediately preceded by another, which reads as follows:

"All members who fail to pay their dues or assessments when due, shall be suspended from the order, at a regular meeting of the council, by order of the senior counselor, and from all benefits derived therefrom, and if there be no more than two adverse ballots against his reinstatement he may, at a regular meeting of the council, on the payment of a fine of twenty-five cents per month, * * * be reinstated by a regular vote by the ball ballot. * * *"

The two provisions aforesaid, standing as they do in juxtaposition, must be read and construed together; and they must be so read the light of the well-established rule that insurance contracts and other instruments of that nature, whereby an indemnity is promised in case of death or accident, must be construed most strongly against the insurer, and so as to avoid, if possible, a forfeiture of the rights of the insured, where the language employed in formulating the contract gives rise to doubt or uncertainty as to its proper interpretation. As contracts of that nature are formulated by the insurer, and generally with an eye singly to the protection of its own interests, it is the insurer's duty to see to it that the various provisions which they contain are harmonious, and that the intentions of the contracting parties are clearly expressed. First National Bank v. Hartford Fire Insurance Co., 95 U. S. 673, 678, 24 L. Ed. 563; Thompson v. Phenix

Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Phenix Insurance Co. v. Wilcox & Gibbs Guano Co., 65 Fed. 724, 13 C. C. A. 88, 92. The provision first above quoted cannot be regarded reasonably as working a permanent forfeiture of a member's right to indemnity if he fails to pay an assessment, and as depriving the subordinate council to which he belongs of the right to advance his dues and perpetuate his membership if it is so minded, because the preceding provision, also quoted, gives the local council the power to suspend members "who fail to pay their dues * * * at a regular meeting of the council. * * *" It is apparent, therefore, that the subject of suspending a member who is in default is one to be considered and acted upon at a regular meeting of the local council, and the exercise of this power involves the exercise of some discretion on the part of the local body. No provision of the constitution to which our attention has been directed declares that a subordinate council shall not advance to the supreme council the dues of one of its members who is in default, and by that means preserve his good standing; and, in the absence of such a provision, we know of no sufficient reason why it may not so act, especially as it is vested with authority, to be exercised at a regular meeting, to determine whether a member ought to be suspended. The exercise of the power in question by the members of the local council, who are usually acquainted with the causes which have led to a default, and with the condition of the defaulting member, undoubtedly tends to preserve and enlarge the membership of the order, which is an object that such organizations generally aim to accomplish, and on which their successful operation, in a great measure, depends. The opposite view, that a failure of a member to pay an assessment to the local council the very day it is due terminates his good standing in the order, and extinguishes his right to indemnity, and that the local council has no power, even if it so desires, to retain him as a member and maintain his standing, is not enforced by any apt provision contained in the constitution to which our attention has been directed, and that view, if adopted, would prove harmful to the best interests of the order. Inasmuch as the constitution of the order establishes a system of dual assessments—that is to say, since it directs an assessment to be made at intervals against the respective subordinate councils, as such, to replenish the indemnity fund of the supreme council, and an assessment to be made against individual members to replenish the indemnity fund of each subordinate council, over which fund the local body seems to have full control—it is possible, we think, to place upon the two provisions of the constitution now under discussion a construction which is not only reasonable in itself, but will give to each due effect, and not lead to any conflict. It is obvious that when a member fails to pay a given assessment a certain period will ordinarily elapse between such default and the next regular meeting of the council at which he may be suspended by that body. It may be that during this interval he is not to be regarded as a member in good standing, by virtue of the operation of that provision of the constitution above quoted, on which the appellant relies, and that if injured

during that period he is not entitled to indemnity, provided the previous course of dealing with the member has not been such as to operate as a waiver of the default. But when the next regular meeting of the subordinate council does occur, if the member is not suspended by the local body, as it is empowered to do, but is reported to the supreme council as a member in good standing, and assessments are paid upon that theory by the local council, out of its own indemnity fund, to the supreme council, this operates to restore the member's good standing and right to indemnity. Such action on the part of the local council clearly indicates its intention to carry the member who is in default, and to hold itself responsible to the supreme council for the payment of his dues. Such intention on the part of Grand Forks Council to carry McAdam was not left to be deduced by inference from the failure of the local council to suspend him when it was advised that he was in default, but was expressly declared by the resolution of the local council adopted January 13, 1900, to which reference has already been made.

The foregoing view—that the provision of the constitution denouncing a forfeiture of good standing and consequent loss of the right to indemnity, for failure to pay dues, is temporary in its operation, and does not occasion a permanent loss of the member's right to indemnity, but that the consequences of such default may be overcome by the subsequent action of the subordinate council to which the member belongs—is confirmed by the fact that if such default on the part of a member, in and of itself, occasions a permanent loss of good standing and the right to indemnity, then there would seem to have been no necessity for inserting in the constitution of the order the other provision conferring on local councils the power to suspend members at regular meetings. It is further confirmed by the fact that the constitution requires local councils to report to the supreme council the number of their members, at stated intervals, as a basis for levying assessments against them, while it does not require a report to be made of members who have lost their good standing for failure to pay dues, but have not been suspended for that reason. It seems clear, therefore, that the constitution of the order does not contemplate the existence of a class of members who have lost good standing and the right to indemnity, but have not been formally suspended, unless it be during the short period which may elapse between the occurrence of a default and the next regular meeting of the subordinate council. Those who framed the constitution seem to have intended that the respective local councils should determine for themselves, at regular meetings thereof, whether members then in default should be definitely suspended, or carried by the local body as members in good standing, and reported as such to the supreme council. In accordance with these views, we are constrained to hold that McAdam must be regarded as having been a member in good standing and entitled to indemnity at the date of his death.

Counsel for the appellee strongly contends that none of the assessments, to wit, Nos. 46, 47, 48, were legal assessments when levied, because the indemnity fund of the subordinate council had not been so far depleted at the time they were levied as to authorize the supreme

counselor to levy them, and that McAdam lost none of his rights by failing to pay them promptly. This view seems to have been adopted by the lower court. On the other hand, the appellant contends that the assessments made by the supreme counselor against the subordinate council operated to deplete the local indemnity fund as soon as the assessments were announced, and hence that the several assessments aforesaid against individual members of the local body were properly levied. It is undoubtedly true, as the appellee contends, that no forfeiture can be predicated upon a failure to pay an unlawful assessment; and, if the assessments in question were made at a time when no power existed to make them, McAdam's failure to pay them at the appointed time did not affect his rights. Miles v. Mutual Reserve Fund Life Ass'n, 108 Wis. 421, 84 N. W. 159; Niblack on Benefit Societies, §§ 250, 252. We find it unnecessary, however, in the present case, to express a definite opinion concerning the legality of the several assessments; being satisfied, for reasons already stated, that McAdam must be regarded as a member in good standing when he accidentally lost his life. These assessments appear to have been made in the same manner that the order had been in the habit of levying assessments, and it may be that the previous conduct of the order, which had been assented to by its members, operated as a contemporaneous construction of the provisions of the constitution, which should be held binding. We would not be understood, however, as expressing a definite opinion on this point, because it is unnecessary to do so.

We turn at this point to consider questions of a different character. The appellant contends that it incurred no liability to the appellee by the accidental death of appellee's husband, because he was intoxicated at the time, and that this condition of intoxication exempts it from liability, irrespective of the question whether it did or did not contribute to cause his death. This contention is founded upon a provision of the constitution of the order which relieves it from the payment of any indemnity when the death of a member happens while he "was, or in consequence of his having been, under the influence of intoxicating drinks." The learned judge of the trial court, after hearing numerous witnesses who testified respecting McAdam's condition at the time of his death and previously, made a specific finding, which is contained in the record, "that the injuries sustained by said Thomas J. McAdam, resulting in his death, and the said death caused thereby, did not happen while the said McAdam was, or in consequence of his having been, under the influence of intoxicating drinks." This court has been asked to review that finding, and to find, to the contrary thereof, that the deceased was intoxicated when the explosion occurred which occasioned his death. This we must decline to do. This court and other courts have repeatedly decided that, even in an equity case, where the trial court has determined an issue of fact upon conflicting evidence, the finding will be presumed to be correct, and will not be disturbed unless a serious and important mistake appears to have been made in the consideration of the evidence, or an obvious error has intervened in the application of the law. This rule has become so firmly established by judicial decisions of this and other

courts, and the presumption in favor of the accuracy of a finding made by the trial judge is necessarily so strong, in view of the peculiar facilities which he enjoys to ascertain the facts, that we are not at liberty to disregard it. Warren v. Burt, 7 C. C. A. 105, 58 Fed. 101; Snider v. Dobson, 21 C. C. A. 76, 74 Fed. 757, and cases there cited; Latta v. Granger, 15 C. C. A. 228, 230, 68 Fed. 69. Nothing is disclosed by the present record to relieve the case in hand from the operation of the rule last stated. It seems to have been tried by the lower court with great fairness, deliberation, and care, and with the aid of able counsel. The testimony relative to McAdam's condition on the occasion of the accident is quite voluminous and very conflicting. Charges are freely made that the testimony of some of the witnesses for the appellant on the point in controversy is utterly unreliable, and ought to be disregarded. Moreover, it does not seem to be claimed that the death of the deceased was caused by the condition as to sobriety that he may have been in when he met his death. Under these circumstances, and conceding that the testimony was such that the issue as to intoxication might have been decided either way, we are of opinion, following our usual practice in such cases, that the finding of the trial judge ought not to be disturbed. The strong presumption which must always be indulged in favor of the finding of the lower court in a case like the one at bar has not been overcome to our satisfaction.

It is finally urged by the appellant that even if it was liable for the full amount of the indemnity now sued for, at the time of McAdam's death, yet that the liability was discharged by the release which the appellee saw fit to execute on March 26, 1900. This contention presents the question whether that release, whereby a valid claim for $6,300 was released in consideration of the receipt of a draft for $1,000, was obtained in such a manner as will justify a court of equity in upholding it. It also necessitates a brief statement of the circumstances under which the release was obtained. After McAdam's death his wife was repeatedly assured by one B. F. Brockhoff, who was a member of the Grand Forks Council, and a personal friend of her husband, as well as his administrator after his decease, that the indemnity due to her from the defendant order would surely be paid, and that $5,000 thereof would be paid in a few days, and the balance in installments. She was utterly ignorant of her rights, except as she was informed by Brockhoff. She had never seen nor read the constitution of the order, and had no knowledge that the insurance contract was embodied in the provisions of that instrument. She was quite sick when her husband's death occurred—so sick that she was unable to attend his funeral—and she remained in an enfeebled condition until long subsequent to March 26, 1900. Up to the latter date she relied confidently upon the statements made by Brockhoff, expecting that the promised indemnity would be speedily paid, and she seems to have had no knowledge that her right to the indemnity had ever been challenged. On the latter date, however, between 3 and 4 p. m., she was waited upon at her home in Grand Forks, N. D., by four men, to wit, B. F. Brockhoff; W. W. Fegan, secretary of the Grand Forks Council; B. F. Holbrook, grand counselor for the jurisdiction embracing said

Grand Forks Council; and C. B. Flagg, secretary of the order. These men, through Holbrook, acting as spokesman, informed her, for the first time, that her claim had been disallowed because of her husband's intoxication at the time of his death, and irregularities in paying his assessments. This statement greatly surprised her, as she had previously been informed that her claim was valid; and, as she remained silent for a few moments, one of the parties suggested that she go into an adjoining room and confer with Brockhoff, in whom, as they knew, she had great confidence. On retiring to an adjoining room, Brockhoff told her, in substance, that he did not know much about the matter concerning which she had been advised, but that the other gentlemen probably understood the situation, and if she had no claim against the order, as they stated, it would be best to accept the offer which they had come prepared to make; that is, to pay her $1,000. He further told her, however, to hold out for half of the promised indemnity, and on returning to the adjoining room the statement was made by Brockhoff that Mrs. McAdam thought she ought to have half of the indemnity. Thereupon Holbrook said, in substance, that, if she was entitled to be paid half of the indemnity, she was entitled to the whole; that she had no claim against the order, and that they proposed to give her $1,000 because it would cost them that much to contest the claim if she should sue; and that they would prefer to make her a gift of that sum, rather than pay it to a lawyer. The interview was hurried to a conclusion within 20 minutes or half an hour. The statement appears to have been repeated that she had "no claim." One of the parties took out his watch and said "they were in a hurry to get away. Let us hurry up with this business." Being thus informed that she had no claim against the order, and pressed to a speedy decision, the appellee finally signed the release in controversy, which was drawn up by Fegan, and received a draft payable to the order of C. B. Flagg, and by him indorsed. She never cashed or negotiated this draft, or attempted to do so, but shortly after the transaction in question, having in the meantime consulted an attorney and been advised as to her rights, she brought the present suit to annul the release and recover what was justly due her. Brockhoff testified that, as the parties left Mrs. McAdam's residence, Flagg remarked "that settlement was dead easy," and "that he expected to pay $1,500 or more."

The trial court found the facts attending the execution of the release to be substantially as last stated, and, after an examination of the testimony, we fully concur in that view. It is apparent, therefore, that the transaction in question was not one where a person having a demand against another, and full knowledge of the facts on which it depends, makes a claim against that other for its payment, which the latter disputes, whereupon mutual concessions are made by way of compromise to avoid litigation. Mrs. McAdam had no acquaintance with the provisions of the appellant's constitution, and no knowledge of the conditions that would serve to destroy her right to indemnity, or whether such conditions in fact existed. She had heard it said casually that her husband was not intoxicated at the time of his death, but she does not appear to have been aware that intoxication at that

time would forfeit his right to indemnity, while she had been repeatedly assured that the indemnity would surely be paid. While in this frame of mind she was suddenly assured, in the most positive manner, by at least two high officers of the order, that she had no claim against the order, and that the sum of $1,000 which they proposed to pay was not paid by way of compromise of a doubtful claim, but was a mere gratuity. Besides, she was constrained to an instant acceptance or rejection of the offer when she was in a low, depressed, and nervous condition incident to sickness and the shock occasioned by her husband's death. It is furthermore noteworthy that Brockhoff, the only person with whom Mrs. McAdam had an opportunity to confer privately, told her, in substance, that, while he "didn't understand much about it," yet the two officers of the order who asserted that she had no claim "probably understood the situation, * * * and, if there was no claim, it would be better to accept" what they offered. This statement, coming, as it did, from a member of the order and a friend of her husband's, in whom she had great confidence, undoubtedly induced her to believe that the representation that she had no claim was reliable, and that she ought to act on it. We are of opinion that a release obtained in the manner aforesaid cannot be upheld by a court of equity. It is evident that Mrs. McAdam signed the release in the belief that she was not entitled to any indemnity from the defendant order, or, in other words, under a misconception of her legal rights, which was occasioned by the confident assertion of two officers of the order that she had no claim against it, and that what they proposed to pay was in the nature of a gratuity. This statement implied that McAdam was intoxicated when he met his death, and that no action had been taken by the order or the subordinate council to which the deceased belonged that could operate to cure the alleged irregularities in the payment of assessments. Mrs. McAdam appears to have had no knowledge concerning the acts of the local council after her husband was in default, and, even if she had such knowledge, she was not qualified to judge of the effect of such acts upon her right to indemnity. On the other hand, the assertion that she had "no claim," or was not entitled to any indemnity, was made by persons who presumptively were well acquainted with all the facts on which her right to indemnity depended, and who were thoroughly conversant with the constitution of the order, and whose statements, for these reasons, could and ought to be relied upon. In any aspect of the case, when the release was obtained the parties did not negotiate on equal terms. The agents of the order who induced the appellee to sign the release took advantage of her ignorance of material facts on which her rights depended, as well as of her ignorance of matters of law, and hurried her to a decision with indecent haste when she was in a nervous and enfeebled condition. As a natural result of such conduct, she was misled and induced to act under a misconception of her legal rights, for which the appellant should be held responsible. In such cases courts of equity will afford relief. In his work on Equity Jurisprudence, § 849, Mr. Pomeroy, after considering at length the character of mistakes which will serve to entitle one to relief in the forum of equity, says:

"A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. * * * Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party, which they have inferred or assumed. The real reason for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always a very complex conception. It necessarily depends so much upon conditions of fact that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person, with respect to his own private legal rights and liabilities, may be properly regarded—as in a great measure they really are—and may be dealt with as mistakes of fact."

Further on in the same section he formulates the following general rule as being eminently just and based on principle, namely:

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative; treating the mistake as analogous to, if not identical with, a mistake of fact."

Other text-writers have, in substance, expressed their approval of this doctrine. Kerr on Fraud & Mistake (American Notes by Bump) pp. 398, 400, 401; Eaton on Equity, p. 263. In addition to the authorities which are cited by Mr. Pomeroy as recognizing the doctrine stated in the text, the following cases may also be consulted as cases where the doctrine in question has been stated, or, if not stated in terms, has been practically applied: Gerdine v. Menage, 41 Minn. 417, 421, 43 N. W. 91; Renard v. Clink, 91 Mich. 1, 3, 51 N. W. 692, 30 Am. St. Rep. 458; Whelen's Appeal, 70 Pa. 410, 427; Berry v. American Central Ins. Co., 132 N. Y. 49, 53, 54, 30 N. E. 254, 28 Am. St. Rep. 548; Freeman v. Curtis, 51 Me. 140; Skillman v. Teeple, 1 N. J. Eq. 232, 245; Bonney v. Stoughton (Ill.) 13 N. E. 833, 837. See, also, Billings v. Aspen Mining & Smelting Co., 51 Fed. 338, 347, 348, 2 C. C. A. 252, 261, 262.

It would not alter the conclusion at which we have arrived, namely, that the release in question ought not to be upheld, even if it were conceded that, when the appellant's agents represented to the appellee that she had no claim against the order, they supposed the statement to be true. In point of fact, it was not true. She did have a valid claim against the order in the sum of $6,300, and it cannot be permitted to profit by a false representation made by its agents, on which the appellee confidently relied, although it was unwittingly made. The manner in which the release was obtained, and the conduct of the appellant's agents on that occasion, preclude such a result. They did not lay before Mrs. McAdam all the facts on which her right to indemnity depended, with which facts they must be presumed to have been acquainted, and, after stating their own view of her rights in the premises, request her to seek competent legal ad-

vice, which they must have known that she needed badly, before acting on the proposition to accept $1,000 in discharge of all claims. On the contrary, they referred her for advice to one of their own number, a member of the order, in whom, as they well knew, she had great confidence, and whose advice would doubtless control her action, who merely confirmed the statement of his associates. By their conduct they also compelled an immediate decision, without allowing her adequate time for proper deliberation. That Mrs. McAdam was taken by surprise, having previously been informed that the indemnity would surely be paid, and that she did not deal on equal terms with the agents of the order, and for these reasons was led to act hastily and improvidently, admits, we think, of no controversy. And where such a state of facts is disclosed, it seems that courts of equity will afford relief against a mistake, although it was purely one of law. Coffman v. Lockout Bank, 5 Lea, 232, 40 Am. Rep. 31, 34; Evans v. Llewellyn, 2 Brown, Ch. 150; 2 Pomeroy's Eq. Jur. § 847; 1 Story's Eq. Jur. §§ 134, 251.

Another consideration, which cannot be overlooked, and should have some weight in a case of this character, is the fact that the defendant order professes to be a fraternal association consisting exclusively of commercial travelers—an association organized, as its constitution declares, "to give all moral and material aid in its power to its members and those depending on them. Also to assist the widows and orphans of deceased members." If these professions do not in themselves establish a relation of peculiar confidence and trust between the order and its members, including the families of deceased members, which impose on it the duty, in all of its dealings with them, of exercising the highest degree of fairness and good faith, they at least justify a court of equity in condemning the unfair method by which the release now in question was obtained. We are of opinion that the Circuit Court acted properly in canceling and annulling it, and that the decree below should be affirmed.

It is so ordered.

WEEKS v. INTERNATIONAL TRUST CO.

(Circuit Court of Appeals, First Circuit. October 6, 1903.)

No. 473.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—ACTION AGAINST AGENT OF INSOLVENT NATIONAL BANK.

An action against a stockholder's agent for winding up the affairs of a national bank is one of which a federal court has jurisdiction, irrespective of citizenship, under section 4, Judiciary Act Aug. 13, 1888, c. 866, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514].

2. NATIONAL BANKS—POWERS—LEASE OF PROPERTY.

A national bank has power to lease property for its occupancy in conducting its business for a term extending beyond the expiration of its charter, even though the lease is assignable only by consent of the lessor.

¶ 1. Jurisdiction of federal courts in cases involving federal question, see note to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.

3. SAME—CONSTRUCTION OF LEASE—OPTION TO RELET AFTER RE-ENTRY AT TENANT'S RISK.
A lease provided that on a breach of any of its covenants by the lessee the lessors might re-enter and resume possession, "and thereupon the lessors may, at their discretion, relet the premises at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized." *Held* that, to entitle the lessors to recover rent under such provision after a re-entry and resumption of possession by them, they must show an election to relet the premises, and that where the evidence did not show any offer to relet, except at an increased rental, the question of such election was one for the jury.

4. LANDLORD AND TENANT—ACTION ON LEASE—PLEADING.
That the declaration in an action by a lessor against the lessee, after default by the latter in the payment of rent and re-entry by the lessor, states the cause of action as one for the recovery of rent, instead of for damages for breach of covenant, is immaterial where the lease provides that in such case the lessee shall remain responsible for the rent during the term.

5. SAME—TRANSFER OF PROPERTY BY LESSOR.
A provision of a lease giving the lessor, in case of re-entry for condition broken, a discretion to relet the premises at the lessee's risk, must be construed as giving such election to the landlord in interest at the time, in case of a conveyance of the premises by the original lessor.

In Error to the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 116 Fed. 898.

Edward E. Blodgett and G. Philip Wardner (Eugene P. Carver, on the brief), for plaintiff in error.

Robert M. Morse (William M. Richardson, on the brief), for defendant in error.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. This is an action brought against the plaintiff in error, receiver of the Broadway National Bank, upon a covenant in a lease of the first floor and basement of a building on Milk street, in Boston, given by the predecessors in title of the defendant in error to the bank. In this opinion the plaintiff in error will be called the defendant, and the defendant in error the plaintiff. The bank had occupied since 1884 a part of the premises described in the lease. On March 30, 1893, the owners of the building had let the first floor to the bank. The lease ran for six years from April 30, 1893, and was signed, on the part of the lessee, "Broadway National Bank, by James B. Kellogg, Cashier." On August 11, 1898, Parkman and others, then owners of the premises, executed to the bank the lease here in question for a term of 10 years from April 1, 1899, at a rent of $6,000 a year. This lease was signed, "Broadway National Bank, by Roswell C. Downer, President." There was no vote authorizing Downer to negotiate or to execute the lease, but the directors knew that he was negotiating for a lease in behalf of the bank, and on July 27, 1898, they voted that he be authorized to execute a lease from the bank to one Pray, upon such terms and with such covenants as to Downer might seem fit. By this vote they intended to authorize Downer to let to Pray one-half of the basement which the bank was

then occupying under a verbal agreement for a new lease made with Parkman and the other owners of the property. A lease for two years was thereafter executed by Downer in accordance with the vote. On March 28, 1899, the lessors sold the whole building to the defendant in error. On December 16, 1899, the bank became insolvent, and the comptroller of the currency appointed Wing as its receiver. On February 15, 1900, the comptroller released the estate of the bank to the defendant, as the stockholders' agent. Between December 16, 1899, and January 5, 1900, the plaintiff entered upon the premises and repossessed itself of the same as of its former estate. The plaintiff agreed with the receiver and the defendant that the occupation of the premises by the two latter after January 5, 1900, should be taken as a tenancy at will, and should not operate as a waiver by the plaintiff of its termination of the lease or the bank's tenancy thereunder, nor operate as an affirmance or acknowledgment by the bank or the receiver or the stockholders' agent of any liability on their part under the lease. The defendant occupied the premises until May 19, 1900. Except as above stated, the plaintiff had possession of the premises since its re-entry. The bank's charter was issued September 29, 1884, and was limited to expire October 3, 1904.

The lease, in addition to the terms above stated, contained the following clause:

"Provided, always, and these presents are upon this condition, that if the said lessee or its successors or assigns do or shall neglect or fail to perform and oberve any or either of the covenants contained in this instrument, which on its or their part are to be performed, or if the said lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then and in either of the said cases the lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the said lessee and those claiming under it, and remove its effects (forcibly, if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

On June 21, 1901, the plaintiff brought suit. After setting out a part of the facts heretofore stated, the declaration proceeded as follows:

"That by the terms of said lease said bank, notwithstanding such entry and taking possession by the plaintiff, remained and remains responsible for the rent reserved by said lease; that the rent due on the last days of May, 1900, June, 1900, * * * and May, 1901, was unpaid; that demand for said rent was duly made of said bank when said amounts were severally due, and that the total amount of rent due and unpaid May 31, 1901, was $6,500, for which said bank is responsible; that on January 22, 1900, John W. Weeks was duly elected agent; * * * and that on February 15, 1900, the Comptroller of the Currency and Daniel G. Wing, receiver as aforesaid, duly transferred and delivered to said Weeks, as agent of the Broadway National Bank, all the assets and property of said bank; and that by virtue of the appointment of said Weeks as agent and of the other acts aforesaid

he became and is liable to be sued in his own name for the rent hereinbefore set forth."

The defendant pleaded a general denial and a payment, and also that upon the termination of the lease it became the plaintiff's duty to use all reasonable effort to relet the premises, so as to minimize the damages; that, if the plaintiff had used such effort, suitable and responsible parties were willing at various times to hire the premises in question at a rent as great as, or greater than, the rent reserved in the lease to the bank; that the plaintiff willfully and arbitrarily refused to accept these parties as tenants; that the defendant offered to the plaintiff several specified suitable and responsible tenants, whom the plaintiff arbitrarily and unreasonably refused to accept. At the trial the Circuit Court directed a verdict for the plaintiff for an amount equal to the rent reserved in the lease for the time in question, less certain payments actually made to the plaintiff by the occupant of the basement, formerly the bank's subtenant. The case is here upon the defendant's exceptions. In discussing some of these exceptions further evidence bearing upon them will be set forth in addition to the general statement of the case above made.

1. The defendant excepted to the jurisdiction of the Circuit Court. The jurisdiction is based upon Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514]:

"That all national banking associations established under the laws of the United States shall, for the purposes of all actions, by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

That the receiver of a national bank may be sued in the Circuit Court, irrespective of citizenship, was decided in Auten v. U. S. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. That a stockholders' agent in this respect stands like a receiver was decided by the Circuit Court of Appeals for the Ninth Circuit in Guarantee Co. v. Hanway, 104 Fed. 369, 44 C. C. A. 312. With that decision we find no reason to disagree. See, also, In re Chetwood, 165 U. S. 443, 459, 17 Sup. Ct. 385, 41 L. Ed. 782. The exception is overruled.

2. The defendant contended that the lease in question, whose term extended beyond the expiration of the bank's charter, was ultra vires and void, and he excepted to the ruling that the bank could take such a lease. In Brown v. Schleier, 118 Fed. 981, 55 C. C. A. 475, the Circuit Court of Appeals for the Eighth Circuit held that a national bank can take a lease for 99 years. That court said that the lease there in question "was an interest which was salable during the life of the corporation or on its dissolution." 118 Fed. 984, 55 C. C. A. 478. In the case at bar the bank's interest could be alienated only with the consent of the lessor. But we are not prepared to hold that the difference (if there be one) between the lease in Brown v. Schleier and the lease in this case is material to the validity of the latter. Strictly speaking, the lease here in question is alienable, though alien-

able only upon a condition. The condition is usual, at any rate in Massachusetts. And the assignment of a lease, even where permitted unconditionally, does not free the lessee from his obligations thereunder; he remains liable on his covenants, unless the lessor expressly or by implication releases the liability. To require unrestricted assignability in those leases taken by a national bank which extend beyond its charter would hamper the bank in obtaining a lease, without relieving the bank from embarrassment at the charter's expiration. Considering that the charter of a national bank may be extended as a matter of course (Act July 12, 1882, c. 290, § 1, 22 Stat. 162 [U. S. Comp. St. 1901, p. 3457]), we hold that Congress did not intend to forbid such a corporation from hiring banking rooms for a term extending beyond the period of its existing charter. When, for example, but three years of its chartered existence are left, it will be unduly hampered if it is not permitted to take a lease for more than three years. In McCormick v. Market Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817, at the time the lease was executed the bank had no authority to execute a lease of any sort, and the case does not assist us in determining what sorts of leases a national bank may validly enter into. What would be the effect of a lease which, in respect of length of term or otherwise, was entered into for some purpose other than that of meeting the reasonable needs of the bank, we need not discuss at this time. This exception of the defendant is therefore overruled.

3. The defendant contended that Downer, the president of the bank, was never authorized to execute the lease, and that the bank and the defendant were never bound by its terms, and he excepted to the ruling of the judge that the lease was validly executed. The evidence above stated was clearly sufficient to submit to the jury upon the question of ratification, and, upon the whole, we deem it so convincing as to justify the direction given by the court.

4. The defendant contended that, even if the plaintiff had a good cause of action on the facts set forth and proved, it could not recover under an allegation of liability for rent, because the defendant was not liable for rent, but only for breach of covenant. We think the declaration sufficiently sets out a claim for a breach of the bank's covenant, and is not limited to a claim for rent eo nomine. In its use of the word "rent" the declaration follows the lease, and in this respect the meaning of both is plain. Perhaps it would have been more accurate, in both lease and declaration, to substitute for the word "rent" the phrase "a sum of money equal in amount to the rent"; but such a substitution in the declaration, after the original inaccuracy of the lease, would have been needlessly verbose. This exception is therefore overruled.

5. The defendant contended, and laid particular stress upon the contention, that the plaintiff could not recover under the clause in the lease hereinbefore set forth without some effort on its part to relet the premises. Upon this point the learned judge instructed the jury as follows:

"I think the construction which the defendant asks me to put on it (the covenant in the lease) is a narrow one, and rather a strained one, which I

would not be justified in giving it. Take the clause as it stands, and referring to the words, 'Thereupon the lessors may at their discretion relet the premises,' the defendant says that that imposes upon the plaintiff a certain duty to use reasonable efforts to rent the property. I do not so read it, at least as far as this court is concerned. I cannot justly hold that the International Trust Company intended to assume any risk. I think the fair construction of it is that they did not intend to incur any risk, but that they intended to use their own discretion in the matter absolutely. Of course, under such circumstances, where a man agrees to act only at his own discretion, the law ordinarily says he must act with some degree of reasonableness and with some degree of justice, and have some regard to the rights of the position of the other parties concerned. If that is the construction to be given to this clause, still it remains on the defendant to show that the plaintiff had abused that discretion; that it had proceeded with a certain degree of willfulness. Now, I find no evidence of that. I find, on sifting out the testimony, only three tenants actually brought to the International Trust Company in such a form as would present to it a fair question for solution. The first was the Beacon Trust Company, which it was clearly justified, and correct, in disregarding; the second was the Title Insurance Company, as to which, under the circumstances, it was justified in using its discretion. Whether or not its conclusion was correct, it was a case where it had a right to solve according to its own discretion. The same with reference to the tailoring establishment."

To these instructions the defendant duly excepted.

The plaintiff contended in argument, first, that it was entitled to recover, even though it had willfully and even maliciously refused to let the premises; and, second, that, if reasonable effort to relet was required of it, the evidence showed that reasonable effort had been made. Therefore this court has to determine, first, what is the proper construction of the covenant in question? and, if the defendant's construction be found the correct one, then, second, what does the evidence in this case show concerning the plaintiff's efforts to relet?

We cannot adopt the plaintiff's construction of the covenant. At common law, if a lessee broke a covenant of the lease, either the covenant to pay rent or some other, and if the lessor had the right to re-enter for breach of covenant, the lessor might take either of two courses: Either he might abstain from re-entry, in which case the lessee remained liable on his covenant to pay rent until the end of the term, or, on the other hand, he might re-enter and resume possession, in which case the lessee's liability to pay rent was at an end. If the lessor did not re-enter, he retained his right against the lessee, but risked losing rent for his property by reason of the lessee's insolvency. If he re-entered, he gained the right to seek a solvent tenant, but ran the risk of losing rent by reason of his inability to find one. A covenant like that here in question, not uncommon in Massachusetts, has for its object to give the lessor some of the advantages which result from both the courses before described. The lessor is permitted to seek a solvent tenant without letting go his hold upon the old one. The covenant does not compel the lessor to relet or to attempt to relet if he does not wish to do so. He need not avail himself of the covenant. He may still abstain from re-entry, and so hold the lessee liable for rent eo nomine. He may still re-enter, and thereafter may use the premises as he sees fit, or may leave them wholly unused. The lessee cannot complain of either action. By the first he is left

in possession of the premises; by the second he is relieved from his liability, under the covenant, to pay rent. On the other hand, the lessor may avail himself of the covenant. He may re-enter, and may exercise his discretion to relet the premises at the risk of the lessee. The exercise of this discretion is manifested by a reletting or by an attempt to relet. If there is an actual reletting, the covenant becomes operative, and the original lessee is liable for the deficiency of rent, at any rate if the reletting is honestly and reasonably made. If an honest and reasonable attempt to relet is made without success, then also the lessee is liable; the lessor need not go through the form of a reletting. But if the lessor does not relet, and makes no attempt to relet, he has not exercised the discretion nor has he made the election given him by the covenant, and, as we hold, it is only upon the exercise of the lessor's discretion to relet that the covenant imposes a liability upon the lessee. The re-entry has terminated the lessor's right to recover rent eo nomine, and the right given by the covenant to recover the difference between the old rent and the new does not arise until the election to relet has been made by the lessor. The lease does not, indeed, impose upon the lessor any duty to relet or to attempt to relet. The lease merely gives the lessor certain rights upon his election to do certain acts.

The injustice which would result from the plaintiff's construction of the lease makes it improbable that the parties intended such a construction. In argument, the plaintiff's counsel admitted that the lessee's liability under the covenant would cease if the premises were destroyed by fire or were actually used by the lessor. But to concede this is to abandon the plaintiff's whole contention. There is no material distinction between the actual use of premises by the lessor, and his possession of premises with an intent to prevent actual use by anybody else, and there is none between a general refusal to relet and an unreasonable refusal to relet to a suitable tenant. We go further, and hold that, in order to make the lessee liable under this covenant, the lessor must within a reasonable time make his election to relet, and must manifest that election by a reasonable attempt to do so. What sort of an attempt he must make we need not discuss here. In general, the effort must be that which a reasonable landowner would make under the circumstances. Not every proposed tenant need be accepted, but an unreasonable refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee.

It was urged by the plaintiff's counsel that, if the construction thus put upon the covenant be the true one, much litigation will necessarily result, because in almost every case the lessee will urge by way of defense or of mitigation of damages that the lessor did not make any reasonable attempt to relet, and, if the premises were relet, that they were let at an unreasonably low price. We are not insensible to the force of this argument, but it assumes that the court and jury will be unable to pass fairly upon the questions thus raised. If the argument be urged by way of stating a hard case, we think that the case suggested by the plaintiff's counsel is harder, viz., that in which a tenant under a long lease, who is early ejected for breaking one of its smallest

covenants, is compelled to pay full rent during the whole term, while the lessor declines to receive a new tenant. A construction which gives an arbitrary right of forfeiture of the tenant's beneficial interest, while holding him to the payment of full rent, is to be avoided.

In several cases the courts of Massachusetts have dealt with the covenant here in question, and in none of their decisions do we find anything opposed to the conclusion we have reached. See Way v. Reed, 6 Allen, 364; Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285. In the latter case the court said: "At the first publication of notice there was a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. The lessors in their discretion might not relet the premises, but resume possession of them." This language implies that resumption of possession without reletting prevents the obligation of the covenant from attaching to the lessee.

Having thus determined that the plaintiff, in order to recover, must show an election to relet the premises, we next consider if an election to relet was so clearly shown as to justify the instructions quoted above.

We cannot take this view of the evidence. To go no farther, we find that the plaintiff's president testified that he told several persons who inquired the price of the premises that he asked $6,000 for the banking rooms, and that he never quoted a lower price. The banking rooms in question were on the first floor of the building. The basement was in the actual occupation of the bank's old subtenant, who was paying therefor to the plaintiff more than $2,000 a year. The testimony of the plaintiff's president amounts to this: That, instead of seeking by a reasonable reletting to reduce the sum which the defendant was bound to pay, the plaintiff was holding out to possible tenants a demand for a rent more than $2,000 larger than that stipulated for in the old lease. The evidence was sufficient to warrant a jury in finding that the plaintiff did not elect his remedy of reletting the premises. It was argued that the evidence showed that the plaintiff had elected not to relet, and so that the court should have ordered a verdict for the defendant; upon the whole, however, we think the issue should have been decided by the jury under proper instructions.

6. The defendant further objected that the discretion stipulated for in the covenant was that of the original lessors, and not that of the plaintiff or actual owner of the premises. Thus to construe the covenant would deprive it of all its value. The discretion intended by the lease was that of the landlord in interest, not that of some one who had been the landlord at an earlier time. In this respect the ruling of the court below was correct.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings in accordance with the opinion passed down this day, and the costs of appeal are awarded to the plaintiff in error.

UNITED STATES PEG-WOOD, SHANK & LEATHER BOARD CO. v. B. F. STURTEVANT CO.

(Circuit Court of Appeals, First Circuit. October 6, 1903.)

No. 480.

1. PATENTS—ANTICIPATION—CONSTRUCTION OF CLAIMS.
The rule applied that the fact that the machine of a patent is capable of a method of use not referred to nor indicated in the patent cannot be availed of to affect the construction of the claims.

2. SAME—MACHINE FOR CUTTING SHOE-SHANK STIFFENERS.
The Lewis patent, No. 607,602, for a machine for cutting shoe-shank stiffeners, is void for anticipation.

3. SAME—INVENTION.
The substitution in a machine of a common drive shaft for other methods of driving is too familiar in the mechanical arts to constitute invention, under ordinary circumstances.

4. SAME.
"Means for holding in and out of operative position" a part of a machine are so common in the arts that there can be no invention in such means, except in the details thereof, unless under exceptional circumstances.

5. SAME—MACHINE FOR CUTTING SHANK PIECES.
The Lewis patent, No. 675,661, for a machine for cutting shank pieces for shoes, claims 1, 2, 3, 4, 12, and 19, are void for lack of invention. Claim 15 construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 122 Fed. 470.

James E. Maynadier and George A. Rockwell, for appellant.
Elmer P. Howe and Benjamin Phillips, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH District Judge.

PUTNAM, Circuit Judge. This bill is based on the alleged infringements of two patents for alleged inventions—one to George E. M. Lewis, No. 607,602, issued on July 19, 1898, on an application filed on October 30, 1897; and the other, No. 675,661, issued on June 4, 1901, on an application filed on April 4, 1900, to John Lewis, a brother of George E. M. Lewis, who assigned one-half of his interest to the latter. Patent No. 675,661 covers only improvements on the earlier one. Both relate to machines for cutting "shoe-shank stiffeners" or "shank pieces" from wood veneers.

The litigation with reference to patent No. 607,602 is limited to the third claim as follows:

"(3) In a machine for cutting shoe-shank stiffeners, the combination with the cutting-block, the knives, and the cam, h, of the reciprocating holder, i, intermediate of the knives, the lever, e', pivoted to the frame, the rods, h', connecting the holder, i, with the lever, e', the roller, o', on the extremity of e', and the spring, g', for pressing the roller, o', against the cam, h', substantially as set forth."

¶ 1. See Patents, vol. 38, Cent. Dig. § 241.

The specification fails to express the state of the art or the nature and purpose of the invention in any comprehensible manner. It deals with numerous small details of machinery, and points out the purpose in such general terms as not to be practically useful. The record also fails to explain in a clear manner what is thus omitted from the specification. We gather that the stiffeners are cut transversely of the ribbon of veneer; that is, at a right angle to the length of the ribbon, or substantially so. It is desired, also, that the cut shall leave the edges or sides of the stiffeners beveled. The invention, among other things, relates to two knives operating in converging lines on the surface of the veneer, so one of them cuts through the veneer with a bevel to or from the center of the stiffener, while the other cuts with a bevel to or from that center, but with a reversed direction. Both knives reciprocate towards and from the veneer, and it is plain from the mechanism that it would be within the competency of any machinist of ordinary skill to arrange them so that they would reciprocate simultaneously. Of course, any machinist would thus arrange them, because a simultaneous reciprocation would result in better work and increased speed. That such a simultaneous reciprocation is to be accepted as a part of the claim, introduced therein by the words "substantially as set forth," is plain, because the specification uses the words "upward movement of the knives," and also the expression, "knives moved on the downward stroke," each of which, by using the singular number for the words "movement" and "stroke," contemplates only a single, and therefore a simultaneous, action in either direction.

All the details of this clam are of that class of which the common arts have many equivalents. Nothing in the record tends to prove to us, with reference to any of these details, that there is any peculiarity indicating an inventive spirit which distinguishes them from equivalent methods well known in the prior art of obtaining like movements of dfferent parts of machines. Indeed, the complainant's expert testifies that "the only new and fundamental and useful parts of this machine" (meaning the patented machine) "are the two obliquely placed cutting knives; their adjuncts, such as the chopping block and holder." He adds, "I do not consider the means for operating the knives or the feeding mechanism to be new."

The learned judge who sat in the Circuit Court dismissed the bill, so far as it relates to patent 607,602, on the ground that the supposed invention was anticipated by a machine constructed in 1892 by J. Roak Pulsifer. His opinion (122 Fed. 470) puts this with sufficient detail and clearness to save us the necessity of adding much thereto. There is here no such question as arose in Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456, decided by this court on June 10, 1897, with reference to the existence, construction, function, and actual use of the alleged anticipation. Bearing in mind what we have cited from the testimony of the complainant's expert, to the effect that the means for operating the knives or the feeding mechanism in its machine were not new, with which we agree, the Pulsifer machine was mechanically the same as that now in controversy. It was capable of doing exactly the same work, although used by Pulsifer on leather-

board, and not on wood veneers. It required no readjustment which presumably involved the inventive faculty for the purpose of doing the work to which Lewis applied his device. There is nothing in the record showing that the trade had been looking in vain for suitable means of cutting out shanks or stiffeners from wood veneers, to bring the case within Watson v. Stevens, 51 Fed. 757, 2 C. C. A. 500, decided by this court on September 6, 1892. On the other hand, in McKay-Copeland Lasting Mach. Co. v. Copeland Rapid-Laster Mfg. Co., 77 Fed. 306, and 80 Fed. 518, 25 C. C. A. 611, decided by the Circuit Court for the District of Maine on August 18, 1896, and by this court on April 24, 1897, a device for clamping counters of leather was held to be anticipated by a prior wood-bending machine, containing the same parts, and operating on the same method. The analogy between the two anticipations is so striking as to require on our part no further discussion in support of the conclusion reached by the Circuit Court with reference to this patent.

We must not overlook the proposition brought to our attention, and discussed in the opinion of the Circuit Court, that machines constructed under patent No. 607,602 have been used to cut out the "waste" between the shanks or stiffeners; thus, in cutting, bringing the thin edge of each bevel against the chopping block, and there supporting it during the process, with a claimed resultant of giving better work. It is enough to say, however, that the patent on its face does not show the slightest indication of this method of operation. Thus, according to the axiomatic rule applied by us in Long v. Pope Mfg. Co., 75 Fed. 835, 839, 21 C. C. A. 533, and in Heap v. Tremont & Suffolk Mills, 82 Fed. 449, 457, 27 C. C. A. 316, this subsequent method of use cannot be availed of to affect the construction of claim 3 for the purpose of saving this case. Moreover, underlying this distinction between cutting out the waste and cutting out the shanks or stiffeners, is the fact that it is a mere question of feed, which can be regulated in any machine so soon as it is perceived that it is desirable so to do. The Circuit Court was right in holding that this proposition of the complainant is ineffective.

This brings us to patent No. 675,661, in which there are several claims in issue. This patent is for improvements in details on No. 607,602. With reference to all the claims except 15, the complainant submits to us that their characteristics are in "a common drive shaft, straight-edge cutting knives, which approach the material simultaneously, moving obliquely towards each other on their cutting stroke, and cutting out waste pieces between them, and means connecting the knives and drive shaft." As we have construed patent No. 607,602, the word "simultaneously" introduces nothing novel, and the only new element is the common drive shaft.

John Lewis testifies that the main difficulty in his brother's machine of patent No. 607,602, which led to the witness' common drive shaft, was the disadvantage of too many connections. While it is perhaps true that sometimes the mere simplification of mechanism by omitting parts may amount to patentable invention, yet this is only under exceptional circumstances, none of which appear in the case before us. The substitution in the arts of a common drive shaft for other

methods of driving is altogether too familiar to be held to be anything more than a mechanical improvement of an ordinary class, unless circumstances appear which this record does not disclose. Therefore, as the Circuit Court held, there is nothing in these claims, in the light of what the record shows, which amounts to patentable invention.

Claim 15 is as follows:

"(15) In a machine for cutting shank-pieces from a strip or ribbon, a main frame, a feed-roller mounted therein, an auxiliary frame hinged to said main frame having a roller mounted in its outer end, said rollers adapted to cooperate with each other to feed the strip or ribbon to the cutting-knives, and means for holding said rollers in or out of operative position, substantially as described."

It is impossible to discover in this claim any novel element, unless it be in the means for holding the rollers in and out of operative position. The mounting of one roller on a frame auxiliary to that which carries the main roller is certainly so common in the arts that we must take cognizance that it affords nothing new. The means for holding the rollers in and out of operative position referred to in the claim are described at great length and with much detail in the specification. They are simply locking contrivances, which also are so commonly used in the arts for holding in and out of operative position that nothing of that nature can be patentable, unless it contains something peculiar in the devices used therefor. In this respect the patent falls within the underlying principle applied in Bates v. Keith (C. C.) 82 Fed. 100, 103, affirmed by this court in 84 Fed. 1014, 28 C. C. A. 638, in the following language:

"Guides used in connection with sewing machines, and for innumerable other purposes, have been so common in the arts, and have been used from time immemorial for so many purposes, that it would be an unreasonable state of the law which would deny as a common right to every artisan and manufacturer freedom to procure or frame guides suited for his art, or for his particular subdivision of any art. In this respect it is impossible to draw any essential distinction between the common right and privilege of every person to adapt guides to his own peculiar necessities and the like right to shape gouges or plane irons, or combine them of different shapes, according to the changing necessities or desires of carpentry, or to devise, subdivide, or change the form of boxes, or other packing cases, according to the necessities of each particular trade."

In like manner, in Nutter v. Brown, 98 Fed. 892, 893, 39 C. C. A. 332, quoting from Consolidated Electric Company v. Holtzer, 67 Fed. 907, 15 C. C. A. 63, we said:

"In Consolidated Electric Company v. Holtzer, 67 Fed. 907, 15 C. C. A. 63, decided by us on April 6, 1895, it was said, at page 908, 67 Fed., and page 64, 15 C. C. A., that 'the right to improve on prior devices by making solid castings in lieu of constructions of attached parts is so universal in the arts as to have become a common one, so that the burden rests on any one who sets up this improvement in any particular instance as patentable to show special reasons to support his claim.' So, by parity of reasoning, it is so common in the arts to shift the movable point, when there is a movable point, that the mere statement that it is shifted will not enable the court to pronounce that there has been a substantial advance."

Following these practical applications of rules for aiding in the determination of what does or does not involve patentable invention, we

repeat what we have already said, that the subject-matter of "means for holding" "in and out of operative position" is so universal in the arts that there can be no invention except in the details thereof, unless under exceptional circumstances, which do not exist at bar. The Circuit Court was of the opinion that the respondent's machine has no "means for holding" the feed roller "in and out of operative position." Possibly this might need some qualification; but, however that may be, it is entirely plain that the respondent does not use the particular means pointed out with so much detail by the complainant. It follows, therefore, that the respondent does not infringe claim 15, and that the conclusions of the Circuit Court with reference to patent No. 675,661 are also correct.

The decree of the Circuit Court is affirmed, and the appellee will recover its costs of appeal.

UNITED STATES PEG-WOOD, SHANK & LEATHER BOARD CO. v. B. F. STURTEVANT CO.

(Circuit Court of Appeals, First Circuit. October 16, 1903.)
No. 481.

1. PATENTS—INFRINGEMENT—VENEER-CUTTING MACHINES.
The Lewis patent, No. 609,513, for a veneer-cutting machine, construed, and *held* limited to the particular combination described, and, as so limited, not infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 122 Fed. 476.

James E. Maynadier and George A. Rockwell, for appellant.

Elmer P. Howe and Benjamin Phillips, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This case relates to an alleged infringement of letters patent No. 609,513, for improvements in veneer-cutting machines, issued to George E. M. Lewis under date of August 23, 1898, on an application filed on August 9, 1897. There is only one claim, as follows:

"In a veneer-cutting machine, the knife-block, and a curved knife-blade secured thereto, combined with the knife-block provided with grooves, e, the pivoted clamp, the screw, Q, the presser-bar, g, held in position by the clamp, the two chamfering knives placed in grooves in the block, A, and held in position by the presser-bar, and the screws, f, for adjusting them, substantially as shown and described."

The question is that of infringement, which depends on the nature of Mr. Lewis's invention, and the construction, in the light thereof, to be given to the claim in issue. The specification states the objects of the invention to have been two, of which we need refer to only one, as follows: "To provide means by which a curved or straight veneer can be cut and chamfered on either one or both edges to a desired

bevel by the simultaneous use of different knives." This is put at bar by the complainant in different ways, but, among the rest, it is said that the operation of cutting veneer and chamfering the edges by the combined and simultaneous action of the various knives of the machine and the presser-bar, constitutes the functional novelty. The effect of this proposition, if sustained, would be that any machine which has the elements thus specified would infringe, whatever might be the means for holding the various parts in the relative operative positions required.

On the other hand, the claim expressly enumerates as elements "grooves, e," a "pivoted clamp," a "screw, Q," and a presser-bar "held in position by the clamp." The specification also contains the following:

"This clamp is pivoted at P, and its pressure upon the presser-bar, g, is controlled by the set-screw, Q, which passes through the outer end of the knife-block, A."

The learned judge who decided the case in the Circuit Court (122 Fed. 476) found that the respondent's machine did not embody a pivoted clamp, the screw, Q, or the grooves referred to in the specification, and that it used a direct acting clamp. He also found that the use of the patentee's pivoted clamp, with the screw, Q, and the grooves, was to facilitate removing the chamfering knives from the front of the machine without removing the clamp, and that the respondent had no equivalent means which would give it the same advantages. The record sustains these findings. The only question is whether the claim can be construed, in the light of the nature of the invention and of the specification, to cover all means for holding the parts in their relative operative positions, as maintained by the complainant at bar. If it cannot, the decree of the Circuit Court dismissing the bill must be affirmed.

Bearing on this question there are two propositions. One is that on the face of the patent the claim is so positively limited that it cannot be construed to sustain the case; and the other is that, in the light of what occurred in the Patent Office with reference to this patent, the inventor consented that his claim should have a literal, narrow construction. Bearing on questions of this character are lines of cases which illustrate the extreme rules of construction one way and the other. In Reece Buttonhole Machine Company v. Globe Buttonhole Machine Company, 61 Fed. 958, 10 C. C. A. 194, the specification, and also the claims, detailed certain directions relating to the mere order of the arrangement of the machine, which were clearly not essential to its functions, and which also had no relation to the invention which it embodied. The respondent made use of all the elements of the complainant's invention, but reversed the described arrangement of mechanical parts, and thus evaded only the mere letter of the specification and claims. The invention marked a very decided advance in the art, and was of great merit. We held that to construe the claims as urged by the respondent was, in the light of the context, unreasonable; and again, that, although the described order of the mechanical parts was reversed, the rule of equivalents protected the inventor.

On the other hand, among cases which run to the other extreme, where the range of equivalents is held to be very narrow, are Masten v. Hunt (C. C.) 51 Fed. 216, 55 Fed. 78, 5 C. C. A. 42; Ball & Socket Fastener Co. v. Ball Glove Fastening Co., 58 Fed. 818, 7 C. C. A. 498; Ball & Socket Fastener Co. v. C. A. Edgarton Mfg. Co., 96 Fed. 489, 493, 37 C. C. A. 523; and Millard v. Chase, 108 Fed. 399, 47 C. C. A. 429. In some of this class the nature of the invention prohibited anything except the narrowest range of equivalents, it being a practical rule that the range is proportionate to the extent of the invention; but some are within the expressions in the Reece Case, at pages 961 and 962, to the effect that words and phrases which might have been omitted may be so introduced as to leave the courts no option except to regard them as limitations.

When the application for the patent in suit was first filed it contained three claims. The first was for a combination in a veneer-cutting machine, in general terms, of a curved-cutting knife-blade, a curved presser-bar, and two chamfering knives. This is precisely what the complainant now maintains it is entitled to cover. The second was for a combination, in a veneer-cutting machine, in general terms, of a curved knife-blade and a curved presser-bar. The third was for a combination, in a veneer-cutting machine, in general terms, of a curved knife-blade with a chamfering knife or knives. The learned judge who sat in the Circuit Court carefully explained the proceedings in the Patent Office, showing how the patent came into its present form; and he held that the patentee was estopped thereby from maintaining that any machine infringed which did not have the details which we have said are not found in the respondent's machine. The rule on this topic laid down in the Reece Case, at pages 968 and 969, is to the effect that, in order that the proceedings in the Patent Office should positively operate as a waiver or estoppel, they must relate to the pith and marrow of the alleged improvement, and be understandingly and deliberately assented to. This rule has been many times approved by the federal courts. Perhaps as good a commentary on it as can be found is in Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87, 91, 38 C. C. A. 56, decided by the Circuit Court of Appeals for the Seventh Circuit, and in Paxton v. Brinton, 107 Fed. 137, 138, decided by Judge Dallas in the Circuit Court for the Eastern District of Pennsylvania.

Applying these observations, we find that what occurred in the Patent Office did not relate to the pith of the complainant's invention as now maintained. The application was rejected in general terms on various references. The letter of rejection closed as follows: "It being held that there is no invention, in view of the well-known art in veneer cutting, to employ a presser-bar of the same shape as the knife." No other ground of objection was specifically stated. In this way the Patent Office put its finger on only the second claim as originally drawn, which had no relation to the alleged invention in issue here. It in no way touched the claims which covered combinations of a cutting knife with chamfering knives, with or without a presser-bar. Yet for some reason which the record does not explain, the patentee not only abandoned the second claim as originally drawn,

but introduced, both into the specification and into the claim now in issue, the details which we have pointed out. Therefore we come to the question within which of the two rules of construction stated in the following extracts from the Reece Case (already cited) 61 Fed. 958, found at pages 960 and 961, the patent at bar must be held to fall, namely:

"The ordinary rule that if, by a literal construction, an instrument would be rendered frivolous and ineffectual, and its apparent object frustrated, a different exposition will be applied if it can be supported by anything in it, requires that words which relate to what may be held nonessentials, however much multiplied, shall not be permitted unnecessarily to control the sense. For the most part, such words are merely illustrative, or are used through inadvertence. On the other hand, it is true that words and phrases which might have been omitted on the presumption that they relate to nonessentials may be introduced in such direct and positive manner as to leave the courts no option except to regard them as affecting the objects and limitations of the instrument in question."

The most that the inventor in the present case can claim is that he pointed out a way in which the two processes of cutting veneers and chamfering can be combined. It might almost be said that any skilled machinist, accustomed to manufacturing machines for cutting veneers, to whom it might occur that it was desirable to simultaneously cut and chamfer, would easily have found a method of accomplishing that purpose. This, of course, does not absolutely contravene the fact that what the inventor in this case did was invention; but it leaves it a very narrow one in a narrow art. In view of this fact, and looking at the specific and precise language of the specification and claim, we would not be justified in holding that a "literal construction" can be avoided; nor could we be relieved from holding that the phraseology was "introduced in such a direct and positive manner" as to leave us no option except to give full effect to it. The patentee has expressly made the pivoted clamp an element of the claim in issue. We are of the opinion that the conclusions of the Circuit Court were correct.

The decree of the Circuit Court is affirmed, and the appellee will recover its costs of appeal.

PARSONS v. NEW HOME SEWING MACH. CO. et al.

(Circuit Court, N. D. Illinois, N. D. October 21, 1903.)

No. 25,647.

1. PATENTS—CONSTRUCTION OF CLAIMS—LIMITATION BY PRIOR ART.
A prior patent, although not pleaded as an anticipation, may be shown and considered on the question of infringement as a part of the prior art to limit the claims of the patent in suit.

2. SAME—INFRINGEMENT—SEWING MACHINE RUFFLERS.
The Parsons patent, No. 354,577, for a sewing machine ruffler, construed as to claims 2, 7, and 8, and *held* valid, but, as limited by the prior art, not infringed.

In Equity. Suit for infringement of letters patent No. 354,577, for a ruffling attachment for sewing machines, granted to Winslow R. Parsons December 21, 1886. On final hearing.

Elliott & Hopkins, for complainants.
John W. Munday and Henry Love Clark, for defendant.

KOHLSAAT, District Judge. Complainant files his bill to restrain defendants from infringing claims 2, 7, and 8 of patent No. 354,577, which read as follows, viz.:

"(2) The combination, in a sewing machine ruffler having a reciprocating ruffling-blade, of the customary frame-piece having an upright portion, a main lever to engage with the needle-screw, embracing one side of said upright, a swinging arm to carry said blade, embracing the other side of said upright, and a pivotal rivet, the respective ends of which pivot said lever and said arm at the upper end of said upright, as herein specified, for the purpose set forth."

"(7) In a sewing machine ruffler, a separating blade holder having an upright portion provided with a pair of horizontal slots, each having an open end, in combination with a frame-piece having a stud and a stud-screw fitted to said slots, and a thumb-nut permanently applied to said screw, as herein specified, for the purposes set forth.

"(8) In a sewing machine ruffler having a reciprocating ruffling-blade and an under blade or separator, a series of cloth-guides, including a guide slot or passage closed at both ends and crossing the path to the needle, for automatically guiding a piping cut and folded to fit the same, said guides being formed in stationary parts, and located wholly in front of the presser-foot, so as to be supplemented by the blades, substantially as herein specified, for the purposes set forth."

The only infringement insisted on as to claim 2 consists in placing the needle-screw lever and the swinging arm, which carries the reciprocating ruffling-blade, on opposite sides of the upright part of the frame-piece, and pivoting the same at the upper end of said upright part. There is some justification in the record for the allegation that in this manner several advantages are attained, among them the minimizing of friction and of irregularity of action between the two moving arms. An exactly similar arrangement of those two arms is shown in the Sieven & Hildebrand patent, No. 152,254, granted June 23, 1874. This patent was not set up in defendants' answer, but is in evidence, and may be considered as bearing upon the state of the prior art for the purpose of construing complainant's claims, though not to

¶ 1. See Patents, vol. 38, Cent. Dig. § 542.

invalidate them on the ground of want of novelty. Eauchus v. Broomall, 115 U. S. 429–434, 6 Sup. Ct. 229, 29 L. Ed. 419, and other cases cited on page 10 of defendants' brief. The mechanism of the device manufactured under the last-named patent is essentially different from that of complainant, but it establishes the fact that the arrangement of the lever and arm, in the patent sued on, with reference to each other and the upright portion of the frame-piece, is old in the art. It further appears that in the patent issued to A. L. Smith, numbered 266,554, the swinging arm is made to carry the ruffling or shirring blade just as in complainant's device; i. e., the blade is rigidly attached to the arm, which thereby not only carries it, but firmly directs its course, so that it requires no additional guide. The lever and the arm of this patent, however, are pivoted on the same side of the upright portion of the frame-piece. This patent and several others, showing the device to be well-known in the prior art, are set up in the defendants' answer. Thus it is evident that claim 2 of complainant's patent depends for its patentability upon the combination set out, and, in view of the evidence, I am of the opinion that said claim, properly construed in the light of the prior art, is valid. Applying the same test to defendants' device, we find that it is in all respects identical with that of complainant's, provided it carries the ruffling-blade.

While, as above stated, complainant's blade is rigidly affixed to the swinging arm, and consequently rigidly moved and directed, defendants' ruffling-blade, as exhibited in complainant's exhibits defendants' rufflers Nos. 1, 2, 3, and 5, is an integral part of the guide; that is, the blade and the guide constitute one rigid device, which is pivotally attached to the swinging arm. Defendants' ruffler No. 4 might be said to be pivoted to the swinging arm and to carry the stud of a guide, one end of which is rigidly attached to the frame-piece, though defendants insist it, too, is supported by an extension or arm of the guide. However that may be, can it be said of defendants' rufflers that any of the ruffling-blades thereof in evidence are carried by the swinging arm? The term "carried" of complainant's patent signifies both the actuating and guiding of the blade. In defendants' rufflers, aside from the fact that the blade may be said to be attached to the guide, and not to the swinging arm, the blade is only advanced and withdrawn reciprocally by the arm. It is not directed in any sense thereby. It lacks entirely a vital element necessarily implied in the word "carried" as employed in complainant's claim 2. In view, therefore, of this fact, and of the construction to be given complainant's patent in view of the prior art, I am of the opinion that defendants' combination does not infringe said claim 2.

Claim 7 of the patent in suit covers a device for attaching, detaching, and adjusting a separating blade. It consists of a blade holder having an upright portion provided with a pair of horizontal slots, each having an open end, in combination with a frame-piece having a stud and a stud-screw fitted to said slots, and a thumb-nut permanently applied to said screws. Defendants' device has only one open slot. It has no thumb-nut. It has no horizontal slots, whereby it can be longitudinally adjusted. It is clear as daylight that it was not intended to be so adjusted. It requires a screw driver to put it in and out of posi-

tion. To my mind it lacks every feature of complainant's device, so far as claimed to be patentable, and therefore does not infringe said claim 7.

Claim 8 pertains to a series of cloth-guides, including one closed at both ends. It calls for a reciprocating ruffler-blade and an under blade or separator. By its terms the result attained is the product of the ruffler elements and the separator. It appears from the drawings of the patent in suit, figure 4, that the closed cloth-guide is located in the separator or shirring plate or blade, and not in the ruffler proper. In defendants' device the closed slot is above the ruffling-blade, and located near the upper part of the ruffler frame, and not at all related to the separator holder, thus lacking one of the essential co-operating elements of complainant's patent. In arriving at this conclusion I have followed the drawings of the patent in suit, rather than complainant's exemplifications of his patent in evidence. In view, therefore, of the foregoing, I am of the opinion that defendants' device does not infringe said claim 8.

The record and briefs go at length into certain alleged inventions and dates, which have made the case tedious, and which involve the relative veracity of the witnesses. In view of the fact that I find no infringement as aforesaid, it becomes unnecessary to determine who has told the truth (an undertaking which must be, in the absence of the observation of the witnesses, their manner of testifying, and the other tests of a personal examination, calculated to aid a court in deciding where the truth lies, a most unsatisfactory task).

The bill is dismissed for want of equity.

NATIONAL PHONOGRAPH CO. v. LAMBERT CO.

(Circuit Court, N. D. Illinois. July 29, 1903.)

No. 26,598.

1. PATENTS—INFRINGEMENT—PROCESS PATENT.
   A patent for a process is not infringed by a sale of the product.
2. SAME—SUIT FOR INFRINGEMENT—EVIDENCE.
   Proof that defendant sold an article a month or so after the issuance to complainant of a patent covering a process for making such article is not sufficient to establish that the article was made by defendant after date of the patent, in infringement of such process.
3. SAME—PROCESS—PHONOGRAPH RECORDS.
   Claim 17 of the Edison patent, No. 713,209, for a method of producing record cylinders for phonographs, is for a process, and not for a product.

In Equity. Suit for infringement of letters patent No. 713,209, for a process of duplicating phonograms, granted to Thomas A. Edison November 11, 1902. On motion for preliminary injunction.

Richard N. Dyer (William G. Beale, on the brief), for complainant.
Thomas F. Sheridan, for defendant.

KOHLSAAT, District Judge. This cause comes up on defendant's motion for a rehearing, and upon complainant's motion for a prelim-

inary injunction. Heretofore, on the like motion of complainant, the court rendered its opinion sustaining the validity of the patent, and the title thereof in complainant; granting the motion on the ground, mainly, that defendant failed in its answer to sufficiently and specifically negative the allegation of infringement. The answer contained a general allegation traversing the charge, but it seemed to me to equivocate somewhat in denying the clause thereof making specific allegations of infringement. Leave was given defendant to amend its answer in this respect, which was done. The proof, therefore, of infringement, rests entirely upon the affidavits of Taylor and Nesbeth, and the record filed as an exhibit in the case. From these it appears that Nesbeth purchased from defendant, about six weeks after the patent in suit was granted, a record marked "Pat'd Mch. 20, 1900." From Taylor's affidavit it appears that patent No. 645,920 was granted on that date. Complainant insists that this evidence is sufficient to establish the fact, for the purposes of this motion, that defendant was on December 23, 1902, manufacturing and selling records made under the process of the patent in suit. The court cannot proceed upon the presumption on this hearing that this record was made since the granting of the patent in suit. From all that appears in the record, it may have been made prior to that date. There remains to be considered, therefore, only the question as to whether defendant had the right to sell the record, even though it were made prior to the grant to complainant. The patent in suit is for a process, not for the article produced. A patent for a process is not infringed by selling the product. Welsbach Light Co. v. Union I. Light Co., 101 Fed. 131, 41 C. C. A. 255. This being so, I am of the opinion that the proof fails to make such a case of infringement as would justify the granting of a preliminary injunction herein.

The motion for a preliminary injunction is denied.

TONOPAH & SALT LAKE MIN. CO. v. TONOPAH MIN. CO. OF NEVADA.

(Circuit Court, D. Nevada. August 3, 1903.)

No. 734.

1. MINING CLAIMS—BOUNDARIES—AMENDED LOCATIONS.

The statute of Nevada (Cutting's Comp. St. 1897, §§ 210, 213) giving locators of mining claims 90 days after posting of location notice in which to file certificate of location, and also permitting them at any time thereafter to file an additional or amended certificate, in which they may change the boundaries of the claim, "provided that such relocation does not interfere with the existing rights of others," is not in conflict with any law of the United States, but is consistent with and supplementary to the federal statutes; and an amended location perfected thereunder becomes the completed location of the discoverer, and is as valid and effective to define the boundaries of the claim as an original location, as against others whose rights were subsequently initiated.

2. SAME—ADDITIONAL NAMES IN AMENDED CERTIFICATE.

The fact that a second or amended notice or certificate of location of a mining claim contains names other than those set forth in the original cannot be taken advantage of by other parties, but, as to the persons

whose names first appear therein, it may be treated as an original notice or certificate, and as a supplemental or amended notice or certificate as to those whose names appear on both.

3. SAME—REQUISITES OF AMENDED CERTIFICATE.
The law does not require that the object or purpose of making an amended certificate of location of a mining claim shall be specified therein; such certificate being effectual for all the purposes enumerated in the statute, whether mentioned in the certificate or not.

4. SAME—EXTENSION OR CHANGE OF BOUNDARIES.
The locator of a mining claim, who by an amended location extends or changes its boundaries, is not required to make any discovery of ore on the ground so added, or to take physical possession of or do assessment work thereon, but it becomes a part of the original claim, possession of which and work done on which extend to the entire location as amended.

Suit in Support of Adverse Claim to Mining Ground.

Dickson, Ellis & Ellis and Key Pittman, for complainant.

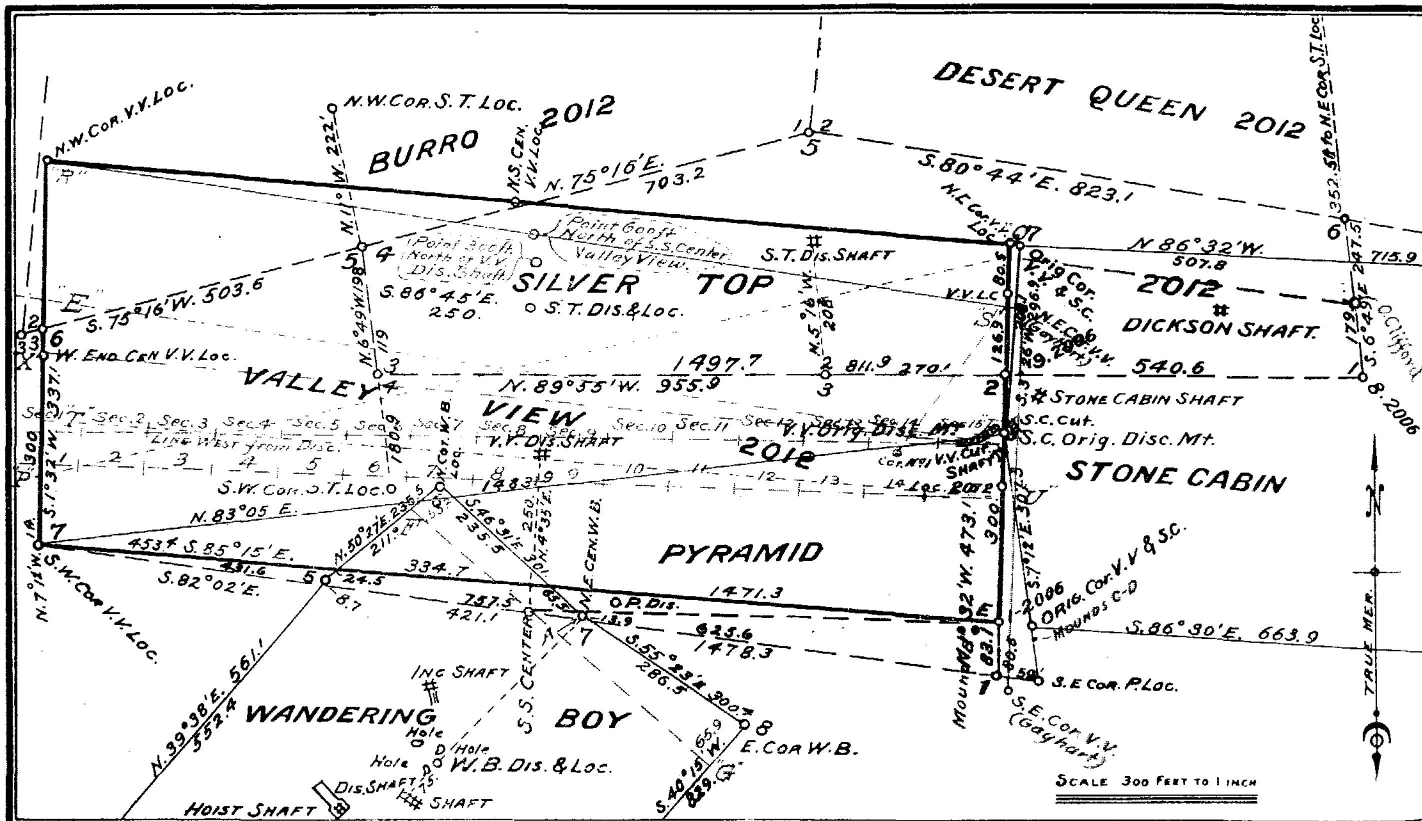
W. E. F. Deal, Kenneth M. Jackson, and Campbell, Metson & Campbell, for defendant.

HAWLEY, District Judge. This is a suit or proceeding brought under the provisions of section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430], upon an adverse claim and protest filed in the United States land office at Carson, Nev., against the application of the defendant for a patent to consolidated claim No. 2,012, embracing eight mining claims, for the purpose of determining which of the parties has the better right to the mining ground in controversy. The right and interest of the complainant to the land is based upon a location of a mining claim situate in Tonopah mining district, Nye county, Nev., known and designated as the "Pyramid"; and the right and interest of the defendant to the area in conflict is based upon the location of the mining claim known and designated as the "Valley View." A composite diagram is here inserted, which was prepared by complainant's surveyor for the purpose of showing the conflict existing, not only between the Pyramid and the Valley View in this suit (No. 734), but also between the Wandering Boy and Valley View in suit No. 735, 125 Fed. 400, and between the Stone Cabin and the Valley View and Silver Top in suit No. 736, Id. 408.

This diagram contains many red lines and marked points, inserted at the trial to illustrate and explain the testimony of the respective witnesses. Reference will be made thereto as occasion may require. (The Pyramid location overlaps the Valley View for some distance, covering ground to which complainant makes no claim.) The portion of the ground in conflict between the Pyramid and the Valley View is colored yellow, and is described in the bill of complaint as follows:

"Beginning at corner No. 3 of the Pyramid location, which is identical with corner No. 7 of survey No. 2,012, Valley View lode, and running thence along the southerly side line of the said Valley View lode as surveyed south, 82° 02' east, 1,478.3 feet, to corner No. 1 of said Valley View as surveyed; thence north, 1° 32' east, 83.1 feet, to a point on the line running from post No. 1 to post No. 2 of said alleged Valley View claim, as surveyed; thence north, 85° 15' west, 1,471.3 feet, to corner No. 3 of said Pyramid lode, the place of beginning. Area in conflict, 1.401 acres."

¶ 3. See Mines and Minerals, vol. 34, Cent. Dig. § 49.



DESERT QUEEN 2012
BURRO 2012
SILVER TOP
VALLEY VIEW 2012
STONE CABIN
PYRAMID
WANDERING BOY
DICKSON SHAFT.
STONE CABIN SHAFT
S.C. Orig. Disc. Mt.
V.V. DIS. SHAFT
S.T. DIS. SHAFT
S.T. DIS. & LOC.
W.B. DIS. & LOC.
HOIST SHAFT
INC SHAFT
E. COR W.B.
S.E. COR. P. LOC.
N.W. COR. V.V. LOC.
N.W. COR. S.T. LOC.
S.W. COR. V.V. LOC.
W. END CEN V.V. Loc.
S.W. COR. S.T. LOC.
S.S. CENTER
TRUE MER.
SCALE 300 FEET TO 1 INCH

The south line of the original location of the Valley View, as claimed by the defendant, is marked on the diagram by the broken black line drawn through the ground colored yellow from the original S. E. corner of the Valley View to the S. S. Center monument, which is 250 feet in a southerly direction from the Valley View discovery shaft, marked on the diagram, "V. V. Dis. Shaft." The red line drawn on the diagram from the point marked "N. W. Cor. V. V. Loc." to the point on the easterly end line of the Valley View, marked in red ink "N. E. Cor. V. V. Gayhart," represents the northerly side line of the Valley View in the additional and amended location of the Valley View, which will be hereafter referred to. It is proper to add, in explanation of the diagram, that the line in red east (about 30 feet) of the dark easterly end line of the Valley View represents the easterly end line of Gayhart's survey. The ground between these respective end lines was surrendered by Butler to the Stone Cabin claim (referred to in No. 736).

The contention on behalf of complainant is that the original location of the Valley View claim could legally embrace only the ground marked with dark lines on the diagram, with the corners and side center stakes and monumuents thereon, as designated, because the notice of location of the Valley View was placed in a discovery monument (marked on the diagram "V. V. Disc. M.") at the east end center of the Valley View; that, as matter of law, the locators thereof are only entitled to 300 feet in a northerly direction and 300 feet in a southerly direction therefrom, which would bring the southerly side line of the Valley View north of that portion of the Pyramid marked in yellow. In other words, that the Valley View was located in the form of a parallelogram, and is so stated in the location notice; that the location notice on the ground calls for 1,500 feet west to the west end center, and 300 feet on each side; that this must be a straight line between the discovery and the west end center, and that the side lines must conform to the line drawn through the center, that being the initial line establishing the location of the Valley View claim; that they have located a straight line as the north side line of the Valley View; that 300 feet south of that, connecting the discovery point and the west end center, is a straight line running parallel to the north side line (marked by a red line on the diagram); that the south side line of the Valley View must necessarily be a straight line, and that they would not be allowed to place a side center monument outside of the boundaries of their claim, and outside of 300 feet from the center of their claim; that at the date of the Pyramid location the ground marked in yellow was vacant, unappropriated public land, and was subject to location by the grantors of complainant. The defendant claims that the dark straight line on the southerly side of the portion marked in yellow is the southerly side line of the Valley View location. Defendant's contention in this regard will be best shown by a review of the evidence.

There are three independent suits between the same parties. They were tried separately, with the understanding and agreement between counsel that any testimony taken in either which was applicable to either or both of the other suits might be considered with like force

and effect as if given therein. The arguments of counsel were made after all the testimony was taken, and the three cases were argued together. The cases are not identical in all respects, either in the facts or the principles of law applicable thereto, but there is much in common between them. It would, perhaps, have been better if the cases had been consolidated for trial, but the agreements and stipulations of counsel have accomplished the same end. Separate opinions will, however, be prepared in each suit, in order to present the legal views which bear upon the conflict as made in each case; but as to matters common to all they will not be repeated, the reference made thereto in either to be applied to all.

In all of the three cases the facts admitted and proven clearly show that the respective locators of the mining claims in controversy (except as noted in the opinions) had fully complied with the mining laws in every respect, and the only point involved in each case is in establishing the boundaries of the respective claims, and the extent of the surface ground to which the owners of each claim are entitled. To do this it was necessary to prove each and every step taken by the original locators, every monument built by them, and where placed, every peg driven in the ground, and every stake placed in the monuments, with the marks thereon. A mass of testimony was taken upon these points, the details of which need not be specially referred to.

In considering the methods adopted of building monuments, posting notices, defining corners and directions of lines, etc., we must keep in mind the rules universally recognized as to the necessity and duty of applying to such acts of the pioneer locators the same liberal construction that was given by this court in Book v. Justice M. Co., 58 Fed. 106, 114, 115, and by the Court of Appeals in this circuit in Walton v. Wild Goose M. Co., 123 Fed. 209, and remember that we are dealing with locations made in a new, unknown, and previously undiscovered mining district, without any surveying instruments, or other means at hand to secure absolute accuracy as to courses and distances in marking the lines and defining the boundaries, etc. Another rule to be applied in each of the three cases is that, when a valid location of a mining claim is once made, it vests in the locator and his successors in interest the right of possession thereto, which right cannot be divested by the obliteration or removal, without the fault of the locator or his successor in interest, of the stakes and monuments marking its boundaries, or the obliteration or removal from the claim of the location notice posted thereon. The nature and character of these suits, and the objects and purposes to be accomplished by such proceedings, were explained and discussed at length by this court in Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936, and the principles therein announced are applicable to each of the three cases.

The eight claims in the application for a patent embrace the original Butler group of mining claims, discovered and located by J. L. Butler, and were the first locations made in what is now known as the "Tonopah Mining District." Butler went to Tonopah May 19, 1900, accompanied by his wife, on a prospecting trip. After considerable search, he discovered mineral-bearing rock, the value and richness of which were to him unknown. He left Tonopah May 27th, and returned to

his home at Belmont, distant from Tonopah about 60 miles. At the time he left he took samples of ore from the lode he had discovered, leaving a portion of said samples with assayers at Klondike, in Esmeralda county, and others with W. C. Gayhart at Austin, Nev. The returns made of the assays taken showed the ore to be of great value. He returned to Tonopah about August 25, 1900, and on this trip posted notices of location on the eight claims, the Valley View being the seventh claim located. The original notice, with the certificate of location hereafter referred to, was found by the surveyor, Charles P. Brooks, in a tin can in the monument marked on the diagram "V. V. Orig. Dis. Mt.," on or about the 11th day of May, 1902. This notice of location was written with a pencil, and when introduced was weatherworn and difficult to make out. As near as it could be deciphered, it reads as follows:

"Valley View Mine Location Notice.

"Notice that J. L. Butler, the undersigned, on this 30 August, 1900, locates and claims for mining purposes 1,500 by 600 feet on this lode or vein containing gold, silver and precious minerals commencing at this notice and monument and running westerly along the side of the south hill to another monument making 1,500 feet from location notice, also 300 feet on each side of center of location for surface ground, and all dips, stratas, or other minerals therein; this mine shows good strong lode * * * Desert Queen lode on 27 day of August by J. L. Butler will on the southeast corner overlap or touch part of the surface of the Valley View ground; the Burro mine will nearly if not quite touch the northwest corner of the Valley View also. No ground claimed south of this mine. It is situated most southerly of all the mines in open country on south hill in view of the valley * * * and passed through the mountain about five miles south of the Tonopah Springs just at the foothills of Butler Butte, fifteen miles east from Lone Mountain foothills of Montezuma Valley * * * and is supposed to be in Nye County, State of Nevada. J. L. Butler, 1,500 feet."

On the 8th day of October, 1900, James L. Butler, accompanied by Mr. Oddie and Mr. W. Brougher, returned to Tonopah with two loads of timber to be used as stakes in constructing the monuments, and marking and defining the boundaries of the mining claims which he had previously located. Between the 1st and 24th of November, 1900, monuments were erected on the lines and corners of the original location of the Valley View, and the discovery work done upon the claim. On the 24th of November, Butler filed in the clerk's office of Nye county his certificate of location of the Valley View, which was placed in a tin can, and found by Brooks, as before stated.

Mr. Gayhart on or about the 20th of March, 1901, made a survey of the eight claims. With respect to the Valley View location, as surveyed by him, he states that after the survey he prepared the amended certificate of location, using a printed form, and to this added a tissue page on thin paper, with the field notes typewritten thereon, and the names of the amending locators; that he made this in triplicate, "one to be posted on the claim, or put in the mound in the location monument, * * * and one that I retained, and still have in my possession, and one that was placed on record"; that this amended certificate of location was posted or put in the monument at the east end center of the claim as designated by his survey (marked "Loc. 2012" on the diagram). The record shows that monuments were built

at the time designating the corners and side and end line centers at the points designated in the amended certificate of location. This certificate reads as follows:

"Additional and Amended Certificate of Location.

"Know all men by these presents: That the undersigned, J. L. Butler, W. Brougher, T. L. Oddie, Alice H. Gayhart and B. F. Higgs, citizens of the United States, have this 20th day of March, 1901, amended, located and claimed, and by these presents do amend, locate and claim, by right of the original discovery, and the location heretofore made, such deeds, transfers or conveyances as may have been made, and this amended location certificate made, filed and recorded as provided by federal law and by the laws of the State of Nevada now in force, and local customs and rules, fifteen hundred linear feet, on this lode, vein, ledge or deposit, bearing gold, silver, lead, copper and other valuable minerals, with all its dips, angles and variations, as allowed by law, together with 300 feet on each side of the middle of said vein at the surface, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim.

"This said lode was originally located by J. L. Butler on the 30th day of August, 1900, and named the Valley View Lode, by which name it is found of record in Book D of Mining Notices, pages 324 and 325, Nye County, Nevada, Records. The name of this lode is Valley View. The date of this amended location is March 20, 1901. The name or names of the amending locators are, J. L. Butler, W. Brougher, T. L. Oddie, Alice H. Gayhart and B. F. Higgs. From the discovery point, 690 feet easterly from the discovery shaft, there is claimed by us, 1,500 feet in a westerly direction along the course of said lode or vein. The general course of this vein is east and west. The discovery shaft or its equivalent is situated upon the claim 690 feet west from the east end center, and exposes the ledge at a depth of fully ten feet; its dimensions are 12 feet long by 3 feet wide by 10 feet deep.

"This further additional and amended certificate of location is made and filed without waiver of any previously acquired and existing rights in and to said mining claim; but for the purpose of correcting any errors or omissions in the original location, or location certificate, description or record; and for the purpose of securing the benefits of the Act of the Legislature of the State of Nevada, approved March 16, 1897, and the amendments thereto, and of conforming to the requirements of law. The amending locators hereto are the original locators or lawful grantees deriving title and right of possession from them, through deeds of conveyance.

"This said location is described by metes and bounds as follows, to wit:

Feet. Commencing at Cor. No. 1. On the southeast slope of Mt. Oddie. Sec. Cor. common to Secs. 25, 26, 35 and 36, T. 3 N., R. 42 E. M. D. B. & M. bears N. 17° 10' E., at the distance of 4,345 feet. A monument of earth and rock over three feet high with stake, marked 'N. E. Cor. Valley View.'

Thence S. 1° 30' W.

600 To Cor. No. 2, intersecting south side line 2 to 3 Silver Top lode. A monument of earth and rock over three feet high with stake, marked 'S. E. Cor. Valley View.'

Thence N. 82° 10' W.

1,500 To Cor. No. 3. A monument of earth and rock over three feet high with stake, marked 'S. W. Cor. Valley View.'

Thence N. 1° 30' E.

600 To Cor. No. 4, intersecting south side line West End lode, and south side line Burro lode. Near south side of Main Street between Brougher and Oddie Avenues. A monument of earth and rock over three feet high with stake, marked 'N. W. Cor. Valley View lode.'

Thence S. 82° 10' E.

1,500 To Cor. No. 1, the place of beginning, intersecting west end line of Silver Top lode and south side line of Burro lode.

All courses from the true meridian, Variation 16° 20' East."

The owners of the said Valley View lode, and the interests owned by them in said lode, are also set forth in this certificate. It was—

"Filed for record Apr. 16, 1901 at 9:45 A. M. T. F. Egan, Dist. Recorder. Recorded at request of J. L. Butler May 1, 1901 at 20 min. past 5 P. M. in Book E. of Ming. Rec. pages 29/0/1, Nye County, Nevada, Records, W. Brougher, Recorder."

It is admitted that the ground described in this additional and amended certificate of location does not include any more ground than the law allows. The location thus made was in the form of a parallelogram 1,500 feet in length and 600 feet in width, and a straight line drawn from the end centers does not exceed 300 feet from either the north or south side lines thereof. The northerly side line of the Valley View in the application for a patent does not follow the lines of either the original location or the amended certificate, being further drawn down in order to avoid any conflict with other locations. This was done by agreement of the parties interested in that portion of the ground.

The whole case, so far as the legal questions have any bearing, depends upon the validity or invalidity, and the interpretation and effect, of this amended certificate of location. The Pyramid notice of location bears date May 24, 1902, and the certificate of location is dated August 19, 1902, and recorded August 21, 1902. Both the notice and the certificate of location were signed, "Tonopah and Salt Lake Mining Company, by J. M. Healy, Supt."

It will be noticed that the original location of the Valley View, the certificate of location, and the additional and amended certificate of location were long prior in point of time to the location of the Pyramid. The right of the original locators to change their original location, so long as such change does not interfere with the existing rights of others acquired previous to such change, is unquestioned. Erhardt v. Boaro, 113 U. S. 527, 533–536, 5 Sup. Ct. 560, 28 L. Ed. 1113; McEvoy v. Hyman (C. C.) 25 Fed. 596, 600; Shoshone M. Co. v. Rutter, 87 Fed. 801, 806, 31 C. C. A. 223; Thompson v. Spray, 72 Cal. 528, 529, 14 Pac. 182; Strepey v. Stark, 7 Colo. 614, 620, 5 Pac. 111; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109; Duncan v. Fulton, 15 Colo. App. 140, 148, 61 Pac. 244; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, and numerous authorities there cited; Morrison v. Regan (Idaho) 67 Pac. 956; 1 Lind. on Mines (2d Ed.) § 396 et seq.

In several of the Pacific Coast states, statutes have been enacted, supplemental to and consistent with the laws of the United States, clearly defining the rights and duties of the miners in making and perfecting their locations, and recording the same. The statute of this state approved March 16, 1897 (Laws Nev. 1897, p. 103, c. 89; Comp. Laws 1900, § 210), gives 90 days after the date of posting the location notice in which to file a certificate of location, which must be recorded, and provides what it shall contain. In another section it provides for the filing of an additional or amended certificate of location. This section reads as follows:

"If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was de-

fective, erroneous, or that the requirements of the law had not been complied with before filing; or shall be desirous of changing his surface boundaries or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act: provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such titles as he or they may have held under previous location." Cutting's Comp. Laws 1900, § 213.

The courts, previous to the enactment of statutes of this character, held that the locator, after posting his notice of location, should be allowed "a reasonable time" within which to perfect his location. 1 Snyder on Mines, § 205, and authorities there cited; Doe v. Waterloo (C. C.) 55 Fed. 11, 15; Id., 70 Fed. 455, 457, 458, 17 C. C. A. 190; Gleeson v. Martin White M. Co., 13 Nev. 442, 460. One of the objects of the state statute was evidently to make this time certain and definite. The Legislature of this state, in enacting this statute, recognized that difficulties are always liable to present themselves to the enterprising prospector, especially in districts where no actual development has been made, to determine with accuracy and precision the course of the ledge which he has discovered, its apex and width. The statute gives to the locator of the lode 90 days to take such bearings as he can to guide him in marking and defining his boundaries, and further provides that if he discovers that he has made mistakes, has taken up more or less ground than he is entitled to, or from any cause that his location is defective or erroneous, he may relocate or change his boundaries, provided the same "does not interfere with the existing rights of others." It gives the original locator the full measure of the rights which the mining laws permit him to acquire as the reward of his energy in discovering the mineral lode or vein. It has always been the policy of the government to encourage its citizens in searching for, discovering, and developing the mineral resources of the country; and this policy can always be best subserved by permitting the discoverer to rectify and readjust his lines, whenever from any cause he desires to do so, provided he does not interfere with or impair "the intervening rights of others." There is no statute, law, rule, or regulation, state or national, which denies this right. The amended certificate of location, when made, becomes the completed location of the discoverer, and is just as valid as if it had been made in the first instance. It necessarily follows that parties coming upon the mining claim and ground described in the amended certificate of location, subsequent to the perfection of such amended location in compliance with the mining laws, can acquire no rights, because they have not been injured, and have no right to complain.

The amended certificate of location in the present case contains the names of several persons, as locators, who were shown by the evidence to have legally acquired interests therein after the original location had been made, and before the amended certificate was prepared or filed. The rule is that, where the second or amended notice or certificate of location contains names other than those set forth in the original, it cannot be taken advantage of by other parties. It may be

treated as an original notice as to the persons whose names do not appear on the first, and as a supplemental or amended notice as to those whose names appear on both. Lind. on Mines (2d Ed.) § 398; Thompson v. Spray, 72 Cal. 528, 529, 14 Pac. 182. The law does not require that the object or purpose of making the amended certificate shall be specified therein. A general statement that it is made to cure errors or defects will be sufficient, the general rule upon this subject being that the filing of such certificate is effectual for all the purposes enumerated in the statute, whether such purposes are mentioned in the certificate or not. Lind. on Mines (2d Ed.) § 398; Johnson v. Young, 18 Colo. 625, 629, 34 Pac. 173.

One of the reasons testified to at the trial was that the original north side line of the Valley View took in the Silver Top discovery shaft, and also interfered with other previous locations. Another was to straighten up the south line. In making the change from the original marking of the northerly side line, the northeast corner of the Valley View was dropped down in a southerly direction along the eastern end line about 83 feet, at which point a new monument and stake were placed to mark the northeast corner of the amended location of the Valley View. A monument and stake were placed 300 feet southerly from the northeast corner to designate the east end center of the Valley View, marked on the diagram "Loc. 2012," and are about 83 feet south of the "V. V. Orig. Disc. Mt." From the point marked "Loc. 2012" to the southeast corner of the Valley View, as shown on the diagram, is 300 feet. The location of the Valley View under the amended certificate of location was and is valid, as against the Pyramid location, the owner of which had not at that time acquired any right whatever to the ground in controversy. At the time the Pyramid location was made, the complainant knew where the monument marking the south side center of the Valley View was. It knew that a monument was erected at the southwest corner (No. 7), V. V. location, and that a similar monument was erected at the southeast corner of the amended location (under the Gayhart survey), and must have known—at least must be held to have had knowledge—of the monument and stake on the east side center where the amended location was put.

When Mr. Brooks, who had been employed by the complainant to find certain facts which it believed would tend to support its theory, went to the "V. V. Orig. Disc. Mt.," he was not looking for any amended certificate of location, or any new monument. He was doing just what he had been employed to do—trying to find where the original notice and the first certificate of location were posted. He found them at the "V. V. Orig. Disc. Mt." On cross-examination Mr. Brooks was asked whether he did not find an amended notice of location. He answered:

"I am trying to recall exactly the point where I found that. It was a very windy day, and in going down over the hill to that notice of location I did find what purported to be an amended notice of location on the ground near that monument. It appeared as though the wind had blown it out. Q. Did you examine that? A. Yes. Q. How did that compare or correspond with the original, from your examination? A. It appeared to correspond, claimed some ground from the same point, * * * as it appeared to me.

Q. Didn't that original location speak of a discovery shaft 650 feet from the west end of the Valley View? A. My remembrance of it is that it did. I have not read it for a long time. Q. And did it not then claim a direct line directly east to the center stake—directly east on a direct line to the middle center stake of the Valley View ground?"

Here objections were made, it appearing that the witness could not remember what was in that notice.

It is deemed safe to say that this notice was the amended certificate of location. It was evidently not deemed to be a necessary link in the chain of evidence tending to support complainant's theory of the case, or it would have been more carefully scrutinized by Mr. Brooks, for his entire testimony showed to the court that he was not only a competent surveyor and engineer, but was at all times faithful in looking after the interest of his employer; making the most of everything he could find or see in its favor, and ignoring everything that militated against it. He marked on his map such points only as he had been requested to do by his employer. Other references to his testimony will explain this matter. After his testimony about the notices of location and amended notice, the following questions and answers appear (in his cross-examination):

"Q. Was there not a monument on the ground south of that which you have indicated on this map—the location monument—some 80 feet? A. There was a post there; yes, sir. Q. Then, sir, will you kindly state to the court why, in making this map, when you made a survey of the Valley View ground, you didn't indicate that? A. Simply, I made that map to illustrate the conflict between the Pyramid and Valley View lodes. I put on nothing except what related to that ground colored yellow; that is, primarily to that ground. There are a lot of workings and monuments on the white portion of the Valley View not shown—I didn't attempt to show. * * * Q. Will you kindly take your pencil and place on this map where you found that post and what was on it? * * * A. Loc. 2,012. * * * Q. Now, Mr. Brooks, did you not find a monument—a center south monument of the Valley View—the side center? A. Yes; it was side center. Q. Is that shown on your map? A. No, sir; it is not. Q. Will you kindly put that on your map? A. I thought I had a record of it here, but I don't see it. Q. To the best of your recollection, mark it where you think it is. A. I think it is 756 feet from the corner where the numbers are. (Marking on map.) I will mark that side center. Q. Mr. Brooks, what were the marks upon that monument which you have marked here 'S. S. Center'? A. I don't know as I can give you those marks. I don't remember them. I don't remember without looking at my notes and refreshing my recollection of having seen that side monument when I was out there, so I am unable to describe it. I put it on there from the patent—from the record. Q. Didn't you see any monument there at all? A. I don't remember it at this time. If I did, I made no memorandum of it. I was taking in the corners, knowing that the line was straight between the corners. Q. You ran out the south line, didn't you? A. I did—a portion of it—not directly on the line. My lines were run by traverses connecting various points on the claim. Q. Then that is the reason why you don't remember now having seen it while you were there, but you knew that there was a south side center monument described in the application for patent? A. Yes. Q. And you didn't look for it? A. I didn't take special pains looking for it, because in the patent application the line was straight from 7 to 1, and practically one course and one distance, and I was connecting the exterior boundaries of the property rather than the interior posts. Q. But you were satisfied that 756 feet from the southwest corner of that line was where that monument was? A. I was satisfied from the observation that I had made of those surveys; yes, sir. Q. And you answered my question before that the reason you didn't mark these other matters was that

you were simply surveying for this yellow strip of ground which was the territory in conflict. That is the fact, is it? A. Yes, sir. Q. Well, didn't the fact that there was a monument—a south side center monument—enter into your calculations in relation to the conflict? A. Not particularly. Having the extreme ends of that line, knowing it to be the straight line, I didn't take any special pains to hunt up the intermediate monuments."

Mr. Brooks, at the time he found the original notice of location and the original certificate of location of the Valley View, was accompanied by Mr. Wilson, a surveyor and mining engineer, also in the employ of the complainant; and from the testimony it appeared that he had abstracted the notices from the tin can, and appropriated the same for his own uses and purposes, and, being in court, he was called as a witness by the defendant, and admitted, under oath, that he took possession of these notices "by his own authority," and carried them away to Salt Lake, and delivered the same to the attorneys for complainant for the purposes of presenting them to the court as the best evidence in regard to where they were posted on the ground, "regardless of any surveys or contests or protests," and because he thought "they were safer" in his possession than they were or would be if left where they were found. "I was acting for the Salt Lake & Tonopah Company."

The broad contention of complainant, as made in all the three cases, is that the locators of the Valley View must be held to the lines of its original location; that they acquired no new rights in their amended location, because it included ground not within its original boundaries, and they did not make any relocation of such new territory, and did no annual assessment work thereon, and did not make any discovery of mineral therein, and were never in the actual possession thereof. The law does not require that such things should be done in order to make the claim, as described in the amended certificate of location, valid to the full extent of the boundaries therein described, as against any subsequent locator of any portion of said ground. If such is not the true intent and meaning of the state statute, it has no meaning, and ought never to have been passed. The object of the state statute has already been fully discussed. It was to protect, not to deceive, the locator. It was to enable the miner to make good the developments he had made—the assessment work he had done under his original location—and at the same time include other ground not embraced in his original notice or first certificate of location, so as to make his lines conform to the directions which his labor, time, and expense had indicated to him as the true course of the lode. In making the additional amended notice, it was not necessary for him to take physical possession of the additional ground, sink new shafts, or make any new discoveries of mineral. The fact is that, before the amended location was made, the owners of the Valley View had sunk shafts and run cuts at an expense of thousands of dollars at different points from the point marked "V. V. Orig. Disc. Mt." in the direction of, and within a few feet of, the point marked "S. S. Center," and had discovered mineral in nearly all of them; and the complainant, in building the monument on the yellow ground at the point marked "P. Dis.," used mineral rock taken from one of these near-by shafts or cuts on the Valley View claim.

In Duncan v. Fulton, supra, the court, in discussing the question as to the rights of miners under different certificates of location made under the provisions of the state statute, among other things, said:

"The question of good faith is an important consideration, because that is the real basis of the rule which all the courts, as we observe them, have adopted in construing these mining statutes—liberality of construction. * * * Under the specific terms of our statute, the boundaries need not be the same. The miner is given the absolute right to change his boundaries to take in overlapping and abandoned claims, or other territory which has not been located or occupied. It is to the end that the prospector may cure any defects in his location, and conserve and protect the results of his industry, that the authority is given. For this reason, * * * the original [certificate] and the additional one ought to be admitted; and, we believe, if therefrom and thereby, and not necessarily from one alone, but from either one or both together, the necessary statutory steps can be shown to have been taken, the miner thereby establishes an unimpeachable title as against the subsequent claimant. In other words, we believe the law to be that though neither one, as a whole, may be absolutely correct and in perfect conformity to the statute, yet if in both and from both there may be found and deduced all that the law requires, the statute being otherwise complied with, the miner's record is complete, and his title is perfect."

See, also, Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109.

From all the facts disclosed by the record in this case, and the principles of law applicable thereto, I am of opinion that complainant, at the time it made its location of the Pyramid claim and entered upon the ground marked in yellow on the diagram, was a mere trespasser upon the ground then legally possessed by the defendant by virtue of the rights acquired by it to the Valley View mining claim.

Let a decree be entered in accordance with the views herein expressed in favor of the defendant, and for its costs.

TONOPAH & SALT LAKE MIN. CO. v. TONOPAH MIN. CO. OF NEVADA.

(Circuit Court, D. Nevada. August 3, 1903.)

No. 735.

1. MINING CLAIMS — CONFLICTING BOUNDARIES — RECOGNITION OF LINE AS BOUNDARY.

The locator of a mining claim ran his end line across the side line of a prior claim in order to make his end lines parallel, but with the intention, as declared in his certificate of location, not to claim anything within the lines of the other claim. On a subsequent survey of the latter its side line was moved further outward, over the newer claim, and so marked by monuments, and an amended certificate of location was filed to conform thereto. Later the new claim was also surveyed by the same surveyor, one purpose being to establish the boundary between the two claims; and the locator, as shown by a preponderance of the evidence, recognized the side line of the older claim, as established by the survey, as the true boundary, and claimed nothing beyond it. *Held*, that it was competent for the parties to adopt such line as the boundary between them, whether the correct one or not, and that such action was binding upon them and their subsequent grantees.

Suit in Support of Adverse Claim to Mining Ground.

Dickson, Ellis & Ellis and Key Pittman, for complainant.

W. E. F. Deal, Kenneth M. Jackson, and Campbell, Metson & Campbell, for defendant.

HAWLEY, District Judge. This suit is brought in support of an adverse claim made by complainant, as the owner of the Wandering Boy mining claim, against the application for a patent made by the defendant to the Butler group of mines, situate in Tonopah mining district, Nye county, Nev., and is one of the three cases referred to in the opinion in No. 734 (125 Fed. 389). It will be noticed from an examination of the diagram inserted in that case that the Wandering Boy, as located, overlaps the Valley View in the form of a triangle. The complainant makes no claim whatever to any part of the ground within this triangle that is situated north of the ground marked in yellow on the diagram. The dispute between the parties is confined to that portion in yellow situate between the northeasterly and southwesterly side line and the northeasterly end line of the Wandering Boy. It is described in the bill of complaint as follows:

"Beginning at a point which is north, 55° 23' west, 286.5 feet distant from corner No. 8 of said Wandering Boy claim, and running thence on a true course north, 55° 23' west, 13.9 feet, to corner No. 7 of said Wandering Boy claim; thence north, 46° 31' west, 301 feet, to corner No. 6 of said Wandering Boy claim; thence south, 50° 27' west, 235.5 feet, to corner No. 5 of said Wandering Boy claim; thence south, 39° 38' west, 8.7 feet, to a point on the southerly side line of said alleged Valley View claim, as surveyed for patent; thence south, 82° 02' east, 421.1 feet, to the place of beginning; containing 0.872 acres."

The side lines of the Wandering Boy, marked in black on the diagram, measure in length 1,553 feet. Deducting the excess over 1,500 feet therefrom brings the northeasterly end line down to the line in red from F to G on the diagram.

The contention of complainant is substantially the same as made in the Pyramid Case with reference to the dropping of the east end line southerly 83 feet; the difference in the cases being that the Wandering Boy was located, and certificate of location recorded, prior to the recording of the amended location certificate of the Valley View, instead of subsequent, as in the case of the Pyramid in No. 734.

The Wandering Boy was located September 9, 1900, by Edward Clifford, Jr. A notice was posted on the ground by the Cliffords. Mr. Butler thereafter called their attention to the fact that the notice was defective, and, among other things, suggested they had not given any name to the claim. They requested him to name it. He said Ed had often expressed great pleasure in listening to a famous song: "I will name it the Wandering Boy to remind him of it." This original notice of location was not introduced, but the certificate of location was. It bears date December 5, 1900, and was recorded on that date. It refers to the original location, and states, in giving the description, "This claim joins the south side line of the Valley View claim." It contains the further statement that "the north corner of said claim overlaps the Valley View claim; said ground lying within the south side line of the Valley View claim, which is included within this Wandering Boy claim, to belong to the Valley View." In an additional and amended certificate of location, dated May 29, 1901, and recorded July 7, 1901, defining the Wandering Boy by metes and

bounds, is the statement "intersects south line of Valley View lode at its middle point."

The controversy in this case is principally one of fact. It depends upon the proper solution of the question as to where the south side line of the Valley View was at the time the Wandering Boy was located, and where it was at the time the owner of the Wandering Boy filed the additional and amended certificate of location. The lines in relation to these points are sharply drawn. There is upon some of the points a direct conflict in the evidence, which is somewhat difficult to unravel or make clear, and there are other points in connection therewith which are undisputed. There is in this case, as well as in case No. 736 (125 Fed. 408), a long history as to the manner in which the early locations were made in the Tonopah mining district. Conspicuously in the foreground stands the original discoverer, J. L. Butler, who was the active and moving spirit that directed all the locations involved in these two suits, as well as other locations made in the immediate vicinity. After Butler had made the discoveries mentioned in case No. 734, he notified the Cliffords thereof, and suggested that they ought to go to the new district and locate some mining claims. They had no knowledge of mining, but had faith in Butler as a friend, appreciated his friendship, and acted upon his suggestion. The complainant's case rests entirely upon the testimony of Edward Clifford, Sr., and Edward Clifford, Jr., from whom complainant derives title. Prior to any statement or review of their testimony, it is deemed proper to say that the Cliffords, father and son, had lived upon a ranch for several years; that they had no experience in mining; that their memory and recollections of the events that transpired at Tonopah were not clear upon many points; that they often became confused in giving their testimony (they were not, however, the only witnesses that became confused); that they evidently had but little experience as witnesses, and were unable at all times to comprehend the questions asked by the respective counsel, and were easily led into making answers contradictory of their first statements. They were called and recalled, examined and re-examined and cross-questioned, to explain their testimony, and at times lost their bearings. It is difficult to review such testimony.

Mr. Edward Clifford, Sr., testified: That after his arrival with his son at Tonopah in September, 1900, he found where Mr. Butler had made some locations, and went prospecting around to see if he could not find something—some ground that he could take up. That he went upon what is called the "Valley View Ground," and thought he would take the course of the Valley View ledge, and would locate across the cañon. He told his son where that ledge crossed through a cañon, and went off with a hammer in his hand, breaking rock around, and went across what is called "Gold Hill" now, and came right down and found some rock cropping out, and that his son located the claim known as the Wandering Boy. That they first intended to locate the claim east and west, parallel with the Valley View. That he knew at the time of the location of the Wandering Boy where the southwest and southeast corners of the Valley View were, and saw the monument marking the south side center of the Valley View,

that after making the location he had it surveyed by W. C. Gayhart. He and his son Edward and a man named Roddick assisted, and Gayhart had Mr. Egan and Mr. Miles assisting him. Upon his cross-examination he was asked:

"Q. For what purpose was the survey made? A. My monuments on the claim was knocked down right along. Every time I would go over the ground I would find monuments knocked down, and I spoke to the boys that we ought to have it surveyed. So my son went and seen Mr. Gayhart, and got him for to survey the ground. Q. Wasn't it surveyed for the purpose of establishing the line between the Wandering Boy and the Valley View? A. I suppose it was. Q. When Mr. Gayhart surveyed it, had your monuments then been knocked down—the ones which you erected prior to that time? A. Yes, sir; I put them up many times. Q. At the time of the survey, had they been knocked down? * * * A. Well, now, I could not say whether they were down then or not. * * * Q. I come back now to where we were talking about yourself and Mr. Butler at the time of the Gayhart survey. You didn't intend to claim any of the Valley View claim as it was located at that time, but you wanted all that was south of the Valley View. That is a fact? A. Yes, sir. Q. And that is because Mr. Butler and you were friendly, and you wanted to adjust the lines between your mining claims? A. Yes. Q. And that was the only reason of the survey? A. No, sir; that was not the reason of the survey, altogether. If my monuments had not been knocked down, we would not have had it surveyed at all. Q. Having it surveyed, that was what you wanted Mr. Gayhart to do—to establish the line as it existed between you and the Valley View, as it existed then? A. To establish the whole line, clean around the claim. Q. And you all the time didn't want any of the claim that was at that time within the lines of the Valley View, did you? A. I wanted nothing belonging to the Valley View. I didn't want any ground belonging to the Valley View."

It will thus be seen that the object of this survey was to establish the line between the Wandering Boy and the Valley View, that at the time of making this survey it was his intention to establish the south line of the Valley View as the northerly boundary of the Wandering Boy, that they understood at the time of fixing the boundaries that Mr. Gayhart had surveyed the Valley View ground, and they did not intend to infringe upon any portion of the Valley View claim.

The contention of counsel presents the question whether the Cliffords meant the line first established by Butler before, or the line established after, the easterly end line of the Valley View was dropped down, as stated in the former opinion, No. 734. On the redirect examination of Edward Clifford, Sr., the counsel for complainant brought out the evidence upon which it relies to establish its contention.

"Q. When you say you didn't want any ground belonging to the Valley View, you mean the ground originally located by Mr. Butler, or the ground surveyed by Mr. Gayhart? A. The ground that was originally located by Mr. Butler. Q. When Mr. Gayhart got through surveying the Valley View, was there any difference between it and the way it was when Mr. Butler located it? A. Yes, sir. Q. What was the difference? A. The northeast corner of the Valley View was originally downhill, and the southeast corner of the Valley View was run down a hill. * * * south. I could not exactly state how much, but quite a ways. Q. Did you intend to give any of that ground that he had run down the hill up to the Valley View? A. No, sir. * * * Q. Now, Mr. Clifford, at the time that Mr. Gayhart was surveying the Wandering Boy claim did you then know that he had dropped the south line of the Valley View to the south? A. I did not."

He then testified as to the details, stepping off the ground from point to point. Upon his cross-examination, touching these details, he was asked:

"Q. But before you put your monuments up, the Valley View had their monuments up, didn't they? A. Yes. Q. But at the time you did the stepping the Valley View didn't have their monuments up? A. No, sir. * * * Q. Is it not a fact that, at the time the Gayhart survey was made, you knew that prior to that time Mr. Gayhart had surveyed the Valley View claim? A. Well, I heard it. Q. You had heard that it had been surveyed before this? A. Yes. Q. And you had heard that the corners had been dropped, hadn't you? A. No, sir; I don't think I had. Q. Didn't you know that? A. No, sir; I didn't know that the corners had been dropped. Q. At any rate, you did erect monuments in March, 1901, on the line of the Gayhart survey, which was made for you and under your pay, did you not? * * * A. Yes. Q. Mr. Gayhart put down pins or pegs in the earth where the monuments should be erected, and you, or people in your employ, erected those monuments where Mr. Gayhart put the pins, didn't they? A. Yes."

On redirect examination he testified that the first knowledge he had that the east end line of the Valley View had been moved down was "when I got these maps from Mr. Gayhart." Upon his recross-examination, referring to his testimony on behalf of complainant, he was asked: "Q. Did you see any indication that the south center point of the Valley View side line had been shifted also? A. No, sir."

As stated in the opinion in No. 734, from the start to the finish of these cases the testimony virtually unites upon the point that the south side center monument of the Valley View remained substantially at the point where first erected.

Edward Clifford, Jr., testified that he went with his father to Tonopah.

"We got into Tonopah, I think, between the 4th and 9th day of September. We found where Mr. Butler had located some mines there, and we prospected around to see if we couldn't find some. So we made one location, now called the 'Wandering Boy.'" That he located and built the original monuments on the Wandering Boy. That afterwards his father had other monuments built around the lines of this location. "I don't know what his object was in placing them there. * * * Q. Do you know whether or not your father tried to find the south line of the Valley View claim, or where it would be? A. Yes, sir; I believe he did. Q. Did you see him attempting to do that? A. Yes, sir. Q. Well, what did he do? * * * A. I think he stepped off from the west end line of the Valley View. Q. Do you know when the original monuments were put up on the Wandering Boy lode? A. Yes, sir; they were put up on the 9th of September. Q. Do you know when the claim was monumented by marking the boundaries? A. Within the ninety days. * * * We had ninety days to do our work and erect our monuments. Q. At that time were the monuments up on the Valley View? A. Yes, sir; I believe they were. I think they were. Q. Do you remember when the Gayhart survey took place? A. Yes, sir. Q. Do you know whether or not, according to Mr. Gayhart's survey, the Valley View claim differed from what it was originally located? A. No, sir; I do not."

He testified upon his cross-examination that he did not pay much attention to the monuments of either the Valley View or the Wandering Boy; that he secured Mr. Oddie to make out the certificate of location—the first paper filed outside of the location notice—but could not say whether he signed it or not.

"Q. Mr. Clifford, did you know the monuments of the Valley View ground prior to March, 1901—before March, 1901? A. Yes, sir; some of them. Q.

You had helped Mr. Knapp, had you not, run some lines there? A. Yes, sir; I did. Q. Now, you were there with Mr. Knapp in January, 1901, was it not? A. Yes, sir; I believe it was. * * * Q. In the Knapp survey, did you not start at what was termed the southwest corner of the Valley View claim, and run east? A. Well, to tell you the truth, I could not say where we did start from. Q. Can you tell me whether or not in that survey which you know or was pointed out to you to be the south side center line of the Valley View? A. No, sir. Q. You don't know much about the boundaries? A. No; I do not. Q. And you don't know much about the mine, the Wandering Boy or the Valley View, either? A. No. Q. You didn't pay any particular attention to it? A. No, sir; I did not."

On behalf of defendant a number of witnesses were introduced. Mr. Knapp, among other things, testified that he first took the position of the south center side line of the Valley View on January 26, 1901, accompanied by Edward Clifford, Jr., who at that time pointed out to him "the north end line of the Wandering Boy, and the south center side line of the Valley View"; that he had occasion to examine the south side center of the Valley View recently, and found the monument in the same place it was in January, 1901. Mr. Oddie testified that the Gayhart survey of the Valley View was made prior to March 20, 1901; that the survey of the Wandering Boy was made about one month afterwards; that he erected the monument on the south line of the Valley View claim, which is called the "South Side Center Monument," prior to November 24, 1900, and that at no time since has that monument been moved to the north or to the south; that it was there at the time of the survey of the Wandering Boy; that Mr. Edward Clifford asked him to draw the certificate of location of the Wandering Boy, and gave him the initial points.

"I knew that it joined the Valley View on the south and overlapped it. Well, he told me, or I suggested to him putting a monument inside of the Valley View to square his end lines—parallel his end lines—and he said that would be a good idea, and he would not claim any of the ground inside; and I wrote the description of the monuments, and numbered each one carefully, and wrote in the certificate exactly what each monument was, and told him to be careful and build his monuments where I had indicated, and mark them exactly that way. I had helped him before, and I did the same thing with his other claims. Q. Now, as I understand it, at the time you made the certificate of location for Mr. Clifford, the monuments had not been permanently erected on the ground? A. I never had seen them, and he told me they were not, and I advised him to put them up within ninety days. He told me he was going to do it, and I impressed upon him the necessity."

W. C. Gayhart testified: That he made a survey of the Wandering Boy claim for the Cliffords, who were with him during the survey, about one month after he had surveyed the Valley View. That at the time of the survey of the Wandering Boy he pointed out and explained to the Cliffords, father and son, the south side line of the Valley View as established by his survey thereof. That they were at the time of this explanation near the south side center Valley View monuments. Mr. Clifford, Sr., said that—

"He claimed no ground inside of the Valley View. He claimed the Wandering Boy, but no ground that belonged to the Valley View, or that was included in the lines of the Valley View, and that was in response to my running the end line of the Valley View in order to make both end lines parallel, and he understood that the block of ground in there did not belong to the Wandering Boy. * * * I explained to him that * * * a part of

the claim was in conflict with the Valley View, and that was ground that belonged to the Valley View claim, and he said that he so understood it, and, of course, did not claim it, but he wanted the ground southerly from the Valley View, as included in the Wandering Boy ground."

Edward Clifford, Sr., was called in rebuttal by complainant, and testified that Mr. Gayhart did not show or tell him that "he had surveyed the south line of the Valley View claim." On his cross-examination in rebuttal he said that Mr. Gayhart, when making the survey of the Wandering Boy, did not "say anything at all—not a word."

Edward Clifford, Jr., was called in rebuttal, and upon his cross-examination testified as follows:

"Q. Did you know what you signed when you signed the amended certificate of location? A. I suppose I did, or I would not have signed it. Q. You signed two, didn't you—two certificates of location—the first for Mr. Oddie, and another one sent you by Mr. Gayhart? A. Yes, sir; I think I did. Q. Now, then, did you read it? A. Yes, sir; I certainly did, or I would not have signed it? Q. Did you read in that that your north line was where the south line or the south side center of the Valley View was—the south side center monument intersected? A. I don't remember whether I did or not. I don't remember about that. Q. Now, what did Mr. Gayhart say to you? Tell the court a single thing that he said to you during that survey of the Wandering Boy claim. A. Mr. Gayhart and I had but very few words. Q. Well, what did he say? A. That I could not tell you. * * * Q. Did you know where the southwest corner of the Valley View was? A. Yes, sir. Q. Did you know where the south side center was? A. I could not tell you. I could not say that I did. * * * I seen a monument there. I could not say whether it was the Valley View monument or another monument. I don't know. Q. Did you know where the southeast corner of the Valley View was? A. Yes, sir. Q. You knew, did you not, that there was a certain amount of that claim which was within the Valley View ground that you didn't claim? A. I certainly did. Q. And you never did claim it? A. No, sir. Q. And you didn't claim it up to the time you sold to these people? A. A certain piece we don't claim, and didn't claim at the time we sold it. Q. Did you explain to the gentlemen to whom you sold it that that portion of the ground was within the Valley View ground? A. Yes. * * * Q. Mr. Oddie wanted the claim surveyed for the purpose of establishing the lines between the two claims, didn't he? A. He advised me to have the claims surveyed. Q. You knew they had had their claim surveyed, didn't you? A. Yes. * * * Q. You say you knew where the southeast corner of the Valley View claim was. That was the monument that has been testified to, of earth, and a nail keg in it? (At the S. E. corner of the Valley View, as surveyed by Gayhart.) * * * A. Yes, sir. * * * Q. Didn't you and Mr. Gayhart have a conversation about that particular monument, with the nail keg in it? A. I did not. Q. And didn't he tell you that that was a monument which was established as the southeast corner of the Valley View? A. No, sir; he did not. * * * Q. Can you tell the court a single thing that he did speak to you about? A. No, sir; I cannot. * * * Q. The only thing you can tell the court is that he didn't say anything to you about the monuments? A. He did not."

Mr. Thomas F. Egan, the mining recorder, called on behalf of the defendant, testified that he advised the Cliffords to have the Wandering Boy surveyed; that during the time of the survey made by Gayhart he heard conversations between Gayhart and Edward Clifford, Sr., "in relation to the lines or monuments of that survey"; that there was something said about the boundary of the Valley View claim, "but I could not exactly state what it was. I know they had a talk about it."

In arriving at the proper interpretation and effect of the testimony of the respective witnesses, it will, for the purpose of this opinion, be conceded, as a legal proposition, that the Cliffords, at the time of the location of the Wandering Boy, might have taken up and located all the ground in dispute, situate south of the straight dark line drawn by Mr. Brooks as the legal south line of the Valley View, but the court must decide the case upon the facts. It matters not what might have been done. The question is, what was done? And from the acts performed by the parties the court must determine the legal effect thereof.

The weight of the testimony establishes the fact that the location of the Valley View was prior to that of the Wandering Boy; that, at the time of the location of the Wandering Boy, the locators thereof recognized the prior right of the Valley View, and did not intend to interfere therewith; that they intended that their northern or northwestern boundary should be on the southerly side line of the Valley View. They knew where the stakes and monuments of the Valley View at the southwest and southeast corners were, and they also knew where the south side center monument was placed. They ran their northerly or northwesterly end line over a portion of the Valley View location for the purpose of making their location conform to the laws of the United States, which they had the right to do (Del Monte M. & M. Co. v. Last Chance, 171 U. S. 55, 83, 18 Sup. Ct. 895, 43 L. Ed. 72), and with the declared intention not to claim any portion of the ground embraced in their location, which was north of the south side line of the Valley View ground. When the owners of the Butler group of mines concluded that they had better have their claims surveyed, and boundaries made more certain and definite, the locators of the Wandering Boy soon followed their example, employed the same surveyor, and pointed out to him their original temporary monuments, and lines of their location, and at the time of such survey recognized the south side line of the Valley View mining claim as then marked on the ground by the monuments and stakes at the northeast corner, at the south side center and at the southeast corner of the Valley View, as shown by the Gayhart survey.

On August 1, 1901, the Cliffords conveyed by deed their right, title, and interest in the Wandering Boy, as well as in the Lucky Jim and Stone Cabin, to W. H. Dickson and A. C. Ellis, and on May 5, 1902, Dickson and Ellis conveyed the same to the complainant herein. The complainant, after it acquired this title, having discovered that the original location of the Valley View covered more than 300 feet in a southerly direction from the original point of the location on the easterly end line of the Valley View, marked on the diagram "V. V. Orig. Disc. Mt.," conceived the idea that the Valley View could not claim any more than 300 feet south of the discovery point, and for that reason the locators of the Wandering Boy, having marked its lines over the Valley View ground, could hold all that portion marked in yellow on the diagram, within its side and end lines south of the dark line on the diagram, which marks a point on the southeast corner of the Valley View 300 feet south of the discovery point on the easterly end line of the Valley View, and claimed that the Cliffords, when they recognized the south line of the Valley View, were not aware that the

east end line of the Valley View had been dropped down, and therefore could not be bound by the line thereof, as surveyed by Gayhart. It is sought in this case, as in No. 734, to hold the Valley View to its original notice, and to ignore its rights to change its boundaries without interfering with the rights of others. The Cliffords, prior to the time of their disposing of their interest, fixed the northerly line of the Wandering Boy on the southerly line of the Valley View after the Valley View end line had been dropped down by the Gayhart survey on the Valley View, and must, in equity, be bound by it. It is always competent for the owners of adjoining mining claims to adopt the line established by a prior survey as their boundary or division line, and when such line is adopted and agreed to by unequivocal acts from which an agreement may be clearly implied, whether it is the correct one or not, they will be conclusively bound by it. Such agreement is not within the statute of frauds. Cutler v. Callison, 72 Ill. 113, 115; Bloomington v. Cemetery Ass'n, 126 Ill. 221, 226, 18 N. E. 298; Boyd v. Graves, 4 Wheat. 513, 517, 4 L. Ed. 628; Hagey v. Detweiler, 35 Pa. 409, 412; Dudley v. Elkins, 39 N. H. 78, 84; Coleman v. Smith, 55 Tex. 254, 259; Levy v. Maddox, 81 Tex. 210, 16 S. W. 877; Bailey v. Baker, 4 Tex. Civ. App. 395, 23 S. W. 454; Barnes v. Allison, 166 Mo. 96, 104, 65 S. W. 781; 4 Am. & Eng. Ency. Law (2d Ed.) p. 862, and authorities there cited. The grantees of the Cliffords could not, by any theory known to the law, acquire any further rights than the Cliffords possessed at the time they conveyed their title.

My conclusion is that the evidence in this case, when carefully examined, considered, and weighed, establishes the fact that defendant has the better right to the ground in controversy. Let a decree be entered in its favor, including costs.

TONOPAH & SALT LAKE MIN. CO. v. TONOPAH MIN. CO. OF NEVADA.

(Circuit Court, D. Nevada. August 3, 1903.)

No. 736.

1. MINING CLAIMS—VALIDITY OF LOCATION—OVERLAPPING CLAIMS.

The Silver Top and Valley View mining claims, owned by the defendant herein, constitute a portion of the Butler group of mines, for which defendant has applied for a patent. These locations were made by the same person, and the lines as made by the original locator overlapped each other. The discovery shaft on the Silver Top was within the lines of that location as made, and was also within the lines of the Valley View. The claims were located on the same day, the Valley View being first. The overlapping lines of the conflict between these claims were afterwards agreed upon and adjusted by the respective locators and owners thereof. The Valley View changed its northern line, so as not to include the discovery shaft of the Silver Top. The adjustment as made did not change any of the boundaries of the Silver Top in so far as the portion of the ground in dispute in this action is concerned. These claims were among the pioneer locations in Tonopah, and were located prior to the Stone Cabin, owned by complainant. *Held*, that the Silver Top is a valid location, that the change in the overlapped lines of the Valley View affected only the rights of the owners of those claims, and that the subsequent locator of other adjoining claims was not injured thereby, and is not in a position to complain or take advantage of any overlapping of the lines between the Silver Top and Valley View.

2. SAME—DISCOVERY OF MINERAL OUTSIDE OF DISCOVERY SHAFT.
It also appears that other discoveries of a mineral lode were made by the locator of the Silver Top at different places within the lines of that claim, and outside of the ground covered by the Valley View location, within the 90 days allowed him to perfect and complete his location, before the Stone Cabin was located. The Stone Cabin cannot for this reason claim any priority over the Silver Top.

3. SAME—BOUNDARIES—MOVING OF CORNERS.
Where, as shown by a preponderance of the evidence, the corner of a mining claim was established and marked by a monument and stake when the claim was located, and had never been moved by the owner, he or his grantees are entitled to a patent to the boundary so marked, where it can be ascertained, as against a subsequent locator of a conflicting claim, who, with knowledge of the prior claim, made no attempt to ascertain its lines, although such corner may have been moved by others.

4. SAME.
Under the facts and principles of law applicable to this case, *held*, that defendant has established a better right to the ground in controversy.

Suit in Support of Adverse Claim to Mining Ground.

Dickson, Ellis & Ellis and Key Pittman, for complainant.

W. E. F. Deal, Kenneth M. Jackson, and Campbell, Metson & Campbell, for defendant.

HAWLEY, District Judge. This is a suit brought in support of an adverse claim made by complainant, as the owner of the Stone Cabin claim, against the application for a patent made by the defendant to consolidated claim No. 2,012, embracing eight mining claims, for the purpose of determining which of the parties has the better right to the mining ground in controversy, and is one of the three suits mentioned in case No. 734 (125 Fed. 389), to which the diagram embodied therein applies, and to which reference is here made. The portion of the ground in controversy in this suit is marked in yellow upon the northerly portion of the Stone Cabin mining claim, as delineated upon the diagram.

It is alleged in the complaint—

"That the defendant above named, claiming to be the owner of an alleged adjacent mining claim called the 'Silver Top,' on or about the 10th day of January, 1902, wrongfully and unlawfully caused said alleged Silver Top mining claim to be so surveyed as to cross upon and overlap the said Stone Cabin mining claim and lode, and include a portion thereof described as follows: 'Beginning at corner No. 1 of the said alleged Silver Top mining claim as surveyed for patent, being mineral survey No. 2,012, from which the section corner at the southeast corner of section 35, township 3 north, range 42 east, Mount Diablo Base and Meridian, bears south, 25° 17′ east, 1,369 feet distant, and running thence on a true course north, 89° 55′ west, 540.6 feet, along the southerly side line of the said alleged Silver Top lode, as surveyed, to its intersection with the westerly end line of the Stone Cabin lode; thence on a true course north, 3° 26′ east, 208.1 feet, to corner No. 7 of the said Stone Cabin lode; thence on a true course south, 86° 32′ east, 507.8 feet, along the northerly side line of the said Stone Cabin lode to its intersection with the easterly end line of the said alleged Silver Top lode as surveyed (survey No. 2,012); thence south, 6° 49′ east, on a true course, 179.1 feet, to corner No. 1 of the said alleged Silver Top lode as surveyed, the place of beginning; containing 2.317 acres.'"

The Stone Cabin claim was located by Edward Clifford, Sr., on the 8th day of October, 1900, as the east extension of the Valley View

claim in the Butler group of mines. His certificate of location was signed and recorded December 22, 1900, and, among other things, contains the following statement:

"The locator hereby further certifies that he located and now claims 1,500 linear feet along the course of the vein or lode extending from the point of discovery and location, a monument upon the ground 1,500 feet in an easterly direction, together with 300 feet on each side of the center of the ledge, lode, or vein, in a northerly and southerly direction. That the general course of the vein is east and west. The discovery cut is situated 10 feet east of the discovery monument, and its dimensions are 15 feet in length along the ledge, cutting it 10 feet deep from the surface. The location and description of each corner of the claim, with the markings thereon, are as follows, to wit."

And then a description is given by metes and bounds from monument to monument, which includes the yellow portion embraced therein.

The Silver Top claim was located by J. L. Butler, for J. H. McCormack, August 30, 1900. He had previously located the Burro and the Desert Queen and the Valley View in the Butler group of mines, and he believed there was some vacant ground lying between the Burro and the Desert Queen, on the north, and the Valley View, on the south; and his object in locating the Silver Top was to include such vacant ground, in order to prevent others from coming in and locating the ground between the claims he had already located, and also to include some vacant ground to the east. This accounts for the overlapping of the lines of the Silver Top over a portion of the Burro, Desert Queen, and Valley View. Mr. Butler, in his testimony, stated that the Silver Top was the last claim located in the Butler group of mines; that there were several ledges on the claim; that he discovered mineral-bearing rock in several places; that the croppings that he located cropped out a few hundred feet—"a pretty solid ledge—rather a low-grade quartz"; that he found several stringers above there "that we afterwards leased, and some ore was taken out." He described the discovery work done upon the claim "in the shape of a trench along one of the ledges," ten feet long, three or four feet wide; that he followed the ledge several feet, and struck "some pretty solid quartz" in place; that the location work was done within the boundaries of the Silver Top location—"about the center of it, I think." He testified to a conversation which he had with Edward Clifford, Jr., about October 8, 1900, which was after he had located the Silver Top. "I told him about the end of the Valley View I had located, * * * on the brink of a wall, there was nothing showing to the east, and to put his location just on there so it would stand side of mine, and to claim east up towards the low country there towards the Middle Buttes, the valley, and he would probably get a whole claim, not to swing in toward the big mountain as that ground was claimed." That the big mountain he referred to was Mt. Oddie, to the east and northwest. Upon cross-examination he said that the Valley View was located a few hours before the Silver Top, but that the Silver Top was monumented first; that "the richest ore in all Tonopah" was taken out of the Silver Top claim; that there was a space of vacant land between the Valley View and Burro at the time

he located the Silver Top of about "four to six hundred feet"; that at the time of this location, August 30, 1900, no boundaries had been erected around any of the Butler group of mines.

On the 24th of November, McCormack signed and filed for record his location certificate of the Silver Top, which, among other things, contains the following statement:

"This claim lies between the Valley View claim, on the south, and the Burro and Desert Queen claims, on the north. The locator hereby certifies that he located as above and now claims 1,500 linear feet along the course of the vein or lode, extending from the point of discovery and location, a monument upon the ground 1,250 (feet) in an easterly and 250 feet in a westerly direction, together with 300 feet on each side of the center of the ledge, lode, or vein, in a northerly and southerly direction. That the general course of the vein is about east and west. The discovery cut is situated about 650 feet easterly from the location monument, on the ledge, and its dimensions are 10 feet long, and about 3 feet deep, showing ore and quartz in place. The location and description of each corner of the claim, with the markings thereon, are as follows, to wit."

And then follows a specific statement, by metes and bounds between monuments, of certain ground, which includes the yellow strip marked on the Stone Cabin claim.

The dotted dark line on the diagram commencing at point 1 on the southeast corner of the ground in yellow (claimed by the defendant as the southeast corner of the Silver Top), and running westerly to point 2 on the east end line of the Valley View, and continuing westerly to point 3 (as the southwest corner of the Silver Top), marks the southerly side line of the Silver Top as originally located.

The record in this case is voluminous. It contains 520 typewritten pages. The witnesses in this case were called upon not only to testify to the lines, boundaries, monuments, and pegs, when and where made, built, posted, and driven upon the ground claimed by the Stone Cabin and Silver Top, but once more to invade the territory traveled over in the Valley View, Pyramid, and Wandering Boy locations in cases No. 734 (125 Fed. 389) and No. 735 (Id. 400). In the light of what was said in the opinion in case No. 734 touching the admissions and proofs as to locations, discovery, posting of notices, building of monuments, performance of annual labor, etc., it would be an endless and useless task to attempt to review all the testimony of the witnesses. It would only tend to bewilder, instead of explain, the real issues involved in the present contest.

The Gayhart survey, as stated in No. 734, included about 30 feet of ground east of the original east end line of the Valley View. The application for the patent adheres to the original line. It appears from the testimony that at one time, when the Cliffords had bonded the Stone Cabin, there were conversations had with Butler in regard to these lines, and the whole thing was settled by Butler (with the consent of others interested with him) voluntarily withdrawing any claim on the part of the Valley View to the ground east of the original end line.

The conflict in this case arises upon somewhat different grounds from those presented in No. 734 and No. 735; but in this, as well as the other cases, the Valley View original location, certificate of loca-

tion, and the additional amended certificate of location, and Gayhart's survey, with the lines and monuments marked under each upon the ground, furnish the groundwork for the theories advanced by complainant, and throughout the record, in all of the three cases, will be seen the footprints of an effort on the part of the complainant to confine the Valley View to the limits of the lines and monuments embraced within the original location.

It will be noticed by looking at the diagram in No. 734 that the Silver Top discovery shaft was sunk at the point "S. T. Dis. Shaft," which is south of the original north line of the Valley View, and north of the red line designating the north line of the Valley View, as drawn down by the Gayhart survey.

1. The contention of the complainant herein is that it is the owner of the entire area of the Stone Cabin claim embraced within its exterior boundaries as marked on the diagram; that the location of the Stone Cabin is prior in time, as a matter of law, as against the Silver Top location. Counsel for complainant, in his argument, said:

"The first contention and postulate we make is that the Silver Top so-called location never for an instant of time was valid, that it always was invalid, that it was void ab initio, and that no right immediately thereafter or since, by anything that has transpired, could flow from it."

This broad statement is sought to be sustained upon the ground that the proofs show that the Silver Top location notice and discovery shaft were within the original boundaries of the Valley View, which was located prior to the Silver Top; and, even if it be conceded that the monuments of the Silver Top were, as testified to by some of the witnesses, erected prior to the monuments of the Valley View, the Silver Top would not be entitled to any priority as against the Valley View. Under these conditions, it is claimed that the owners of the Silver Top could not initiate any legal right to the ground by virtue of their discovery, which was made, as shown by the testimony, within the boundary lines of the original location of the Valley View; that, the owners not having acquired any legal rights by reason of the acts done by them under the Silver Top location, the ground in conflict was not and could not be appropriated by them, and was open, public, mineral land, subject to location, at the time that Clifford, Sr., made the Stone Cabin location; and that, for the reasons stated, priority attaches, in law, to the Stone Cabin as against the Silver Top. If the premises as stated by complainant are correct, then the conclusions drawn by counsel would certainly follow. But are the premises correct? Was the Silver Top location void?

The defendant is the owner of the Butler group of mines, consisting of eight contiguous mining claims. Whatever rights the locators possessed at the time of the conveyance, the defendant is entitled to. No more, no less. It stands in their shoes. It so happens, as is often the case, that the lines of the claims at some places overlapped each other. This was particularly so with the Silver Top and the Valley View. The application for a patent, in so far as it relates to the Silver Top, does not embrace any more ground than was in its original location. The government is not concerned as to where the

location monument, the discovery shaft, or boundaries were, unless the application for a patent embraces more ground than the law allows. The defendant, being the owner of both the Valley View and the Silver Top, had the right to adjust the lines in its application for a patent. It makes no difference to the government whether the lines of these two claims overlapped each other or not, provided the land for which the application for a patent is made is all within the boundary lines of the two claims as located.

In determining the conflict between counsel as to the effect to be given to the established facts, and of the application of the law in regard thereto, we must keep in mind that the Valley View and Silver Top were located prior to the location of the Stone Cabin. The locators of the Valley View and the Silver Top were the pioneers in Tonopah. They were unhampered by any outsiders in running their lines, and selecting the ground they deemed advisable to locate. One man controlled the whole thing. He was the original discoverer. He had the pick and choice of all the locations constituting the Butler group of mines. He was not called upon to look for notices, stakes, or monuments. He was, in these respects, unfettered. The ground was all vacant. All that he had to do was to select the ground which he desired to locate, and those who came after him were called on to respect his locations, not to disregard them. He was not monarch of all he surveyed. He was limited by the mining laws, national and state. He could not include within a claim more ground than he was entitled to, and he was compelled to complete and perfect his locations within the time designated by statute. His location, when completed, was at his own peril. If he mistook the true course of the lode or vein, he and those purchasing from him would be bound by it. But the fact of priority of location is one of great importance. It cannot be ignored. If the acts he had performed or caused to be performed were valid, subsequent locators were bound thereby, and could not intrude upon the ground he had lawfully taken up. They were called upon to notice what had been done by him, and others acting with him, and the law required them to ascertain where the lines of his location were, and they were held to a knowledge of his rights, in so far as the time of marking his boundaries was concerned. If his initial steps were valid, the right to complete his location within the time allowed by law could not be interfered with. If he had made mistakes in running the lines, or committed any errors in the sinking of his discovery shaft, or running cuts upon his ground to find the mineral therein contained, he had 90 days after his location, by virtue of the law of this state, to correct such mistakes or errors, and those who came after him would be bound thereby. It does not lie in the mouth of complainant to declare that the Valley View was prior in point of location to the Silver Top, and that the owner of the Valley View had a perfect title to the ground where the discovery shaft was sunk. The fact that the locator of the Silver Top sunk his discovery shaft upon ground overlapped by the Valley View was a matter which might have been taken advantage of by the locator of the Valley View in any conflict that might have arisen as to the overlapping ground between the two claims, and the respective claimants of each thereto.

But this discovery shaft was, as a matter of fact, sunk upon the ground as located by the Silver Top. The lines of the conflict between those two claims were agreed upon and adjusted by the locators of those two claims. The change in the overlapped lines of the Valley View and Silver Top affected only the rights of the owners of those claims. No adjoining locator of other ground was affected thereby, or could complain or take advantage thereof, because he was not injured thereby. The adjustment as made between those claims did not change any of the boundaries of the Silver Top in so far as the portion of the ground marked in yellow is concerned.

In Little Pittsburgh C. M. Co. v. Amie M. Co. (C. C.) 17 Fed. 57, the court, after stating the contention of counsel, said:

"This position appears to be to the effect that one who owns a mining claim must at all events hold onto his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way, by conveyance or otherwise, he thereby abandons the rest of his claim. I do not see upon what principle such a conclusion can rest. After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him. What was done in this instance by the Winnemucca parties and the Little Pittsburgh parties is not stated. Whether the Winnemucca parties yielded voluntarily to the Little Pittsburgh people, or made sale to them, or in what way they disposed of their interest, if they had any, in this claim, is not stated. But I do not think that can be material. Any concession that they may have made to the Little Pittsburgh people is to them only, and is not available to any other person. It has been decided, it is true, in the Supreme Court of this state, and in this court also, that a location may not be made by a discovery shaft upon another claim which has been previously located, and which is a valid location, but that doctrine has nothing to do with the point in controversy here. For all that appears, the Winnemucca may have been the better location, and it may have been sold by the Little Pittsburgh parties, or disposed of in some way. The mere fact that a part of it was transferred to the Little Pittsburgh parties is not enough to defeat the right of the locators to other portions which were not sold, disposed of, or surrendered."

2. There is an additional answer to the contention of complainant. The testimony of Mr. Butler shows that rock in place, containing mineral, was discovered in different places within the limits of the Silver Top location; that there were several ledges on the claim, all of which were discovered by him prior to the location of the Stone Cabin claim. Conceding, as we have throughout this case, that the location of a mining claim based exclusively on a discovery of mineral within the limits of another existing and valid location is void; that the location as made by the locator, as was said by the court in Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. 1110, 1112, 29 L. Ed. 348—

"Must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover. If bad, he must be defeated. A location on account of the discovery of a vein or lode can only be made by a discoverer, or one who claims under him. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it."

But this rule does not apply to a case like the present. If the Valley View had obtained a patent in accordance with the lines of its original

location, including the discovery shaft on the Silver Top, the loss of the discovery shaft would not vitiate the entire Silver Top location, because mineral was found and a discovery thereof made within the undisputed limits of the location within the 90 days allowed the locator thereof to perfect his location, and before the Stone Cabin was located. Such a state of facts would not bring this case within the rule announced in Gwillim v. Donnellan, supra, or of any of the cases cited by complainant.

In Silver City G. & S. M. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11, the court discussed this question at length, citing all the cases, and drawing the distinctions existing between them as to the facts. It was there held that where the original discoverer of a vein upon which a mining location is based is included within the surface boundaries of a junior location, which goes to patent without protest from the owners of the prior location, but before such patent a new discovery has been made on the prior location, without the boundaries of the junior location as patented, and within the surface boundaries of the prior location as originally located, and development work is being there prosecuted in good faith by the owners of the prior location, their claim is valid and holds as to all ground not included in the patent of the junior location, notwithstanding the loss of the original discovery. That case was appealed to the Supreme Court of the United States, and there affirmed upon another point, without passing upon the question here discussed. Lowry v. Silver City G. & S. M. Co., 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151. The views expressed by the Supreme Court of Utah are in accord with the decisions of the Land Department. Secretary Teller, in a letter to Commissioner McFarland, April 11, 1882, said:

"Three questions present themselves in connection with the facts recited: (1) Did the waiver of the discovery shaft and the portion of the lode within the Kangaroo survey, by failure to file an adverse claim, have the effect to vitiate the entire Metropolitan location, and bar an application for any part of the same? * * * On the first point, I am of the opinion that the development and possession of the lode, so far as it runs upon public land, was not interfered with in any manner by the waiver of a portion, even though the original discovery shaft was included in the portion disposed of. The continued possession and working of such outside portion under the original ownership and location ought not to be held as forfeited while the good faith of the owner toward the United States is not impaired, and opportunity should not be given to a stranger to appropriate under United States laws the property and improvements which he has acquired and made upon a good and sufficient location properly asserted at the time of his original discovery."

The yellow portion of the ground in the Stone Cabin was within the lines of the Silver Top as originally located, and marked by stakes and monuments, and the locator of the Stone Cabin must be confined to and bound by those lines, unless there are other grounds which can be found in the evidence which would entitle him to include the same in his location.

3. The other contention on the part of the complainant is that the boundary lines of the Silver Top have been so moved, or are so uncertain, that it is impossible to establish the original corners of the Silver Top. This contention is principally confined to the post and monu-

ment at the southeast corner of the Silver Top, viz., at the southeast corner of the ground marked in yellow on the Stone Cabin claim. This contention involves the question whether the Silver Top claim was so monumented and marked that the boundaries could be readily traced.

At the trial there appeared to be much confusion in the testimony in regard to the S. E. corner monument and stake. Mr. Edward Clifford, upon his cross-examination, testified: That at the time he monumented the Stone Cabin he knew that the Silver Top—one of the Butler group of mines—had been located. That, in monumenting the north line of the Stone Cabin, at the north side center he noticed a stake of the Silver Top inside his lines, and went to it and looked at the marks thereon. "I think it stated the southeast corner of the Silver Top." He understood "it was a stake or monument marking the southeast corner of the Silver Top." That this stake was about 250 feet in a westerly direction—"a little bit south of west"—from his north side center, and about 30 feet south of the north line of the Stone Cabin. In another portion of his testimony he stated that the southeast corner of the Silver Top had been moved south from the point where he first saw it, but he did not state that he saw it moved, or that he knew by whom or when it was moved. The effect of the testimony of Edward Clifford, Sr., and of Edward Clifford, Jr., is, that they never saw any stake or monument of the Silver Top at the southeast corner of the ground marked in yellow.

Mr. Oddie, on behalf of defendant, testified that he saw the original notice of the Silver Top on the ground; that he saw the monuments on the ground before the filing of the certificate of location; that he saw the southeast corner; "that it was marked with a stake, two by four. I remember that monument marked 'Southeast Corner Silver Top.'" Further, he said, "I built up that southeast corner monument and marked the stake myself," some time prior to November 24, 1900. His attention was called to Booker's survey, and he said:

> "If this is the correct southeast corner of Mr. Booker's survey, 'S. E. C.,' I should say that the old monument is in * * * about the same place it is marked here. * * * The monument * * * that I rebuilt is westerly and a trifle southerly of the present Booker monument," about 30 or 40 feet.

Butler testified that between the 8th and 10th of October, 1900, there was a slab about 5 feet high put in place to mark the southeast corner of the Silver Top, and that a dirt monument was also built there at that time by Mr. Oddie.

W. C. Gayhart testified that he made a survey of the Silver Top in March, 1901; that he found a stake at the southeast corner marked "S. E. Corner Silver Top"; that at this point he had a monument built four feet in diameter, three feet high, of earth and sage brush; that Mr. Butler showed him the corner where the stake was found. Egan, the mining recorder, who carried the pegs, and Miles, who assisted in building the monuments, corroborate the testimony of Mr. Gayhart.

Several witnesses were called by complainant in rebuttal of the defendant's witnesses, and testified with reference to the southeast cor-

ner. Blood, who was on the ground in conflict in the month of August, 1901, testified that he did not think there was any monument at the point marked "Southeast Corner Silver Top." Replying to the question whether he at that time saw any monument on the Stone Cabin claim marked "Southeast Corner Silver Top," he said:

"I saw a monument about 150 feet to the north and east of where we wanted to sink a shaft on the Stone Cabin. Q. Were there any marks in that monument? A. There was a peg, marked 'S. E. Corner Silver Top,' 150 feet easterly and northerly of the point marked 'Dickson Shaft'" (on the diagram in case No. 734).

Upon his cross-examination, upon being asked whether he was positive there was not a monument at the southeast corner at the point designated on the diagram, he answered: "I never saw one. I didn't see one there."

Mr. Dewey testified that he was on the Stone Cabin ground in July, 1901, and saw a monument about 100 or 150 feet north of the Dickson shaft, and that he did not think there was any monument at the point marked on the diagram "S. E. Corner Silver Top." On cross-examination: "Q. You simply mean to say if there was a monument there you didn't see it? A. That is what I mean to say."

Mr. Sullivan testified that he saw a monument at one time which he judged was "from twenty-five to thirty feet inside of the lines of the Stone Cabin ground," marked "Southeast Corner Silver Top."

J. O'Toole was also called by complainant, and testified as follows:

"Q. Mr. O'Toole, I will ask you to state whether or not at the time you sunk what is designated upon this plat as the Dickson shaft there was a monument to the south and east of the Dickson shaft, now known as the southeast corner of the Silver Top mining claim? A. There was a monument of some kind over there. I don't know who it belonged to, or what it was. I understood it was the center of the Stone Cabin. I don't know. Q. The point I am referring to is the monument to the south and east of what is known as the Dickson shaft. Was there a monument there or not? A. There certainly was."

He further testified that Mr. Booker was surveying the ground there in October, 1901, and had three men with him; that there was a monument at that time about 200 feet northeast of the Dickson shaft; and that "Booker's employés moved the monument in about sixty or eighty feet south." He did not know "what monument it was."

Mr. Booker was recalled by defendant:

"Q. I will ask you to state to the court whether or not, at any time when you were surveying that ground for any purpose, you, or any person under you, moved the southeast corner of the Silver Top to the south? A. No, sir. Q. Did you ever move the southeast corner in any of your surveys anyway? A. No."

Mr. Healy, the superintendent of complainant, on behalf of complainant, testified that he had a conversation on or about the 1st day of June, 1902, at his office in Tonopah, with Mr. Miles.

"Q. I will ask you to state whether or not at that conversation Mr. Miles stated to you that, at the time he assisted Mr. Gayhart in making the survey of the Silver Top claim, that in assisting in that survey he moved the south-

east corner of the Silver Top mining claim southerly a distance of fifty or sixty feet? A. He did."

Mr. Miles, on behalf of defendant, in rebuttal, testified:

"Q. Did you ever at any time tell Mr. Healy, in his office in the town of Tonopah, that you had assisted in moving the southeast corner of the Silver Top claim fifty or sixty feet to the south? A. I did not."

Mr. Clifford testified that Oddie admitted to him in Carson that he had removed the stake at the southeast corner to the south. Mr. Oddie was called on behalf of defendant, and testified that he heard this testimony of Mr. Clifford.

"Q. Did you at any time since you have been in Carson, or ever, tell Mr. Clifford, Sr., that the monument which we claim to be the southeast corner of the Silver Top had been moved to the south? A. I never told him anything of the kind. Q. Did you ever tell him anything more than that which you testified to on day before yesterday? A. No, sir."

Comment upon this testimony is unnecessary. It explains itself. The testimony offered by defendant is clear and positive as to the monument at the southeast corner of the Silver Top. The testimony of the complainant is negative. Its witnesses never saw it. There is no satisfactory explanation about the "peg" seen by Clifford and others in a northeasterly direction from the Dickson shaft, marked "S. E. Corner Silver Top." How it got there is apparently a mystery. It is the only peg in all of the cases that is not accounted for or explained. There is nothing in the testimony showing that the owners of the Silver Top ever put it there or removed it therefrom. The burden of proving the moving of the corner stake of the Silver Top is cast upon the complainant, and it has failed to establish it by any preponderance of the testimony.

One thing in this case is made certain, and that is that the original southerly line of the Silver Top location included the ground in conflict in this case. There was never any change made in that line anywhere along the ground in dispute. The southeast corner of that line was monumented at the time the Silver Top was located. The patent asked for by defendant by reason of the Silver Top location does not call for any ground that was not included within its original lines. The southeast corner of the ground in yellow is 600 feet southerly from the northeast corner of the Silver Top location as originally located. Under these undisputed facts, it is apparent that the locators of the Silver Top could not be legally deprived of their rights by any "juggling" of the post and monument, which was at the southeast corner of that claim, by strangers. This question is referred to in case No. 734, and is disposed of by the decision of this court in Book v. Justice Min. Co., 58 Fed. 106, 114. Moreover, Mr. Clifford, when he located and monumented the Stone Cabin claim, paid no attention to the stray peg marked "S. E. Corner Silver Top." He included ground to the north of it, without making any inquiry of the locators of the Silver Top claim in regard to it. He could readily have ascertained where the claimed line was. He made no effort to do so, although he knew, as before stated, that the Silver Top claim had been located.

In Eilers v. Boatman, 3 Utah, 159, 164, 2 Pac. 66, 69, a contention was made upon similar grounds to the one under consideration. In discussing it, the court said:

"The proofs show that the plaintiff, at the time he made his location of the Virginia, was not, to say the least, a very anxious inquirer as to the boundaries of the Nabob, for at that time he found the owners of the latter claim at work in a shaft at or near their discovery point, and, without making any inquiry as to the direction or extent of their claim, he completes his location, taking in and including the very ground upon which the defendants were at the time actually working, and which is included in the conflict area. It is sufficient to give a right to the occupants of mining ground on the government domain, which the courts will protect, to establish by evidence its appropriation by means which are a substantial compliance with the law upon that subject, and which, in view of the surrounding circumstances, will give notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private claimant. * * * The same preponderance of testimony shows that the boundaries of the Nabob claim, as surveyed for a patent, are substantially the same as those described in the location, and marked on the ground at the time the location was made. There was testimony showing a somewhat promiscuous marking of trees with the word 'Nabob,' in various directions, and entirely off from the ground claimed and located by the defendants. The clear inference to be drawn from all the testimony is that this marking was done by some party unknown to the defendants, * * * and would indicate an attempt to confuse the boundaries of the Nabob claim. The finding of the court 'that the survey of the Nabob mining claim, as set forth in the answer, is substantially in conformity to the boundaries thereof as located,' is abundantly sustained in the evidence."

The proceedings in this case are in aid of the Land Department of the government, to determine which of the parties to this suit, as against the United States, has the better right to the mining ground in controversy. Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936. Under the facts in this case, as established by the weight of the evidence, and the principles of law applicable thereto, this court is of opinion that the defendant has established the better right to the area in dispute. Let a decree be entered in its favor, with costs.

WELCH v. PHILADELPHIA & R. RY. CO.

SCHAUFFELE et al. v. SAME.

(District Court, E. D. Pennsylvania. October 22, 1903.)

Nos. 37, 49.

1. COLLISION—TUG WITH TOW AND YACHT—YACHT DRIFTING IN RIVER CHANNEL.
The sloop yacht Venture, a pleasure craft 42 feet long, was making her way up the Delaware river at night with the flood tide, having a number of persons on board. The wind was very light, and finally failed when the yacht was on the western side of the river, and she then drifted with the tide toward the center of the channel. She kept no proper lookout, but the master and mate saw the tug International coming down the river some half mile distant, with three heavily laden coal barges in tow abreast. Nothing was done to control the yacht, which continued to drift, until it was too late to avoid collision, and she was struck by the barges and sunk. The tug saw the yacht when half a mile away slightly to the starboard, while between them and to port was another tug coming up with a tow. The International kept her speed and her course in the center of the channel, which was at that point about 750

feet wide. After passing the tug and tow she went to port, but did not at once signal her tows to follow, and when she did later they were unable to clear the yacht, which continued to drift toward them. *Held*, that both vessels were in fault—the yacht for not anchoring when the wind failed, but permitting herself to drift, when not under control, into the channel and the track of passing vessels, and for failure to keep a proper lookout; and the tug for not stopping instead of trying to pass between the two approaching vessels with her tow 100 feet wide, the danger being apparent, and also for not sooner changing the course of her tow.

In Admiralty. Suit for collision and proceeding for limitation of liability.

Chester N. Farr, Jr., Martin H. Stutzbach, and Frank J. Lloyd, for Yacht Venture.

John G. Lamb, for steam tug International.

J. B. McPHERSON, District Judge. By one of these libels the sloop yacht Venture seeks to recover damages for a collision by which she was sunk and became a total loss. The other proceeding was taken by the railway company, in order to limit its liability under the act of Congress. I find the facts to be as follows:

In the afternoon of July 14, 1900, the sloop yacht Venture, a small pleasure craft, 42 feet long and 13 feet beam, started from Camden with a party of 18 persons on board, both men and women, for a sail upon the Delaware river. They proceeded down the river, aided by the ebb tide, to a point not far below Lincoln Park, landing at the park about 7 o'clock, because of the failure of the wind, with the purpose of waiting until a breeze should spring up, and also until the tide should turn. They remained at the park until about half past 11 o'clock, and then, as the tide was at the flood and a light breeze from the southwest was blowing, they started to return. The yacht was of light draft, drawing no more than two or three feet of water, and accordingly her master kept along the eastern shore of the river, in order to be out of the way of larger vessels proceeding up or down the river in the channel. Shortly after 1 o'clock the yacht reached League Island, where the river bends to the eastward, and then resumes its northerly course, forming the Horseshoe Bend. Here they crossed the river to the western shore, and proceeded slowly along that shore as far as the upper end of the Ironside bar or shoal. At this point the set of the tide, by reason of the bend, is toward the eastern, or New Jersey, shore; and here the very light breeze that had been helping them in some degree left them entirely, and the yacht merely drifted with the tide. Indeed, it had done little else than drift during their progress up the river, for the breeze had been barely sufficient to give the boat steerage way. The crew consisted of two men, the captain, and a mate. Both were in the stern of the boat, aft of the sail, which was swung over the starboard quarter. The captain was at the wheel, in such a position that he could not see up the river except by stooping and looking under the boom, and the mate was seated on the rail near the captain, in a little better situation, perhaps, to see approaching objects, but certainly not in the right place for a lookout, under the circumstances. The night was

clear and moonlight, and there was no difficulty in seeing the lights of approaching vessels a long distance away. As the yacht drifted toward the center of the channel, the captain and the mate saw the lights of the tug International, coming down the river with a tow. The tug is a powerful ocean-going vessel, 130 feet long, 26 feet beam, drawing 16 feet, and of 400 tons registered tonnage. The tow consisted of three large and heavy barges, loaded with coal, lashed together abreast, and attached by a bridle to a wire hawser about 60 fathoms long. The barges, from starboard to port, were the Hercules, 200 feet long and 27 feet beam, drawing 13½ feet of water, and of 756 tons registered tonnage; the Girard, 186 feet long, 35 feet beam, drawing 16 feet, and of 841 tons registered tonnage; and the Glendower, 193 feet long, 34 feet beam, 16 feet draught, 855 tons registered tonnage. When the tug was seen by the yacht she was probably half a mile away, and each was showing her green light to the other. The yacht was headed somewhat toward the Pennsylvania shore, with her boom out to starboard, and her sail set in order to catch an occasional puff from the south or west, but she was not under control, for the wind was not strong enough, or constant enough, to give her steerageway, and she was drifting with the tide toward the center of the channel and the track of other vessels. No effort was made on the part of the yacht to change this condition of affairs until the two boats had come very near to each other. There is some dispute concerning the distance that separated the tug and the yacht when they passed each other, but it makes little difference whether the distance was 30 feet, as one witness says, or 100 feet, as it seemed to another witness. In either event, the situation was plainly perilous, and the captain of the yacht, seeing that a collision was likely to occur with the tow, sent the mate forward with an oar to attempt to move the yacht to port, and an ineffectual effort in that direction was made. It was of no avail, however, and in a few moments the yacht came into collision with the barges and was sunk.

From the point of view of the tug the facts are these: The tug, with its tow, was coming down the river in the center of the channel, and as she approached the coal piers at Greenwich Point she saw down the river the red light of a tug having a schooner in tow and the green light of the yacht. At this time the International and the yacht were at least a half mile distant from each other, the other tug being probably not much more than a quarter of a mile away. The situation was evidently dangerous. On the eastern side of the river was the Greenwich Point anchorage, which was occupied that night by a number of vessels at anchor, and the available surface of the channel was thus reduced to a width of no more than 750 feet. Moreover, the yacht was then nearly in line with the tug, for the master of the tug testified that when he first saw the yacht, after he had straightened down on a new course, she was "just a little mite on the starboard bow." The tug with the schooner in tow blew one whistle, indicating that she would pass to starboard, and this signal was returned by the International. At this time three possible courses were open to the International. She could attempt to pass

to the westward of the Venture, where perhaps there may have been somewhat more room; but as this course required the tug to cross the bows of the yacht, and would have also involved the risk of collision, I think it was properly declined. Another course was to continue in the center of the channel, and attempt to pass between the tug and tow and the yacht. The third course was to come to a stop or proceed with the utmost caution until the dangerous passage should be safely accomplished. The master of the International chose the second course, and, without changing his direction or slackening speed, determined to pass between the two vessels. There is some conflict in the testimony concerning his maneuvers immediately before the collision took place, but I do not think the conflict is material. The evidence seems to me to establish clearly the fact that after the schooner had passed the barges the course of the International was changed two or three points to port, in order to get as far as possible out of the way of the yacht; but by this time the current had carried the Venture so far out into the channel that, while the change was sufficient to carry the tug clear, it was not possible then to pull the tow out of the way. This might, perhaps, have been done if the course of the tow had also been altered at the time when the change was made by the tug, but no signal to this effect was given to the barges until an appreciable time after her own course was altered, and there was therefore a distinct, and what may have been a material, delay in this attempt at co-operation. The result was that the unwieldy tow kept its course without sensible change, the mast of the yacht was caught by the bridle of the tow, and the yacht slipped along the bridle until she struck the stem of the Hercules, and then swung around into the space between the Hercules and the Girard, where she was overturned and sank. All on board were rescued except one woman, who was drowned, for whose death damages are claimed by her parents, but the survivors all suffered some loss of property, for which also compensation is claimed in the present proceeding.

Upon these facts it is clear to my mind that both vessels were at fault. The Venture had no business to be in the channel, in the way of large ships proceeding up or down the river, while she was drifting helplessly with the tide and could not be directed. The wind failed while she was still close to the Pennsylvania shore, and the anchor should then have been dropped, unless the captain found it possible so to direct the boat that she would not move further out. He knew that the tide was carrying him out to the middle of the stream, and if he could not steer the boat near the shore it was plain negligence, as it seems to me, to allow her to drift out to the middle of the river, where a collision at any time might be inevitable. The John S. Smith (D. C.) 27 Fed. 398; The Media (D. C.) 45 Fed. 79. It was negligence also not to keep a proper lookout. Possibly an earlier discovery of the approaching tug might not have availed, but this is not certain, and unless it be clear that the absence of a proper lookout did not contribute to the collision such absence is a fault. The International also was negligent, in my opinion, in not stopping at a safe distance from the approaching vessels, or in not slowing

down and proceeding with the utmost caution. The Jesse W. Knight v. The Wm. R. McCabe (D. C.) 45 Fed. 590; The Havana (D. C.) 54 Fed. 411; The Medusa (D. C.) 46 Fed. 303. The situation clearly was one of great danger. Only a narrow lane was offered her for passage, and she had behind her a tow more than a hundred feet broad—enough to occupy nearly one-seventh of the whole breadth of the available channel. Certainly, under such circumstances, to go on without slackening speed was to take an unjustifiable risk, and I have no doubt at all that this failure to act with the proper caution contributed materially to the accident. She did slow down and stop briefly after she came abreast of the yacht, but it was then too late. It was a fault, also, not to signal the barges more promptly to change their course to port. The master of the tug admitted delay in the signal, excusing it on the ground that, "I did not think it was necessary, and it is not customary unless there is imminent danger." To my mind, the danger was imminent enough to require the promptest action, and to omit to call for such help as the barges might be able to afford, little as it might be, was negligence.

I find, therefore, that both parties were at fault, with the result that the damages must be divided. There is not enough testimony in the record to enable me to determine in every case how much damage has been suffered, and the inquiry upon this point must, therefore, go to a commissioner, who is directed to hear such further testimony as may be offered, and to report a suitable decree.

THE GENESTA.

THE ADELINA CORVAJA.

COLLIN v. KIERNAN et al.

In re KIERNAN et al.

(District Court, S. D. New York. October 13, 1903.)

1. COLLISION—SCOW IN TOW AND ANCHORED STEAMER—FAILURE OF TUG TO MAINTAIN A GOOD LOOKOUT.

A collision at night between a scow in tow on a hawser and a steamship anchored within the anchorage grounds off the quarantine station in New York Harbor, *held* to have been due solely to the fault of the towing tug for her failure to keep a good lookout and to see and avoid the steamer.

In Admiralty. Suits for collision, and petition for limitation of liability.

James J. Macklin, for the Goodwins.
Benjamin Patterson, for Augusta Collin.
Ullo & Ruebsamen, for the Corvajas.
Carpenter & Park, for the owners of the Genesta.

ADAMS, District Judge. The first of the above actions was a libel filed to recover the damages caused to the owners of Scow W. 17, in tow of the tug Genesta, by a collision with the steamship Adelina Corvaja, anchored off the Quarantine station, Staten Island. The second of the actions was brought by the administratrix of Gustav

Collin, who was in charge of the scow, and lost his life by the scow being overturned in the collision. The third of the actions was brought by the owners of the Genesta, to contest and limit their liability.

The scow, in tow of the Genesta, on a hawser of about 50 or 60 fathoms, left the foot of 19th Street, North River, on the 14th of March, 1902, about 12:45 A. M., bound for the dumping grounds at sea. The tide was ebb and the wind northerly. The tug's speed was about 11 miles with the tide. When off Quarantine the scow came in collision with the steamship, then at anchor, resulting in the capsizing of the scow and the drowning of Collin, who was on board as master.

The libel of Goodwin alleges fault against the Genesta in that she did not keep a proper lookout and avoid the steamship; and against the Corvaja for not maintaining a proper anchor watch, for being at anchor outside of the anchorage limits and for not giving any warning of her presence.

The libel of Collin alleges similar faults.

The petition of the owners of the Genesta alleges fault against the steamship: (1) in coming to anchor in the channel, (2) in not anchoring within anchorage grounds, (3) in not keeping a proper anchor watch, (4) in not paying out chain to avoid the collision; and against the scow, (1) in failing to maintain an efficient lookout, (2) in not cutting the hawser when the collision became imminent, (3) in that she was not in charge of a competent person, because the master did not take effective measures to prevent the collision.

A great many witnesses were examined in support of the allegations. Without now going into the testimony in detail, I have concluded from an examination of it, that the facts, in addition to those expressed above, were briefly as follows:

When the tug and tow reached the vicinity of the steamship, and before she was discovered by those on the Genesta, a snow squall came on, in which the tug proceeded at the same speed. While thus proceeding, the steamship was discovered ahead in close proximity. The tug endeavored to avoid collision by starboarding her helm, the effect of which was to carry the tug to the eastward of the steamship and leave the scow on the westward. They were both carried down by the tide, the tug on the starboard side of the steamship and the scow on the port side, having first come in contact with the anchor chain, with the effect of overturning her. It is evident that the principal causes of the accident were the failure of those on the tug to see the steamship sooner than they did and avoid her.

It is not a case for an apportionment of the damages between the tug and the steamship. I attach more importance to the testimony of those who anchored the latter in the vicinity of other anchored vessels and subsequently removed her to her wharf, than the judgment of witnesses formed for the purposes of the case; and I find, upon the conflicting evidence, that the steamship was within the anchorage limits. The facts that she did not maintain a vigilant anchor watch and pay out chain are immaterial. The rudder could not be used to any advantage, as the tug was on one side and the scow on the

other. What space she could have gained by touching her compressor and drifting astern would not probably have affected the result. The tide and wind were strong towards the steamship, and it can not be assumed for the benefit of the delinquent tug that such action would have been of any benefit. Moreover there was another anchored vessel not far astern with which a collision would have occurred if the anchor had started and the steamer had drifted about two hundred feet.

Collin, the master of the scow, lost his life in the accident. He was a healthy unmarried man about 21 years of age. The damages, however, to his next of kin were not serious. They were not in any way dependent upon him though occasionally he aided them. His earning capacity was $9 per week, and I consider that the sum of $1,000 will be ample to cover their losses. The deceased was not in fault.

There is no dispute about the owners of the Genesta being entitled to a limitation of liability and she has been appraised at $3,375, which, with interest, is the extent of their liability.

Let there be a decree entered limiting the liability of the owners of the Genesta and providing for the recovery of $1,000 by Augusta Collin, as administratrix; also providing for an order of reference to determine the damages of the libellants Goodwin. The libels against the S. S. Corvaja and the Corvajas will be dismissed.

THE PATRIA.

(District Court, S. D. New York. October 15, 1903.)

1. SHIPPING—DAMAGE TO CARGO—BURDEN OF PROOF

Where the evidence shows that a carrier received goods on board in good condition, and delivered them damaged, it has the burden of proof to show that the damage was due to a risk excepted in the bill of lading and, in the absence of satisfactory proof that such was the cause, it must be held liable for the loss, although the cause of the damage does not plainly appear.

In Admiralty. Action for damage to cargo.

R. Forsyth Little, Jr. (Frank H. Curry, of counsel), for libelant.
Benedict & Benedict, for claimants.

HOLT, District Judge. This action is brought to recover for damages to a lot of beans shipped by the libelant on the steamship Patria from Marseilles to New York. The evidence satisfies me that the beans were in good condition when shipped at Marseilles. When they were landed at New York a large number of the bags were stained, damp, and dirty, and the beans in a large part of the bags were soft and covered with black specks, a condition which seriously impaired their value. The libelant claims that the black specks were coal dust; that dampness had caused the soft condition of the beans; and that the ship was liable for exposing the beans to such coal dust and dampness. The respondent claims that the beans were originally improperly cured; that they became heated, fermented, and mouldy during the voyage; that this heating and fermentation were

the causes of the condition of the beans which were damaged; and that the black specks seen on them were particles of mould. I have examined the evidence carefully, and I am unable to reach any satisfactory conclusion as to what caused the damage to the beans. There is almost no direct evidence on the question. There is no proof that the beans were not properly cured. There is no proof that any coal dust actually came in contact with them anywhere, although it might have blown over the cargo to some extent when the steamer was coaling at Marseilles. There is no proof that anything occurred on the voyage, or when the beans were being landed, or after they were landed at the wharf in Brooklyn, which would cause the bags to be stained, dampened, or soiled. They were properly stowed in the hold, and an examination showed that the dampness was not caused by salt water. The pier was covered, and apparently there was no opportunity for the bags to become wet when being landed or at any time. If the damage was due to heating, caused by improper curing, that does not seem to me to sufficiently explain the stained and discolored external appearance of the bags. If the black specks were coal dust which had been blown over the cargo, I do not see how the coal dust could have become so widely diffused through the interior of the bags. If the damage was caused by dampness, I do not see how the bags could have become wet during the voyage, and if they became wet while discharging I do not see how the resulting dampness could have so quickly caused so much injury to the beans. The claims of both parties to the suit are based solely on inferences which they argue should be drawn from the appearance of the beans after they were discharged from the steamer. All that seems to me clear on the proof is that the goods were shipped in good condition, and were damaged when they reached New York. Under these circumstances, I think that the rule applies that when a common carrier receives goods in good condition, and delivers them damaged, it has the burden of proof to show that the damage was caused by a risk excepted in the bill of lading, and, in the absence of satisfactory proof that the damage was so caused, the court is justified in finding for the libelant, even if the cause of the damage does not plainly appear. Hudson River Lighterage Co. v. Wheeler, etc., Co. (D. C.) 93 Fed. 374; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; Doherr v. Houston (D. C.) 123 Fed. 334.

My conclusion, therefore, is that there should be a decree for the libelant, with the usual reference to fix the damage.

THE WALLACE B. FLINT.

THE TRANSFER NO. 9.

(District Court, S. D. New York. October 9, 1903.)

1. COLLISION—STEAMER AND CAR FLOAT IN TOW—CROSSING—FAILURE TO STOP.
A collision occurred at night in Hell Gate between a steamer bound from Boston to New York and a car float on the side of a tug being towed up the East river. The signals made by the steamer were not heard by the tug, and the vessels were not seen by each other until they

were only about 1,000 feet apart, although their lights were burning. *Held*, that both were in fault for failing to keep a good lookout, that the steamer was further in fault for failure to stop when danger of collision was imminent, and the tug also for failing to stop in time when her signals to the steamer were unanswered.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellant.
Carpenter & Park, for The Wallace B. Flint.
Henry W. Taft, for The Transfer No. 9.

ADAMS, District Judge. This action was brought to recover the damages caused by a collision which happened in Hell Gate about 9:30 o'clock P. M. of the 2nd of January, 1902, between the Joy Line Steamship Seaboard, bound from Boston to New York, and a car-float in tow, on the port side, of the tug Wallace B. Flint, and bound from Pier 50 East River to the Harlem River. The night was clear and the tide ebb. All the proper lights of the vessels were set and burning. The collision happened by the float striking the Seaboard on the port side, abaft amidships, doing considerable damage to the Seaboard.

The claim against the Transfer No. 9 was abandoned by the libellant. It appeared that prior to the collision she was helping the Flint, but just before it happened had cast off her lines. She had not participated in any way in the collision navigation of the float, which at the time was solely in charge of the Flint

The Seaboard blew a long whistle as she was rounding Hallets Point, which was not heard on the Flint. A ferryboat, the Steinway, crossing from Astoria to New York, came between the vessels and they were not seen by each other until she drew away. The Steinway crossed the bow of the Seaboard from port to starboard, after an exchange of a signal of two whistles. As she passed out of the way, those on the Flint saw the Seaboard and blew a signal of two whistles to her, to which the Seaboard did not reply. Then they blew another signal of two, to which no attention was paid and the Flint then stopped and reversed. Shortly afterwards the collision happened while the Flint was still going ahead through the water.

The Seaboard claims that the Flint had her on her own starboard hand and that the navigation was governed by the starboard hand rule, but I can not agree with this contention. The starboard hand situation was only temporary and the rule did not apply. The Seaboard did not navigate in accordance with the rule but changed her course to avoid the Steinway just before the Flint was seen, but not before she should have been seen, and she was changing her course back again when the Flint appeared. The navigation was governed by other considerations. There was obvious danger of collision and it was the duty of the Seaboard to stop and reverse, which she did not do at all, claiming that it was not safe for her to do so in the tide. This contention does not recommend itself to my judgment. A steam vessel under command can nearly always stop temporarily without danger, and there was nothing in the Seaboard's situation to make it peculiar. She claims that she blew three signals of one blast each, to which the

Flint did not reply at all. The Flint denies these signals. Her testimony is rather stronger than the Seaboard's upon the point and it has the support of the pilot of the Steinway, who was a disinterested witness. It is probable that the pilot of the Seaboard thought he could get across the Flint's bow but the attempt was a failure. I regard the Seaboard's faults as condemnatory of her navigation.

The Flint was also in fault. The Seaboard was not seen by her as soon as she should have been, probably not till they were within 1,000 feet of each other, and continuing her two whistle course and speed after she got no response to her first signal, when the vessels were in such close proximity, with the Seaboard continuing her attempt to pass ahead, was grossly imprudent and almost sure to bring about a collision. The combined speed of the vessels was at least 18 knots and there was no time for experiments when they were within about a half a minute of each other.

Libel dismissed as to the Transfer No. 9. Decree for half damages against the Flint, with an order of reference.

MEYER et al. v. PENNSYLVANIA R. CO.

(District Court, S. D. New York. October 20, 1903.)

1. WHARVES—INJURY OF BOAT FROM STORM—INEVITABLE ACCIDENT.
The injury of a barge while moored to a pier during a gale of unusual severity, which caused injury to many other vessels at the same place, *held* to have been due to inevitable accident, for which the owner of the wharf was not responsible.

In Admiralty.

Martin A. Ryan, for libellants.
Robinson, Biddle & Ward, for respondent.

ADAMS, District Judge. This action was brought to recover the damages, amounting to $112.64, suffered by the libellants, through their barge, the John H. Meyer, Jr., being injured at South Amboy, on the 23rd and 24th of November, 1901. The boat first lay at the respondent's wharf, known as the Old Steamboat Pier, and the libellants allege negligence on the respondent's part in causing her to be moved by the tug Winnie, to the New Steamboat Pier, which it is alleged was an unsafe and dangerous berth, and placed on the outside of a number of boats there.

The respondent denies the moving by it and it appears that the Winnie was not at South Amboy at the time. The respondent alleges that the mooring wharf was ordinarily safe and that the injured boat, with a number of others, while lying there, was damaged by stress of weather and by reason of an extraordinary storm.

It is shown by the evidence that the storm was a north east gale, of quite unusual severity, which was attended by rain and a very high tide. The effect upon the boats at South Amboy was disastrous generally and many suffered much more seriously than the libellants' boat. The defence of inevitable accident is clearly established and affords a complete exoneration of the respondent, especially as the evidence

shows that this was the only case of such an accident happening in a period of about ten years, during which the wharf in question had been constantly used as a mooring place.

Libel dismissed.

THE MOONLIGHT.

(District Court, S. D. New York. October 16, 1903.)

1. SEAMEN—FORFEITURE OF WAGES BY DESERTION—REV. ST. § 4516.

Where a seaman employed by a master during a voyage to take the place of one discharged by reason of illness, although not of the same grade as the one whose place he took, as required by Rev. St. § 4516, as amended by Act Dec. 21, 1898, c. 28, 30 Stat. 755 [U. S. Comp. St. 1901, p. 3071], was able to perform the work to the satisfaction of the master, and no complaint was made by the other seamen, the latter were not justified, by reason of such employment, in leaving the ship at an intermediate port, and by their desertion forfeited their right to recover wages.

In Admiralty. Suit by seamen to recover wages.

George C. Bodine, for libellants.

Alexander & Ash, for claimant.

ADAMS, District Judge. This action was brought to recover the wages alleged to be due two seamen, amounting to $43.09. The defence is desertion.

It appears that these men shipped at New York on the 4th of December, 1902, for a voyage to Norfolk and return to an eastern port of discharge, at the rate of $25 per month, in company with another seaman. The latter became ill when the vessel reached Norfolk and was discharged there for that reason. Another man was shipped in Norfolk, who turned out to be a non-union man. The vessel sailed from Norfolk for Boston, after the libellants knew about the new man, but put into New York to make some repairs and the libellants left her there, alleging that the substituted man was not an able seaman. The testimony indicates, however, that the real reason of their objection to the new man was that he did not belong to the Seamen's Union. The advocate for the libellants does not attempt to support the libel upon such ground but claims that they are entitled to recover because of section 4516, Rev. St. U. S., as amended by Act Dec. 21, 1898, c. 28, 30 Stat. 755 [U. S. Comp. St. 1901, p. 3071], which provides:

"Sec. 4516. In case of desertion or casualty resulting in the loss of one or more seamen, the master must ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or rating and equally expert with those whose place or position they refill, and report the same to the United States consul at the first port at which he shall arrive, without incurring the penalty prescribed by the two preceding sections."

A good deal of the difficulty which would arise from the words of the statute, is overcome by the fact that the new man, though not of the same grade as the others, as he was an ordinary seaman and

received but $20 per month, was able to work acceptably to the master and without complaints from the libellants, until they were put forward to meet the defence in this action.

I must hold, under the circumstances, that the libellants were not justified in leaving the vessel and that the defence of desertion should be sustained.

Libel dismissed.

THE HARRY B. HOLLINS. THE TIP TOP. THE ANNIE L.

(District Court, E. D. New York. October 2, 1903.)

1. WHARVES—MANNER OF USE—EXTENSION BEYOND LIMITS FIXED BY LAW.
Where the bulkhead line of a dock is where it has been maintained for years, and since a time before there was any statute on the subject, persons using the bulkhead for mooring vessels in the customary manner, with the consent of the city, cannot be deemed in fault therefor, although it extends farther into the river than the line as established by law.

2. SAME—USE OF SLIP BY FERRYBOAT.
A ferryboat leasing a slip has no right to appropriate the waters abutting the bulkhead below such slip to the extent of shutting out the use of such bulkheads in the customary manner for the mooring of vessels.

3. COLLISION—VESSEL AT WHARF—FERRYBOAT ENTERING SLIP.
A ferryboat *held* in fault for collision with a scow which was moored outside of another vessel at a bulkhead adjoining the ferryboat's slip, on the ground that she failed to exercise due care in entering the slip.

In Admiralty. Suits for collision.

Louis B. Adams, for Hastorf.

Wilcox & Green and Herbert Green, for Brooklyn Ferry Co. and ferryboat Hollins.

John F. Foley, for scow Tip Top, tug Annie L., and Murray & Reid.

THOMAS, District Judge. At about 9 a. m. the tug Annie L. placed the sand scow Tip Top outside of dumper No. 1R, at the bulkhead between Forty and Forty-First streets, Manhattan. The scow California lay ahead of No. 1R. All of the scows were there by permission of the lessee of the dock, and No. 1R was suitably close to the bulkhead, carefully moored. Ericsen, who, for Brown & Fleming, had charge of the dumper and bulkhead, states that he helped to moor No. 1R, and showed the very careful and thorough manner of doing it. His evidence, supported by that of other witnesses connected with the moored vessels, is preferred to the evidence of the witnesses for the ferryboat, that No. 1R was hanging off from 10 to 15 feet from the bulkhead. Such witnesses were wrong with reference to the location of the vessels, as they placed the California in an incorrect position. This mistake of the ferry company's witnesses may not be of great consequence, but is some evidence of lack of careful observation of the conditions. Moreover, the tide, which was about half flood, set on to the dock, and would tend to keep the boats up, rather than to allow them to hang off. The Tip Top and No. 1R occupied about 60 feet in width,

while the California, ahead of them, was about 120 feet in length, and occupied the remaining dock space above the vessels mentioned. Counsel for the ferryboat gives a very good description of the ferry slip, as follows:

"The structure does not extend directly out into the river, with its sides nearly or quite at right angles with the bulkhead, but the inner side of the slip is almost parallel with the actual bulkhead, the rack of that side being 39.06 feet out from the bulkhead. The exterior line of the outer rack is 150 feet from the bulkhead and pierhead line as established by law. The further side of the inner rack is 39.08 feet. The mouth of the slip is about 85 feet wide, and the slip narrows towards the bridge. Because of this plan of construction, the ferryboats, when approaching the slip from their Brooklyn terminus at Broadway, are obliged to proceed inshore on a course about parallel with the bulkhead. This character of slip was necessitated by the fact that the ferry company was permitted to build out into the river not more than 150 feet from the established bulkhead and pierhead line, and that would have been insufficient for the usual type of slip. 'The boat was 200 feet long, and the bridge is about 70, and the backing for the bridge or platform, adding 10 feet, made 280 feet.'"

In making her slip on the flood tide, the Hollins struck the Tip Top, carrying her away from her mooring to No. 1R, and against the California, and the injuries to the Tip Top, California, and Hollins are involved in the above actions. The evidence of the captain of the Hollins is that, on the tide then running half flood, he could not enter his slip without striking the Tip Top, although the Tip Top had been in the same position for several hours, and the ferryboats of the same line had been passing her every 15 minutes, one of them but 15 minutes before the accident, which occurred about 12:15.

It is urged on the part of the Hollins that the actual bulkhead line extends somewhat farther into the river than the lawful bulkhead line, and that therefore the vessels had no right to lie at such point. The actual bulkhead line is the line shown on the maps of the city, and has been in existence for many years, and was there prior to the passage of the statute invoked by the ferry company to condemn it. It was the de facto line, and without it the bulkhead could not be used at all. Persons innocently using the bulkhead with the assent of the city should not be deemed in the wrong. But in any case the use of the line was not a cause contributing to the accident. The presence of the bulkhead line there was one of the conditions that attended the accident, but did not cause it. The cause was the lack of proper calculation, whereby the captain allowed his boat to go too far to port, with the result mentioned. The accident happened in the daytime, with a very light wind, and with no condition that was unusually dangerous at that place, although it did require considerable skill to take the vessel into the slip, on account of the proximity of the slip to the docks, and its peculiar relation thereto. But other vessels did it that morning, and continued to do it, and no good reason appears for the Hollins failing to do it at the time of the accident. It is considered that a ferryboat leasing a slip has no right to appropriate the waters abutting the bulkheads below such slip, to the extent of shutting out the use of such bulkhead in the customary manner, and it had

quite often happened that one boat laid outside of another against such bulkhead. In fact, that is a common method of employing similar mooring places in the harbor.

It results from the foregoing views that the libelants Murray & Reid will have a decree against the ferryboat Hollins; that the libel filed by the Brooklyn Ferry Company against the scow Tip Top and steam tug Annie L. is dismissed; that the libelant Hastorf will have a decree against the Hollins, but that the libel is dismissed as to the scow Tip Top and the steam tug Annie L. No costs will be allowed the Tip Top or the Annie L. in the Hastorf action.

BURNS v. BURNS.

(District Court, S. D. New York. October 15, 1903.)

1. SHIPPING—DEMURRAGE—EVIDENCE OF CONTRACT.
An agreement shown to have been made between a shipper and vessel owner as to the rate of demurrage *held* not to have been changed by the delivery of a bill of lading on a form stipulating for a different rate, which was used by mistake, and without intention to change the prior agreement.

In Admiralty. Suit for freight and demurrage.

Martin A. Ryan, for libellant.

Frederick W. Park, for respondent.

ADAMS, District Judge. This is an action which was brought to recover certain unpaid freight and 21 days' demurrage on a cargo of 307 tons of coal delivered by the libellant on his boat Annie Burns at the foot of 38th Street, North River, in December, 1902. It is not disputed that the freight, amounting to $99.54, is due. The libellant also claims 40c. per ton on the coal, in conformity with a bill of lading, which is produced. The respondent admits that there is freight and demurrage due to the extent of $223.32 and that amount has been paid into court.

The controversy arises between the libellant's claim of demurrage at the rate of 6c. per ton, which is mentioned in the bill of lading, and the rate of $6 per day for the boat, which the respondent says was agreed upon as the rate which was to be paid.

I do not regard the bill of lading as evidence of the contract with respect to demurrage, under the circumstances developed by the testimony. It appears that this form of bill of lading is the one used for eastern shipments and that it was delivered to the libellant by mistake and without intention of changing the agreement of $6 per day, which I find was made when the rate of freight was agreed upon.

The libelant is entitled to recover the money in court with costs up to the time of the tender, including a docket fee, less the respondent's costs, since the tender. Decree accordingly.

¶ 1. Demurrage, see notes to Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

SYKES v. ROBBINS.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1903.)

No. 1,912.

1. VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—REFUSAL OF VENDOR TO PERFORM.

Complainant contracted to sell to defendant a large quantity of land, the contract containing the following provision: "If any title to any part of said real estate shall prove defective, and cannot be perfected within one year, and render the same unmarketable, so that the vendee cannot accept the same, then said parcel shall be withdrawn from this sale. * * *" *Held*, that such provision bound complainant to use, in good faith, such efforts as were reasonable to perfect his title to all the lands within the year; and that conceding that, in case such efforts failed as to any of the lands, he had the right to withdraw them from the contract, he could not avail himself of his inability to make title at the end of the year to avoid the contract, where such inability resulted solely from his own action in instituting a suit to set aside prior tax sales of the lands, instead of redeeming from the same, when, in the nature of things, such suit could not be finally determined within the year; and especially where, subsequent to the making of the contract, he obtained advances from defendant thereon for the purpose of clearing the land of incumbrances, and defendant had agreed, if necessary, to extend the time for perfecting the title, apparently upon an agreement or understanding between the parties that the incumbrance of taxes should be removed by suit.

Appeal from the Circuit Court of the United States for the District of North Dakota.

Seth Newman (Burleigh F. Spalding and Winfield S. Stambaugh, on the brief), for appellant.

John S. Watson (W. F. Ball and D. G. Maclay, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. Under date of April 1, 1901, the appellant, Richard Sykes, entered into a contract with the appellee, Daniel M. Robbins, whereby he agreed to sell and convey to the latter certain lands in the county of Stutsman, N. D., containing 20,720 acres, at the price of $2.75 per acre, of which the sum of $2,000 was to be paid in cash upon the execution of the contract, and the further sum required to make a cash payment of $1 per acre to be paid as soon as a good marketable title in fee simple, free of incumbrances, was shown in the vendor, when deed was to be delivered to the purchaser, by whom a mortgage was to be given to secure the payment in five years of the balance of the purchase price, with interest at 5 per cent. per annum; it being further provided that "if any title to any part of said real estate shall prove defective, and cannot be perfected within one year, and render the same unmarketable, so that the vendee cannot accept the same, then said parcel shall be withdrawn from this sale, and the only damages to vendees under this contract shall be the return to them of all moneys paid on such parcel, together with interest thereon of 5 per cent. per annum. * * *"

When this contract was entered into the title to none of the lands described therein was clear and perfect on the record in the appellant, the First National Bank of Fargo holding the title to 4,224 acres as security, 1,600 acres being held by third parties by title absolute, and of the remainder the record title was in the appellant, F. L. Pirie, and the estate of Findlay Dunn, deceased, and all the lands, except the 4,224 acres held as security by the First National Bank, had been sold for taxes.

Without going into the details, it may be said that such steps were taken that the title to the land held by the bank was conveyed to the purchaser, the interest held by Pirie and the estate of Findlay Dunn was procured by the appellant, and with the exception of 1,600 acres, the title to which could not be procured, the land was cleared of all adverse claims except that created by the levy of taxes thereon and the sale following the failure to pay the same. With respect to these taxes the appellant refused to clear the land by the payment thereof, but, claiming that the same were not valid liens on the realty, he brought suits at the December term, 1901, of the district court of Stutsman county, N. D., against W. H. Beck and ——— Allen, the owners of the tax sale certificates, and Stutsman county, asking that the levy of the taxes and the sales based thereon be declared null and void, and on the 5th of March, 1902, that court handed down an opinion to the effect that the levy of taxes and the sales based thereon were void. From the judgments and decrees following this opinion an appeal was taken in due season to the Supreme Court of North Dakota, which had not been disposed of when the present suit was begun, nor at the date of the trial in the court below.

Under the date of March 31, 1902, the appellant addressed a letter to the appellee, in which he states:

"Judge Glaspell's judgment in the suits brought by me in the district court, Stutsman Co., N. D., against Mess. Allen & Beck, is in my favor, and cancels & annuls all taxes for 1897 to 1900. * * * I am unable, however, to offer you a marketable title to these lands, because the defendants have the right to appeal within 12 months from 13th March, 1902, being the date of record of the judgments. It appears to me, however, that the title is now such that you might accept it, and I should be pleased to hear from you whether or not you can do so at the present time."

At a personal interview between the parties, on the 5th of April, the appellant urged the appellee to accept the title as it then stood, claiming that the tax question was virtually closed by the judgment of the district court of Stutsman county; but the appellee declined to close the deal, by paying for the land, until the tax matter was put at rest either by the failure to appeal the case or by a disposition of the case on appeal.

On the 5th day of April, 1902, the appellant wrote as follows to the appellee:

"Dear Sir: Referring to our interview today, at which you again refused to accept the title to the following lands, I hereby withdraw them from the sale of 1st April, 1901: [Here follows description of lands.] As the agreement above referred to has been recorded, I enclose quitclaim deed, which I hope you will execute and forward to me at Waldorf Hotel, Fargo, N. D. I enclose one dollar to cover the expense of the deed."

To this letter the appellee, under date of April 7, 1902, sent the following reply:

"Dear Sir: I am in receipt of your letter of the 5th enclosing $1 and asking me to sign a quitclaim deed on certain lands. I return the dollar, as I am unwilling to sign the deed, as I expect to take the lands when you can perfect the title to them. When you advised me that you could not perfect the title as soon as expected, I agreed to extend the time so that you should have ample time and opportunity to perfect the same. In regard to the tax title, you had abundant time in which to redeem the lands, and were furnished money, which it was understood was to be used in perfecting the title to the same. You certainly can have no moral or legal right to take advantage of your own laches in failing to redeem from the tax sale when you had abundant time and opportunity to do so. I trust you will get the matter straightened out as soon as possible, as I am desirous of closing the matter up in accordance with the contract."

Upon the receipt of this letter the appellant at once brought suit in equity in the district court of Cass county to quiet the title to the land included in the tax sales, and to remove the cloud upon the title thereto created by the contract of sale of April 1, 1901, which had been duly recorded in Stutsman county, and in the bill filed, after setting forth the contract of sale, it is averred by the appellant:

"That, during the year provided in said contract for perfecting the title to any of said tracts of land, the plaintiff perfected the title to the following tracts, and caused the same to be conveyed to the defendant under and pursuant to the terms of said contract, to wit, all * * * [here follows the description of the 4224 acres formerly held by the Fargo Bank]. That the title to the remainder of said land not so as aforesaid conveyed to the defendant was imperfect, in this, to wit, that it was clouded by certain tax sales and tax certificates issued by the auditor of said Stutsman county thereunder, which said sales and tax certificates were void, and this plaintiff, as soon as practicable after he had ascertained that there existed clouds upon the title to said land, caused actions to be commenced in the district court of the state of North Dakota, in and for the county of Stutsman, to vacate and set aside all such tax sales and tax certificates, and prosecuted said actions to judgment with diligence, and such proceedings were therein had that on the 10th day of March, 1902, judgments were given and rendered in said actions, vacating and setting aside the said taxes, tax sales, and tax certificates upon said lands which were so as aforesaid clouds upon the title of this plaintiff, and on or about said date notice of entry of said judgment were served upon the defendants in said actions, and the time for appeal from such judgments will expire on or about the 10th day of March, 1903."

—The prayer being that the contract of sale, so far as it affected the lands not conveyed to the defendant, be declared to be of no effect, and that the cloud created by the contract be removed, and the title be quieted in complainant.

Upon the application of the defendant, who was a citizen of the state of Minnesota, the suit was removed into the United States Circuit Court for the district of North Dakota, and the defendant filed an answer and also a cross-bill, wherein he prayed a decree for the specific performance of the contract of sale on part of the vendor.

In the answer and cross-bill the defendant set forth at length the contract of sale, averring that under its terms it was the duty of the complainant to pay up the taxes assessed upon the land, or to otherwise protect the title thereto against the said taxes, and the sales based thereon, and further showing that after the rendition of the judgments in the district court of Stutsman county holding the tax

sales and certificates to be void, and in view of the doubt and uncertainty that existed touching the final outcome of the question involved, he caused a purchase to be made, in the name of John Wyman, of the tax certificates, such purchase being made to protect his interest in said lands, and not with any purpose to interfere with or burden the title of the complainant, he being willing that the benefit of such purchase should be availed of by complainant, in case it should be finally determined that the land was subject to the taxes in question; it being further averred that on or about June 14, 1901, by agreement with the complainant, the defendant, in addition to the $2,000 paid upon the execution of the contract of sale, advanced to the complainant the further sum of $8,500 to be used by the complainant in clearing off the incumbrance on the lands contracted to be sold. It is also averred in the cross-bill that on the 9th of July, 1902, the defendant tendered to the complainant the sum of $10,397.42 in cash, and his promissory notes for the further sum of $36,260, with a mortgage securing the sum upon the lands included in the contract of sale, and demanded from the said complainant the execution and delivery to the defendant of a proper deed of conveyance of the lands in dispute, which tender and demand was refused by complainant, and this tender is repeated in the cross-bill, the cash, notes, and mortgage being brought into court to secure the fulfillment thereof.

The evidence being taken, the circuit court decided the case on the merits, ordering a decree dismissing complainant's bill, and granting a decree upon the cross-bill, holding that the defendant was entitled to specific performances of the contract of sale, except as to 1,600 acres, the title to which was not in complainant; and the decree further provides for the retention of $5,500 from the cash payment to be made by the defendant awaiting the action of the Supreme Court of North Dakota, upon the suits involving the validity of the taxes, and also directs the steps to be taken by defendant in carrying out the obligation resting on him as purchaser under the contract of sale.

The errors assigned by the appellant, who was the complainant below, are, in brief, that the court erred in dismissing the bill, thereby refusing to quiet the title of the realty in complainant, and in granting a decree for specific performance upon the cross-bill.

It is admitted in the brief of counsel that the case is to be determined by the construction to be given to the clause of the contract of sale which provides that "if any title to any part of said real estate shall prove defective, and cannot be perfected within one year, and render the same unmarketable, so that the vendee cannot accept the same, then said parcel shall be withdrawn from this sale. * * *" The contention of counsel for appellant is that this clause in the contract is not to be treated as a provision for a forfeiture to be strictly construed, but that it is a provision for the benefit of both parties, to be fairly interpreted, and to be given a reasonable construction; or, to use the language of counsel: "The agreement is mutual, it is lawful, reasonable, and just, and there is no reason why it should not be given effect by the courts according to the intention of the parties, as expressed in the language they have used, provided the contin-

gency has arisen upon which the contract is to be determined. It has arisen, if complainant has done all that under the law he was bound to do to perfect his title."

In support of this contention counsel quote the language used in D., L. & W. R. R. Co. v. Bowns, 58 N. Y. 578, wherein it was said: "The more reasonable interpretation of the contract, and that most in harmony with the intent of the parties, and best calculated to promote justice between them, would only hold the plaintiff to the use of all reasonable and practicable means to procure and deliver coal according to the well-known usage and practice of those engaged in similar business, such as a jury would say would be reasonable and proper under the circumstances; such as the defendants might be presumed to have expected from the plaintiff at the time and under the circumstances in which the contract was made;" and, in reliance upon this case and other authorities cited, the conclusion of counsel is: "The words 'cannot be perfected' must therefore be construed as though they read 'cannot, after such efforts in good faith as are reasonable and proper for the purpose, be perfected.' "

We do not question the correctness of the contention that parties may include in contracts entered into by them provisions limiting the time of performance, or naming the contingencies or circumstances which may absolve either party from further performance, of the contract obligations, and we are content to accept the conclusion of counsel for appellant that the latter was only bound to use "such efforts in good faith as were reasonable and proper for the purpose" in clearing the title of the lands contracted to be sold from the incumbrance created thereon by the levy of the taxes and the sales made thereunder, and the point at issue is narrowed down to the inquiry whether the appellant, with respect to these taxes, made such efforts in good faith as were reasonable and proper to secure the removal of the incumbrance created thereby.

The obligation resting upon the appellant was in good faith to use all reasonable and proper efforts to perfect the title of the lands he had contracted to sell to the appellee. When this contract was entered into both parties knew that to perfect the title it was necessary, among other things, that the incumbrance created by the taxes and tax sales should be removed; and it is admitted by his counsel that appellant was bound to use in good faith all reasonable and proper efforts to that end, so that the contract of sale should be completed within a year from its date. It is clear beyond question that the tax incumbrance could have been promptly removed by the payment of the amount thereof, and this mode of action was open to the appellant. Instead of so doing, appellant, claiming that the assessment was void, brought suits to the December term, 1901, of the state district court, to secure the cancellation of the tax sales and certificates. When these suits were thus brought the appellant knew that, in the ordinary course of events, it would be impossible to bring these suits to a final termination within the year within which the contract of sale was to be completed. He knew that suits of this character, brought to the December term, 1901, could not be prepared for trial and determined in the trial court without the expiration of some

reasonable time, and he knew that after the district court had given its decision a right of appeal could be exercised within one year to the Supreme Court, and he knew that even if the trial court acted with unusual promptness in deciding the cases, and that if appeals should be promptly taken to the Supreme Court, there was no reasonable hope that the cases could be submitted to that court and a final decision be had by the 1st of April, 1902.

It cannot be otherwise, therefore, that when appellant, instead of clearing the title of the lands from the incumbrances created by the tax levy and the sales based thereon by paying the amount thereof, undertook to clear the title by the institution of the suits in question in the state district court, he well knew that by adopting this course he was initiating proceedings which could not be brought to a close within the year.

With respect to these taxes two methods were open to the appellant for removing the cloud created thereby on the lands he had contracted to sell—one being by payment of the amount due, and the other by securing the cancellation of the same through judicial action. By making payment of the taxes the title could be cleared within the year limited in the contract. By initiating suits for cancellation, it would be impossible to perfect the cancellation of the taxes within the year. Was it open to the appellant to say that he was acting in good faith and using all reasonable and proper efforts to free the lands from the incumbrance of the taxes within the year stipulated, if he refused to pay the taxes, and instead of so doing brought suits for the cancellation thereof, which he knew could not be brought to a final conclusion until after the expiration of the year, and then rely on his inability to get a final decision within the year of the suits thus brought as a reason why he should be released from his contract to sell and convey the lands to the appellee?

In our judgment, the appellant would certainly be chargeable with lack of good faith, and a failure in his contract obligations to the appellee, if he availed himself of the delay in clearing the land from the tax incumbrance created by his own action in bringing suits to test the validity thereof under the circumstances developed in the evidence in this case. It was clearly within his right to discharge the taxes and cancel the sales by paying the amount due, and he obtained from the appellee, in addition to the sum of $2,000 paid down at the execution of the contract, an advance of $8,500, to be used in clearing off the incumbrances on the land. He thus had both the legal right to pay the taxes, and was furnished by the appellee with funds more than sufficient to pay the same.

He might fairly claim that, as he denied the validity of the taxes in question, it would be a heavy burden to compel him to pay the same instead of permitting him to test the validity thereof by suits in court; but it would nevertheless not be just to the appellee to hold that the appellant had the right to undertake the performance of his contract by a method, to wit, that of bringing suit to cancel the taxes, which would give him the absolute right to cancel his contract of sale with appellee. The appellant knew when he entered into the contract of sale that the lands were incumbered with the taxes, and he

agreed to use in good faith all reasonable efforts to release the land from the tax incumbrance, and he does not meet the obligation of his contract by refusing to pay the taxes, and undertaking to set them aside by judicial proceedings, which, of necessity, could not be brought to a final determination until after the lapse of the year named in the contract as the time within which the title should be cleared.

The inequity of the claim now asserted by appellant is not in the mere fact that he sought to get rid of the tax incumbrance by suit in court, but in the fact that he endeavors to evade his contract of sale by asserting that when the 1st of April, 1902, came around, the tax incumbrance had not been finally removed, because the right of appeal to the Supreme Court still existed against the decree in the district court of Stutsman county, and that he was therefore absolved from further obligation to convey the lands to the purchaser.

In effect, the contention of appellant is that, although he had bound himself to use, in good faith, all reasonable effort to clear the land from the incumbrance of the taxes, and although it was within his ability to remove the same by payment of the taxes, he could refuse so to do, and then release himself from the obligation to complete the sale by the claim that he had not succeeded in getting a final decree of the court within the year, when he well knew when he adopted that course that it would be impossible to carry the suits to a finality by the 1st day of April, 1902.

The evidence shows that the appellee not only paid promptly the $2,000 required to be paid at the execution of the contract, but subsequently advanced to appellant the further sum of $8,500, to be used in paying off the incumbrances on the land, and in September, 1901, the latter endeavored to procure a further advance of $20,000. Under the terms of the contract no obligation rested on the appellee to advance these sums, and, unless we assume that when he applied for the same the appellant expected to perfect the titles and convey the land in dispute to the appellee, he would be open to the charge of fraud, in that he was seeking to obtain money from the appellee upon the theory that he would in good faith perfect the title to the lands and convey the same to the appellee, when he had no present intention so to do, but purposed to rely on his inability to settle the tax incumbrance by judicial proceedings by the 1st of April, 1902, as a reason why he could withdraw the 15,000 acres from the contract and refuse to convey the same to the appellee.

If it be true that when the appellant sought these advances from the appellee upon the representation that the money was to be used in perfecting the title to the lands in the contract described his purpose was, not to pay the taxes and thus clear the land from the lien thereof, but to bring suits to have the same declared void, and then to rely on the pendency of the suits as a sufficient reason why he was not able to perfect the title by the 1st of April, 1902, thus giving him the right to withdraw these lands from the contract of sale, then the court would be justified in holding that the appellant had not in good faith used all reasonable and proper efforts to perfect the title to the lands, but, in refusing to clear the land by payment of the taxes and bringing the suits, he had done so with the purpose of

evading the proper performance of the contract of sale, and under such circumstances he could not avail himself of the year limitation contained in the contract, even under the construction of the limitation clause contended for by his counsel.

Furthermore, is there any sufficient ground for holding that the appellant was not absolutely bound to clear the land from the tax incumbrance by paying off the same, if that was the only means open to him for clearing the title by April 1, 1902? When the contract of sale was entered into appellant knew that the lands were subject to the incumbrance in question. He agreed, in effect, to use in good faith all reasonable means to clear the land within a year. Provision might have been made in the contract for testing the validity of the tax levies by judicial proceedings, thus giving the appellant the right to resort to that method of settling the title. No such provision was inserted in the contract. The appellant bound himself to use all reasonable effort to perfect the title within the year, and as the evidence shows there was but one method by which this could be accomplished, and that was by payment of the amount due, is it not the necessary inference that the contract of sale obligated the appellant to pay the taxes, that being the only course which would enable the contract of sale to be carried out? If the tax assessments and levy were valid, then the appellant owed the duty to the state and county to pay the taxes, and it would only be by payment that the appellant could perform his contract obligation to the appellee to perfect the title to the lands covered by the contract of sale.

As these taxes amounted to about $5,000, it doubtless seemed a hardship to the appellant to be required to pay them, if in fact they had not been legally assessed and levied, and, for the purpose of endeavoring to escape this necessity, the appellant sought to make some terms with appellee, as is evidenced by this letter of October 23, 1901, addressed to the appellee, wherein he wrote:

"I shall be in Fargo, Waldorf Hotel, Thursday evening of this week, 24th inst., & all Friday 25th inst. I should be much obliged if you would give me a definite reply there or see me regarding my recent letter on the subject of the contract of 1st April, 1901. I am able now to give you as good a title as I shall be able to give on 1st April, 1902, and, if not acceptable to you, let us adjust the matter at once, or, if acceptable, let us adjust the matter now."

Under date of October 24, 1901, the appellee replied to this letter saying:

"I expect to take the land as I agreed. If you are not able to complete title within the year, as specified in the contract, I shall expect to take it as soon as you can complete title. * * * If you are not able to fix it up the first of April I should not take any advantage on account of that. * * *"

Following this correspondence the appellant brought the suits to cancel the taxes at the December term, 1901, of the court in Stutsman county, and is it not the fair inference that the parties understood that the matter of the taxes was to be settled by the results of the litigation thus begun? It would certainly not have been open to the appellee to have declared the contract at an end on the 1st day of April, 1902, for the reason that the suits were not then finally de-

termined, in view of the statements in his letter of October 24, 1901, and it would be even more inequitable to hold that the appellant could terminate the contract of sale because the suits he had brought were yet undecided.

As already stated, the appellee, in order to prevent the tax sales from ripening into a title to the lands, in case it should be finally held that the taxes had been validly levied, bought the certificates from the owners thereof, and thus demonstrated that it was entirely within the power of the appellant to clear the land from the incumbrance of the taxes. It is made clear beyond all question that the only reason why the appellant did not perfect the title to the land, by payment of the taxes and redeeming from the sales, was that he hoped to avoid the outlay that course would have called for; and as the appellant brought the suits for cancellation knowing that the same could not be finally determined by April 1, 1902, after the appellee had stated in his letter of October 24, 1901, that he would take the land whenever the title was perfected, even though that should not be done within the year, it may be fairly held that the parties by their own conduct had waived strict performance of the conditions of the contract within the time named in the original contract.

Subsequently the appellee, to protect the title to the land in case it should be held that the levy of the taxes was valid, bought the tax sales certificates, and thus made it certain that the lands could be cleared from the taxes, no matter what the final decision was upon the question of the validity of the tax levy; and, in view of these circumstances, the contention of the appellant that he was entitled to withdraw the 15,000 acres of land from the contract, because he had in good faith used all reasonable effort to perfect the title by the 1st of April, 1902, but had been unable to do so, cannot be sustained, and our conclusion is that the facts of the case, as proven in the court below, justified the action of the circuit court in dismissing the bill of appellant, and in granting a decree of specific performance upon the cross-bill of the appellee.

Furthermore, since the submission of the case in this court, we have been informed that the Supreme Court of North Dakota has handed down an opinion in the cases appealed from the district court of Stutsman county reversing the decree of that court, and holding that the taxes assessed on the lands in dispute herein were lawfully assessed and levied.

If this is the final result upon the question of the validity of the taxes and tax sales, it demonstrates that the appellant did not take the course and the only one which would release the lands from the incumbrance of the taxes, to wit, by paying off the same, and certainly the appellant should not be permitted to avail himself of his own error to obtain a release from his contract obligation, thus benefiting himself and injuring the appellee, especially in view of the fact that, if the appellee had not protected the title to the lands by buying up the tax sales certificates, it is possible that the lands might have been lost to both appellant and appellee.

Under these circumstances, the order to be entered will be that the decree of the circuit court dismissing the original bill filed by the

appellant is affirmed; that the decree of the circuit court upon the cross-bill filed by the appellee, Daniel M. Robbins, granting him specific performance of the contract of sale, is affirmed; that the case be remanded to the circuit court, with instructions to ascertain whether the cases pending on appeal in the Supreme Court of North Dakota have been finally decided, and, if so, to make such changes in the particular provisions of the decree heretofore entered in this case as may be called for by such change in the situation of the parties, and as may be advisable to fully protect the rights of the parties hereto. And it is so ordered.

On Petition for Rehearing.

(November 14, 1903.)

PER CURIAM. A petition for rehearing has been submitted in this case on behalf of the appellant, in which, after quoting liberally from the opinion heretofore filed, counsel state that:

"In these remarks the mind of the court was focused on four erroneous assumptions of fact: (1) That the contract was valid and enforceable when made on April 1, 1901. (2) That the suits to set aside the taxes were not brought until after October 24, 1901. (3) That that method was resorted to by Sykes without the consent and acquiescence of Robbins. (4) That Robbins had furnished Sykes with money to be used for the express purpose of paying these taxes."

In support of the first proposition, that the court erred in viewing the case upon the assumption that the contract for the sale of the lands was valid and enforceable when made on April 1, 1901, it is said that when the contract was signed the appellant, Sykes, was in England; that the contract is signed by "D. M. Stewart, attorney in fact for Richard Sykes"; that the statutes of North Dakota provide that all agreements for the sale of realty, if made by an agent, are invalid unless the authority of the agent is in writing, subscribed by the party sought to be charged; that no authority in writing authorizing Stewart to make the contract is shown, and therefore the contract is void. Turning to the original petition filed in this case by the appellant, we find it therein stated that on the 1st day of April, 1901, he was the owner of the following described premises, giving the description thereof at length; "that on the 1st day of April, 1901, plaintiff made and entered into a contract with defendant, by the terms whereof the plaintiff agreed to sell and convey unto the defendant, upon certain terms and conditions and upon the full performance of said contract by the defendant on his part, all said premises"; and, further, "that said contract, so as aforesaid made by and between this plaintiff and defendant, was in writing, and was duly acknowledged, so as to entitle the same to record." In view of these positive statements contained in the petition which was the foundation of this case, what need was there for the defendant to introduce evidence showing that the agent, Stewart, had authority to sign the contract. No evidence upon this matter could be as weighty and conclusive as the averment made by the plaintiff in his petition that on the 1st day of April, 1901, he had entered into the contract in question with the defendant, and that the same was in writing

and duly acknowledged. The trial court was therefore clearly justified in disposing of the case upon the assumption that on the 1st day of April, 1901, the parties had entered into a valid written contract for the sale of the lands; the issue in dispute being the question whether, under the terms of the contract and the acts of the parties, the appellant was entitled to withdraw the larger part of the lands from the contract of sale, upon the expiration of a year from the date thereof. When the case was submitted to this court upon appeal, it was stated in the brief of appellant that "on April 1, 1901, the parties entered into a contract for the sale by Sykes to Robbins of 20,720 acres of land." In this condition of the record, we fail to see wherein it was error to determine the rights of the parties upon the assumption that on the 1st day of April, 1901, the parties had entered into a valid and enforceable contract for the sale of the lands in the contract described.

The second point urged is that the court was in error in stating that the suits for the cancellation of the tax sales were not brought until after the 24th of October, 1901. This criticism of the opinion filed is correct, as it is made plain in the petition for rehearing that the record shows that these suits were in fact brought about June 12, 1901; this mistake in the date being caused, as suggested by counsel, by the fact that there were suits brought in October, or later, by the appellant, for the cancellation of the tax sales on lands forming part of the 1,600 acres excluded from the operation of the decree entered, although named in the contract. This mistake as to the time when the suits for the cancellation of the taxes were instituted does not call for any change in the views expressed in the opinion upon the vital points of the case. The rights of the parties, as affected by the action of the appellant in bringing suits for the cancellation of the tax sales, do not depend upon the question whether these suits were brought in June or in October, 1901, but upon the fact that, when brought, the circumstances were such that it was impossible to carry them through to a final determination by April 1, 1902.

The third matter of fact touching which counsel claim the court was in error is with respect to the bringing of suits for the cancellation of the tax sales; it being said that the court was mistaken in holding "that that method was resorted to by Sykes without the consent and acquiescence of Robbins." In considering the terms of the contract, some consideration was given to the question whether the contract itself gave the right to the appellant to adopt a method of clearing the land from the tax incumbrance by selecting the plan of bringing suits for the cancellation thereof, and then to rely upon his inability to secure a final determination of the suits within a year as a reason why, under the terms of the contract, he had secured the right to declare the contract at an end. In dealing with this question, it was considered in the first instance from the point of view that Sykes had of his own motion chosen this course, and this is the only foundation for the claim that the court has erroneously held that these suits were in fact brought without the consent and acquiescence of Robbins; and that this was not the conclusion reached by the court upon a consideration of the evidence is shown by the fact that, after reciting

portions of the correspondence between the parties, it is stated in the opinion that:

"Following this correspondence, the appellant brought the suits to cancel the taxes at the December term, 1901, of the court in Stutsman county; and is it not the fair inference that the parties understood that the matter of the taxes was to be settled by the results of the litigation thus begun?"

There is strong ground to support the statement of counsel in the petition for rehearing "that the record fairly shows that there was an understanding or agreement between the parties that the cloud or incumbrance of the taxes should be removed by suit." This position was not taken or advanced by counsel in their briefs submitted on the hearing of the case, and naturally the opinion filed dealt with the points relied on in the submitted briefs; but, as already said, it was stated in the opinion that it was a fair inference derivable from the evidence that the parties had an understanding to the effect that the matter of the taxes was to be settled by the result of the suits brought by Sykes against the tax purchasers. If, on the submission of the case, counsel had taken the ground relied on in the petition for rehearing, to wit, that after the signing of the written contract for sale of the lands it had been mutually agreed between the parties "that the cloud or incumbrance of the taxes should be removed by suit," it would have obviated the necessity for considering at length what, under the terms of the written contract, was required of Sykes in the performance of his admitted obligation to use all reasonable efforts to clear the land from the tax incumbrance resting thereon, because in that view of the case, the rights of the parties would be dependent upon the meaning of this supplemental agreement. Assuming that such an agreement was had, what is the construction to be placed thereon?

When this agreement was entered into the situation was as follows: By a valid written contract Sykes was bound to use all reasonable efforts to clear the land he had agreed to sell from all incumbrances, being given a year within which to perfect the titles. Among other incumbrances was that created by sales of the land for nonpayment of certain taxes levied thereon. Sykes claimed that these tax sales and the levy of the taxes were illegal and void, and, while it was open to him to clear off the incumbrance by payment of the sums due, he was anxious to avoid incurring that expense. Under these circumstances he reached an understanding or agreement with Robbins to the effect "that the cloud or incumbrance of the taxes should be removed by suit." When this understanding was had, there was no reasonable possibility that the suits to be brought by Sykes could be carried through to a finality within the year named in the written contract, and therefore it must be held that the parties, in having this understanding, intended that the limit of a year should not apply to the matter of clearing the land from the taxes. The claim made in the petition for rehearing is that Robbins agreed that Sykes should have the right to remove the tax incumbrance by suit. This agreement secured the right to Sykes to test the validity of the taxes and tax sales by an appeal to the courts, and Robbins was in good faith

bound to allow him the time necessary for that purpose; and, on the other hand, Sykes was bound to carry the suits through to a final determination. Having agreed to undertake the removal of the tax liens by suits for that purpose, he did not fulfill the agreement by merely bringing the suits, and therefore, when the 1st of April, 1902, arrived, it was not open to him to claim that he had the right to withdraw the lands which were yet incumbered with the tax liens from the contract of sale. Having persuaded Robbins to accept this method of dealing with the tax liens, he was in duty bound to carry through the suits to a final determination, and that he had not done when he brought the present proceeding, in which he claims a decree in his favor on the theory that he had fully performed all the obligations resting on him with respect to clearing the lands from all liens or other incumbrances.

The fourth and last alleged assumption of fact which it is averred in the petition for rehearing was erroneous, and which aided in misleading the court, is "that Robbins had furnished Sykes with money to be used for the express purpose of paying these taxes." It is not stated in the opinion filed that any sum was furnished by Robbins for this express purpose; the statement being that the advance of $8,500 was made to be used in clearing off the incumbrances on the land. In the letter written by Robbins under date of June 6, 1901, to his attorneys, he states the terms under which he was willing to advance the $8,500, further stating that, if these terms were complied with, "I will pay him the $8,500 to be used in clearing up the title, as I understand that is what he wants the money for." Under date of June 8th, Sykes wrote to Robbins, saying:

"I have carried out the arrangement proposed in your letter of the 6th inst. * * * I have drawn upon you at sight to the order of the First National Bank of Fargo for $8,500 as arranged."

In his testimony as a witness Sykes states that he had represented to Robbins that the purpose for which he wished to obtain the $8,500 was to enable him to remove liens upon the land and to perfect the title thereto, and this evidence fully justifies all that is said in the opinion with respect to the $8,500 advanced by Robbins to appellant.

We have given a careful consideration to the petition for rehearing; but, finding nothing therein which satisfies us that the conclusion heretofore announced is erroneous, the same is overruled.

HARP v. CHOCTAW, O. & G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1903.)

No. 1,847.

1. CARRIERS—REGULATIONS GOVERNING MANNER OF RECEIVING GOODS—RIGHT TO CHANGE.

At common law a common carrier has power to make reasonable regulations governing the manner and form in which it will receive such articles or commodities as it professes to carry, and also to change or modify such regulations from time to time upon reasonable notice to the public.

2. SAME—MANNER OF LOADING COAL.

A railroad company having a newly constructed line through a locality underlaid with coal, by permitting owners of mines to load cars with coal from wagons on its side track at two small stations for a number of months, did not give them a vested right to continue such manner of loading, nor lose its common-law right to change its regulations, and refuse longer to receive coal for shipment in such manner when the volume of its business became such that to permit the use of its station tracks for loading cars in that manner would not only interfere with the operation of its trains, and cause it loss and inconvenience, but would also, by reason of the slowness of the method, result in serious loss and inconvenience to other shippers and the public by greatly reducing the quantity of coal which the road could handle and transport below what it might if loaded by the use of modern appliances, as was the case at all other shipping points on its line.

3. SAME—PREFERENCE IN FURNISHING CARS.

A carrier which transports large quantities of coal is entitled to make regulations with respect to the manner of receiving and transporting it, so that it may be handled expeditiously, safely, and economically, without unnecessary interference with the carrier's other business; and regulations which are well designed to promote such object cannot be complained of on the ground that they operate to give a preference to one who complies with them, or as a discrimination against one who does not.

4. SAME—ARKANSAS STATUTE.

Defendant railroad company, which had previously permitted the loading of cars with coal on its side track at a station, made a regulation by which it withdrew such permission, and it thereafter refused to furnish cars to be so loaded to plaintiff or to any other shipper. During such time, however, certain mine owners, who through agreements with the company had constructed private spur tracks to their mines, were furnished cars, some of which they loaded from wagons while standing on such spur tracks before the development of the mines and the construction of tipples for loading. *Held*, that the furnishing of cars for such purpose, while refusing to furnish cars for loading on the station track to plaintiff, who had constructed no spur track, did not constitute the giving of an undue preference, either under the common law or the statute of Arkansas (Laws 1899, p. 89), prohibiting the giving of any preference in the furnishing of cars.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

For opinion below, see 118 Fed. 169.

Joseph M. Hill (James Brizzolara, on the brief), for plaintiff in error.

Edward B. Pierce (John W. McLoud, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. This case was tried to a jury in the Circuit Court of the United States for the Western District of Arkansas, and at the conclusion of all the testimony the trial court directed a verdict in favor of the defendant, which action on its part is said to have been erroneous, and is assigned for error. The complaint on which the case was tried contained two counts. In the first of these counts Jesse A. Harp, the plaintiff in error, alleged, in sub-

¶ 4. See Carriers, vol. 9, Cent. Dig. § 22.

stance, the following facts: That he was the lessee of a coal mine situated very near Hartford, Ark., a station on a railroad belonging to and operated by the Choctaw, Oklahoma & Gulf Railroad Company, the defendant in error; that from September, 1900, until about February 1, 1901, he operated this mine by taking out the coal and hauling it in wagons to the Hartford station, where it was loaded from the wagons into coal cars that had been set out for that purpose on a side track by the defendant company; that during all of the period last aforesaid the defendant company held itself out to the public as a common carrier of freight, being especially engaged in the carriage of coal, and that there were four other shippers of coal at Hartford besides the plaintiff from whom it received coal for transportation in the manner last described—that is to say, by setting out cars as they were called for on a side track to be loaded from wagons; that all the coal so placed on board cars by the plaintiff at Hartford during the period aforesaid was shipped by him westward to points outside of the state of Arkansas, in Oklahoma and Texas; that he succeeded, during said period, in building up a good demand for his coal in those localities, and that in expectation of a larger demand for his product during the coal season beginning August 1, 1901, he bought 40 acres of coal land near the station at Hartford. He further averred that from and after August 1, 1901, and from that time forward, until about February 15, 1902, the defendant company refused to set out coal cars on the side track at Hartford to be loaded from wagons, as it had previously done, save that on or about October 7, 1901, it did offer to furnish cars at that station to be loaded from wagons for the shipment of coal to points in Arkansas, and that, by reason of such conduct on the part of the defendant, his trade in coal was practically destroyed during the fall of the year 1901, and that he had sustained damages in a sum exceeding $6,000, for which he demanded judgment. The second count of the complaint was substantially like the first in all of its material allegations, except that in one paragraph thereof it was charged that other parties, who were engaged in mining and shipping coal, to wit, the Kansas & Texas Coal Company, the Prairie Creek Coal Company, and the Arkansas & McAlester Coal Company, shipped coal from the station at Hartford, and that during the period when the defendant company had refused to set out cars at Hartford for the use of the plaintiff it had supplied cars at said station for the use of such other parties, thereby giving them an unreasonable preference and advantage, to the plaintiff's damage in a sum exceeding $6,000.

The facts developed at the trial below, concerning which there was practically no controversy, are these: From September, 1900, to February 15, 1902, and thereafter, the Choctaw, Oklahoma & Gulf Railroad Company, the defendant in error, operated a line of railroad extending from El Reno, in the territory of Oklahoma, thence eastwardly through the territory of Oklahoma, the Indian Territory, and the state of Arkansas, to Memphis, Tenn. Coal fields existed along this line of road from South McAlester, in the Indian Territory, eastward to a point between Hartford and

Mansfield, both of the latter places being in the state of Arkansas, or for a distance altogether of about 100 miles. The defendant company made a practice of hauling coal taken from the mines contiguous to its road, which belonged either to itself or to other persons and corporations, and about 60 or 70 per cent. of its traffic was of that character. When a mine owner, other than the defendant company, desired to employ the defendant to haul his coal, he made application to that effect to the company, and if, on an examination of the applicant's mine by the executive officers of the railroad, the quantity of coal therein seemed to be adequate to justify the expense, the general practice was to enter into an agreement with the mine owner whereby the latter undertook to procure the right of way and grade a track leading from the railroad to his mine, and to supply the necessary ties, the railroad, on its part, agreeing to furnish the necessary iron and to lay the track, and thereafter keep the track and roadbed in good repair. It was also the usual practice in such agreements to require the mine owner to develop his mine so that it would supply a certain number of cars of coal per day, and to equip it with tipples and screens so that coal could be conveniently and speedily loaded into cars at the mine. In the month of September, 1900, the defendant's road in the vicinity of Hartford, Ark., had been recently constructed, and the volume of traffic at that station was small. The railroad company, before building its road eastwardly into the state of Arkansas, had bought about 1,600 acres of coal land near Hartford, and had located its station at that point on a part of the tract. The coal fields in that vicinity had been only slightly developed in the month of September, 1900, but there was one coal mine called Glenn's Bank that had been opened near the station to supply the local demand for coal, and after the railroad was opened for business, and during the fall of the year 1900 and the winter of 1901, the parties controlling this mine were allowed to haul coal to the station by wagons and load it on cars that were set out upon a side track. The plaintiff at that time was also in possession of a mine near the station, and at his request, and as the traffic at the station was not large, he was accorded the same privilege of loading coal from wagons into cars standing on the house track, which privilege he continued to exercise until the spring of the year 1901, up to which time, during a period of seven or eight months, he had loaded altogether something over 300 cars. During the period in question the railroad company did not permit coal to be loaded from wagons into cars standing upon its sidetracks at any of its stations, except at the Hartford station, and at one other station called Red Oak, in the Indian Territory, at which latter place, as it seems, the practice was pursued temporarily until a spur track could be completed to the mine, which was some distance from the railroad. The defendant gave permission to load coal from wagons at Hartford mainly, if not entirely, for the purpose of aiding in the development of the coal measures at that point, but with no intention on its part of receiving coal permanently in that way, or of permitting its station side tracks to be used continuously for the purpose of standing coal cars thereon to be loaded from wagons. Some time in the spring of the year

1901, or the early summer of that year, the plaintiff was advised, by officers of the railroad company, that the practice of setting out cars on the station side tracks to be loaded from wagons would have to be discontinued. Thereafter there were several interviews between the plaintiff and persons representing the railroad company relative to the construction of a spur track to the plaintiff's mine for his benefit and accommodation. The railroad company appears to have been willing at all times to lay such a track and to furnish the iron therefor, provided the plaintiff would secure a right of way and do the grading. The plaintiff on his part appears to have been willing at first to accept this proposition. They differed, however, as to the place where the spur track should connect with the main line of the road; the plaintiff insisting that the connection should be made at the station house at Hartford, and the defendant objecting to a connection at that point. The negotiations looking to the construction of a spur track accordingly fell through, and on August 15, 1902, the defendant company peremptorily declined to permit cars to be further loaded from wagons at its station or house track, the reason assigned for such action being, in substance, that it was the universal practice of all railroads engaged in hauling coal to require mine owners and coal shippers to have tipples and tracks whereby coal could be speedily loaded direct from the mines, and because of the annoyance, inconvenience, and delay necessarily attendant upon the loading of coal cars from wagons at stations. The plaintiff thereafter made complaint concerning the defendant's action to the board of railroad commissioners of the state of Arkansas, and in view of threatened action by that body the defendant company on October 7, 1902, again permitted cars to be loaded at the Hartford station from wagons, provided the coal so loaded was consigned to points within the state of Arkansas. At a later date, in January, 1902, for the same reason —that is to say, because of action taken or threatened to be taken by the board of railroad commissioners for the state of Arkansas, and to avoid the possible assessment of heavy penalties—the order against loading from wagons at the Hartford station, as respects coal consigned to any point on the defendant's railroad, either within or without the state of Arkansas, was revoked.

The fundamental question which this state of facts presents would seem to be whether the defendant company, by setting out coal cars on its house track at Hartford, and permitting them to be loaded from wagons for a period of several months, under the circumstances above detailed, thereby obligated itself to continue that practice, and was guilty of a legal wrong when it discontinued it in August, 1901. Undoubtedly a common carrier must accept and transport all commodities that are tendered to it for carriage which it holds itself out to the world as engaged in carrying, provided a reasonable compensation for the service is also tendered. Unlike a private carrier, it is not entitled to choose its patrons or customers, but, being a quasi public servant, must serve everybody who chooses to employ it, and must treat them impartially, charging each the same rate for substantially the same service, and affording to each the same facilities for shipment. A common carrier, however, is not bound by the

rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. It is entitled in the first instance to determine what class of commodities it will engage in carrying. Moreover, it is entitled, in the first instance, by the common law, to establish reasonable rules and regulations governing the manner and form in which it will receive such articles as it professes to carry, and providing how they shall be packed for shipment so that they may be handled and transported conveniently, safely, and expeditiously. Hutchinson on Carriers, §§ 111–113, and cases there cited. This power to make reasonable regulations with respect to the manner in which it will receive commodities for transportation implies the existence of a power on the part of a common carrier to change or modify such regulations from time to time upon reasonable notice to the public, as otherwise it might be compelled to pursue a particular practice of receiving goods which it had once adopted, and was at the time attended with no inconvenience, after that practice had become exceedingly inconvenient and burdensome both to itself and the public. It is manifest, we think (indeed, so manifest that we might almost take judicial notice of the fact), that no railroad constructed through extensive coal fields and engaged in transporting coal to market could for any considerable period follow the practice of setting out cars on its station side tracks, some distance from the place where coal is mined, and permitting coal to be hauled thence by wagons and loaded into the cars by the slow process of shoveling. The useless consumption of time, and the additional expense incident to the handling of the commodity in question, in large quantities, in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains and the transaction of its other business. In the case at bar one of the witnesses testified, in substance, that, if all the coal tributary to the defendant's railroad was loaded by wagon, the mines would not produce 20 per cent. of their present output because of the impossibility of handling the output in that way. This is in itself an entirely reasonable statement, and no attempt was made by the plaintiff to disprove it; his contention being apparently that, because the defendant had permitted him to load coal from wagons for a few months, it had deliberately chosen that method of receiving coal and serving the public, and was bound perforce to continue the practice indefinitely. We are of opinion that this contention on the part of plaintiff is untenable, and should be overruled. The evidence shows without contradiction, as heretofore stated, that the practice of permitting a shipper of coal to load cars from wagons at stations obtained at no other station along the defendant's road save at Hartford and Red Oak, where the practice was tolerated temporarily, and for special reasons, with no thought of pursuing it permanently. The great bulk of coal that the defendant received and transported over its road was loaded by means of tipples into cars standing on spur tracks which had been laid to the mines, and in so far as the defend-

ant had held itself out to the world as a common carrier of coal it can only be said to have so held itself out provided the commodity was so delivered and loaded. We entertain no doubt that the defendant had the right to abandon the method of receiving coal which it had adopted at Hartford when the conditions that led to the practice at that station had so far changed as to render its further continuance inconvenient and burdensome. Especially should this right be conceded to the defendant when we reflect that if it permitted coal to be hauled to that station in wagons, and thence loaded into cars, other mine owners along its line might and probably would assert the same privilege, thereby subjecting it to great loss and expense, besides putting the public to much inconvenience. That conditions had materially changed at the Hartford station between September, 1900, and August, 1901, admits of no controversy. It was proven at the trial, and not denied, that in the meantime the defendant had disposed of its coal land at that point; that several large mines had been opened in the immediate vicinity of that place; that the station had become a large shipping point for coal; that the volume of traffic at that place, as well as along the road generally, had largely increased during the year; that the demand for cars in August, 1901, to handle coal and other products which required shipment, was far greater than during the previous year; and that the public interest, as well as the interest of the carrier, demanded that there should be as little delay as possible in loading cars. Under these circumstances, we think that the defendant incurred no liability in refusing to permit its station side track to be further used for loading coal cars from wagons. Nor do we find that when the trial below ended any issue of fact as respects this point remained to be settled or decided by the jury, since all the material facts upon which the defendant's right to terminate the practice of loading cars from wagons depended were practically undisputed, and the existence or nonexistence of that right was a question of law to be determined by the court.

In the second count of his complaint, as before shown, the plaintiff sought to recover damages because, as he alleged, the defendant had given an undue and unreasonable preference to other shippers of coal at the Hartford station. The facts upon which this charge was based were likewise undisputed, and are as follows: The order prohibiting the loading of coal from wagons into cars standing on the house track extended to all shippers of coal without discrimination, and was not confined in its operation solely to the plaintiff or any one else. But while the embargo existed other mine owners who had constructed spur tracks to their mines, as well as tipples for the convenient and speedy loading of cars, were supplied with cars, and during the period in question it seems that some of the parties who had constructed private spur tracks did load some coal from wagons into cars that had been set out on such private spur tracks. This was done, however, as the evidence discloses, only to a limited extent, and for the purpose of disposing of such coal as was taken out at first in the process of opening a mine. The practice was not continued when a mine was fully opened and tipples had been located and built. The charge of giving other mine owners an undue preference is founded

upon the facts aforesaid, which the evidence tended to establish, and none other. We are of opinion that they do not establish a case of undue preference within the meaning and intent of the statute of Arkansas (Laws 1899, p. 89), which declares, in substance, that it shall be unlawful for a common carrier "to make any preference in furnishing cars or motive power" for the transportation of persons or property. The idea conveyed by the word "preference" is that, as between two persons occupying the same situation or relation to the carrier, one has been preferred over the other or granted certain privileges or facilities that were not extended to the other. Such is not the case which the evidence discloses. The plaintiff had not provided himself with a spur track leading to his mine for the storage of cars, while other shippers had done so. He desired to make use of the defendant's side track to stand cars thereon while he loaded them by the slow process of hauling coal to the station in wagons and shoveling it thence into the cars. The privilege which he demanded was essentially different from that accorded to other shippers who had built spur tracks on which cars could be placed and handled by the defendant with much less inconvenience and risk than when standing on its house tracks, which it used for handling other commodities, and for switching purposes, and probably used at times for the passage of trains. We fail to see how the delivery of cars to other shippers of coal on spur tracks which they had caused to be built can be fairly said to have been a preference extended to them, or a discrimination against the plaintiff, who desired to use the defendant's house tracks. The privilege which the plaintiff demanded was not accorded to other shippers nor a substantially similar privilege. We think, therefore, that he has no just cause for complaint on this ground.

The views which we have thus far expressed are confirmed by the decision in Oxlade v. North Eastern Railway Company, 15 Common Bench (N. S.) 680, which is frequently cited as an authority and may be justly esteemed a leading case. The decision in that action was under the canal and traffic act of 1854 (17 & 18 Vict. c. 31), which in broad terms declared "that every railway company * * * shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic * * *; and no such company shall make or give any undue or unreasonable preference or advantage to * * * any particular person or company * * *; nor shall any such company subject any particular person or company or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." It appeared that the railway company made a practice of carrying coal in very large quantities, but for convenience in handling the large amount of traffic over its road it made a practice of carrying coal for colliery owners only, from the pit's mouth to stations where such colliery owners had cells appropriated to their use for the reception and sale of their coal. The complainant was a coal merchant, and on a certain day he tendered 16 cars or trucks loaded with coal to the railway company at one of its stations, to be forwarded to three other stations on its road where the complainant had no cell or siding appropriated to his special use for the reception of his coal trucks and the sale of coal. The railway

company declined to receive and haul his trucks, although they were in a fit and proper condition to pass over its road, whereupon he sought to compel the company to do so. The court held, in substance, that owing to the large amount of traffic in coal over the company's road it had an undoubted right to say that it would haul coal for colliery owners only who had acquired the requisite facilities for receiving and disposing of coal promptly on arrival at its destination, as otherwise the carrier would not have the necessary control over its road. The court further observed that, if the privilege demanded by the complainant was accorded to him, it would have to be accorded to all other persons, and would deprive the carrier of the benefit of an arangement which it had devised to insure the safe and convenient operation of its road. The case in question accordingly decides, in effect, that notwithstanding the broad inhibitions contained in the English traffic act, a carrier whose business consisted in part of hauling coal in large quantities was entitled to make regulations with respect to the manner of receiving and transporting it so that it might be handled expeditiously, safely, and economically without any unnecessary interference with the carrier's other business. It follows, of course, that regulations made by a carrier which have these objects in view, and are well designed to promote them, cannot be complained of on the ground that they operate as a preference in favor of one who does comply with them or as a discrimination against those who do not.

On the trial of this case in the lower court one of the questions which appears to have been discussed and decided by the learned trial judge (vide 118 Fed. 169, 172) was whether the defendant company was under an obligation to put in a switch or spur track for the plaintiff's convenience at such place as he desired. In their brief counsel for the plaintiff in error say that they will not discuss this question, because the plaintiff did not bring his action on account of any failure of the defendant company to put in a switch, but for the other alleged wrongs heretofore considered. Besides, the evidence does not show, we think, that the defendant did decline to put in a switch or spur track for the plaintiff on the same terms that it was in the habit of putting in such tracks for other shippers. This latter question, therefore, according to the concession of counsel, is not before this court for determination or consideration.

Another question, however, has been debated by counsel for both parties at some length, and that is whether the Arkansas statute, above cited, and other statutes of the state of a like nature, have any application in determining the rights of common carriers and shippers of coal as respects coal which is tendered to the carrier for shipment to points outside of the state. The plaintiff in error maintains the affirmative of this proposition, while the defendant in error maintains the negative; contending in effect, that the local law is applicable only as respects coal that is tendered for shipment to points within the state, and that if intended to apply to shipments to other states and territories would be invalid as amounting to a regulation of interstate commerce. We have found it unnecessary to consider or determine that question, holding, as we do, that the acts proven to

have been committed by the defendant company were not a violation of the local law or the common law. Learned counsel for the plaintiff in error concedes in his argument, and in that view we concur, that it is immaterial in the case in hand "whether it be considered that the common law controls or whether the statute controls." The local statute (section 6193, Sandels & H. Dig. Ark.), which declares that railroad companies "shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junctions of other railroads, and at sidings and stopping places established for receiving and discharging * * * passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places on the due payment of tolls," etc., cannot be understood as depriving the carrier of the right to make reasonable regulations applicable alike to all persons and corporations relative to the manner in which such a commodity as coal shall be delivered for transportation, nor as compelling the carrier to set out on its side tracks at stations coal cars to be there loaded by means of wagons. That view of the statute, if it was adopted, would deprive the carrier of the power to serve the public in the most efficient, speedy, and economical manner, and it will not be presumed that such was the purpose of the Legislature. If the statute in question operates to modify the common law, it only modifies it, we think, to the extent of compelling railroads to carry all kinds of property which is tendered for carriage instead of such property as they make a public profession of carrying. It does not deprive railway companies of the right to make such reasonable regulations concerning the manner in which an article like coal shall be delivered as are conducive alike to the successful operation of its road and to the public welfare.

We are of opinion that the case was rightly decided below, and the judgment is accordingly affirmed.

WHITWELL v. CONTINENTAL TOBACCO CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1903.)

No. 1,902.

1. ANTI-TRUST ACT—WHAT CONTRACTS, COMBINATIONS, OR CONSPIRACIES VIOLATE.

Every contract, combination, or conspiracy, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

2. SAME—WHAT ACTS, CONTRACTS, AND COMBINATIONS DO NOT VIOLATE.

Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict, competition in commerce among the states, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

3. SAME—CONSTRUCTION.
The anti-trust act should have a reasonable construction—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled.

4. SAME—ATTEMPTS TO MONOPOLIZE A PART OF INTERSTATE COMMERCE.
Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

5. SAME.
Attempts to monopolize a part of commerce among the states which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were not, made illegal or punishable by section 2 of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because such attempts are indispensable to the existence of any competition in commerce among the states.

6. SAME—RESTRICTION OF SALES OF GOODS.
A manufacturer, a corporation, and its employé restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was not violative of the anti-trust act.

7. SALES—RESTRICTION—DAMAGES.
The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are not actionable, because they are not the result of any breach of duty or of contract by the owner.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Dan W. Lawler (Frank Arnold, on brief), for plaintiff in error.

C. A. Severance and Junius Parker (W. W. Fuller, F. B. Kellogg, and R. E. Olds, on the brief), for defendants in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is an action by the plaintiff, Joseph P. Whitwell, to recover treble damages from the Continental Tobacco Company, a corporation, and from one of its employés, George E. McHie, under the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], on the sole ground that the defendants refused to sell the manufactured products of the tobacco company to him at prices which would enable him to resell them to others at a profit, unless he refrained from buying, selling, or hand-

ling plug chewing tobacco made by independent manufacturers who were competing with the tobacco company for the trade of the country. All the parties to the suit were engaged in interstate commerce, and the products in question were the subjects thereof. The main question which the case presents is, may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his own trade by a manufacturer or merchant and his employés a "contract, combination or conspiracy in restraint of trade" or an "attempt to monopolize any part of trade," within the meaning of the act of July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]?

An analysis of the averments of the complaint to which the court below sustained a general demurrer will demonstrate the fact that the crucial question in this case has been correctly stated. The material facts which those averments disclose are these: The plaintiff is a jobber of tobacco, and of the products of tobacco, at St. Paul, Minn. The tobacco company is a manufacturer and merchant, and McHie is its agent and employé. The tobacco company owns and controls most of the valuable and leading brands of plug and chewing tobacco in the United States, and fixes the market prices thereof. The company and its agent, McHie, had long been, and on May 1, 1902, still were, in the practice of selling its goods to jobbers in this way: They allotted to an intending purchaser an amount of its goods which he was required to buy during each succeeding period of four months. This allotment was much in excess of the amount which he would be able to sell during that time. They fixed the prices of the goods comprising the allotment so high that, if the purchaser paid the prices thus fixed, he could not make any profit by buying and selling the commodities. They required each purchaser to refrain from dealing in plug chewing tobaccos made by independent and competing manufacturers. If the purchaser complied with this requirement, they invariably reduced his allotment to the amount he was able to sell, and paid back to him such a percentage of the aggregate price of the goods he bought that the handling of these commodities was by reason of this repayment alone made profitable to him. If the purchaser refused to comply with this requirement, they refused to reduce the amount of his allotment or the prices of his goods, so that the business was unprofitable to him. The plaintiff had long participated in this method of transacting business, had been handling the products of the tobacco company in accordance with it, and had an established business in the purchase of tobacco and its products, and in the sale of them throughout the states of Minnesota, North Dakota, and South Dakota, when on May 1, 1902, the defendants made an allotment to him for the succeeding four months, and offered to furnish their commodities to him in accordance with their established practice. He, however, refused to refrain from handling the goods of independent manufacturers who were competing with the defendants. Thereupon the latter refused to reduce the allotment which they had made to him, or the prices thereof, so that the handling of the goods of the tobacco company would be profitable to the plaintiff, and he did

not purchase, or agree to purchase, their goods. He was unable to procure them elsewhere, and sustained damages in the sum of $280.

No other facts are stated in the complaint. There are, however, allegations that the defendants combined and conspired to regulate and to raise the prices of their goods, and to control the output thereof, with the intent to monopolize trade and commerce among the states of Minnesota and North Dakota and South Dakota; that they combined to arbitrarily fix the prices of their goods, independently of their natural market value, and to refuse to sell them on equal terms to all intending purchasers; and that they did all these things in restraint of trade and commerce among the states. But the only way in which the plaintiff avers that these defendants restrained or attempted to monopolize interstate trade, or disclosed their intent to do so, was by restricting the sale of their own goods to customers who refrained from handling the wares of their competitors by making their sales on the terms which have been stated. The general averments of the intent, purpose, and effect of the acts of the defendants may therefore be laid aside here. They serve no purpose save to foreshadow the argument of counsel relative to the legal effect of the facts which the complaint sets forth. They neither state, nor aid in the statement of, any cause of action, because they disclose no fact, and the only question here is whether the facts stated in the complaint constitute a cause of action. The only facts thus stated are that the tobacco company and its employé refused to make sales of its products to the plaintiff, or to others who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of its competitors. Was this act, or the course of dealing which it illustrates, a violation of the anti-trust law of 1890? That law provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be deemed guilty of a misdemeanor. * * *"

Under this act, every contract, combination, and conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates this law, and a corporation is a person. Act July 2, 1890, c. 647, §§ 1, 8, 26 Stat. 209, 210 [U. S. Comp. St. 1901, pp. 3200, 3202]. Hence the real question in every case which arises under this law is whether or not the contract, combination, or conspiracy challenged is in restraint of trade among the states. It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among

the states. If its necessary effect is to stifle or to directly and substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; U. S. v. Northern Securities Co. (C. C.) 120 Fed. 721, 725; U. S. v. Jellico Mountain Coal & Coke Co. (C. C.) 46 Fed. 432, 12 L. R. A. 753; Lowry v. Tile, Mantel & Grate Ass'n (C. C.) 98 Fed. 817, 826; Id. (C. C.) 106 Fed. 40, 45; U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 294, 29 C. C. A. 141, 163, 46 L. R. A. 122; U. S. v. Coal Dealers' Ass'n (C. C.) 85 Fed. 252; Chesapeake & O. Fuel Co. v. U. S., 115 Fed. 610, 619, 53 C. C. A. 256, 265; Gibbs v. McNeeley, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; Brown v. Jacobs Pharmacy Co. (Ga.) 41 S. E. 553, 57 L. R. A. 547; Arnot v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159.

If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. Hopkins v. U. S., 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; U. S. Chemical Co. v. Provident Chemical Co. (C. C.) 64 Fed. 946; California Steam Navigation Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; Schwalm v. Holmes, 49 Cal. 665; In re Greene (C. C.) 52 Fed. 104, 115, 116, 117; In re Grice (C. C.) 79 Fed. 627, 644; Allgeyer v. Louisiana, 165 U. S. 578, 589, 7 Sup. Ct. 427, 41 L. Ed. 832; State v. Goodwill (W. Va.) 10 S. E. 285, 286, 6 L. R. A. 621, 25 Am. St. Rep. 863; People v. Gillson, 109 N. Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; Butchers' Union Co. v. Crescent City, etc., Co., 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. Ed. 585; Welch v. Phelps & Bigelow Windmill Co. (Tex. Sup.) 36 S. W. 71; Commonwealth v. Grinstead (Ky.) 63 S. W. 427; Walsh v. Dwight (Sup.) 58 N. Y. Supp. 91, 93; Brown v. Rounsavell, 78 Ill. 589; Noyes on Intercorporate Relations, § 388, p. 563.

In Hopkins v. U. S., 171 U. S. 592, 19 Sup. Ct. 45, 43 L. Ed. 290, the Supreme Court said:

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. * * * To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

And at page 600, 171 U. S., page 48, 19 Sup. Ct., 43 L. Ed. 290, it said:

"The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements."

In Anderson v. U. S., 171 U. S. 616, 19 Sup. Ct. 54, 43 L. Ed. 300, the court quoted this sentence from the opinion in Smith v. Alabama, 124 U. S. 465, 473, 8 Sup. Ct. 564, 566, 31 L. Ed. 508, "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations," and then said:

"The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely an agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

In U. S. v. Joint Traffic Ass'n, 171 U. S. 568, 19 Sup. Ct. 31, 43 L. Ed. 259, the Supreme Court, after reviewing and affirming the case of Hopkins v. U. S. and the rule which has been quoted from that case, declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. * * * To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri Case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed. Hence agreements of competing railroad companies to intrust their power to fix rates of transportation to the same man or body of men (U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; U. S. v. Northern Securities Co. [C. C.] 120 Fed. 721), and contracts of competitors in the production or sale of merchantable commodities to deprive each competitor of the right to fix the prices of his own goods, the terms of the sale, or the customers to whom he shall dispose of them, and either to fix these prices, terms, and customers by the agreement of

the competitors, or to intrust the power to dictate them to the same man or body of men (U. S. v. Jellico Mountain Coal & Coke Co. [C. C.] 46 Fed. 432, 12 L. R. A. 753; U. S. v. Coal Dealers' Ass'n [C. C.] 85 Fed. 252; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Chesapeake & O. Fuel Co. v. U. S., 115 Fed. 610, 53 C. C. A. 250; Gibbs v. McNeeley, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; Lowry v. Tile, Mantel & Grate Ass'n [C. C.] 98 Fed. 817; Id. [C. C.] 106 Fed. 40), necessarily have the effect either to stifle competition entirely, or to directly and substantially restrict it, because such contracts deprive the rivals in trade of their best means of instituting and maintaining competition between themselves.

In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employé. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employé, no such contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers.

The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. In re Greene (C. C.) 52 Fed. 104, 115; In re Grice (C. C.) 79 Fed. 627, 644; Walsh v. Dwight (Sup.) 58 N. Y. Supp. 91, 93; Brown v. Rounsavell, 78 Ill. 589; Commonwealth v. Grinstead (Ky.) 63 S. W. 427; Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832. There is nothing in the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], which deprived any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combi-

nations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

The acts of the defendant which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employé fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employé had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated section 2 of the anti-trust act, because it was an

"attempt to monopolize * * * part of the trade or commerce among the several states." It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. The purpose of the act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared (Hopkins v. U. S., 171 U. S. 578, 600, 19 Sup. Ct. 40, 43 L. Ed. 290; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259), have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive similar interpretations. The Supreme Court has declared that the true construction of the first section is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states. The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants,

and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that damnum absque injuria for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less, at prices so low that he could realize a profit by selling them again to others. The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed.

CENTRAL GRAIN & STOCK EXCH. OF HAMMOND v. BOARD OF TRADE OF CITY OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 977.

1. FEDERAL COURTS—JURISDICTION—MUST AFFIRMATIVELY APPEAR.
   In every case the question with which a federal court is first confronted is that of its jurisdiction both over the subject-matter and of the party, and this jurisdiction must affirmatively appear upon the record.
2. SAME—FOREIGN CORPORATION—SERVICE ON AGENT.
   There are but two means by which a federal court can obtain jurisdiction over a foreign corporation: The one by voluntary appearance,

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¶ 2. Service of process on foreign corporations, see note to Eldred v. Palace Car Co., 45 C. C. A. 3.

and the other, if the corporation is prosecuting its business in the state where sued, by service of process upon some officer or agent in that state appointed to there transact and manage its business and representing the corporation in such state. Service upon an agent of such corporation is not service upon the corporation, unless it be engaged in business in the state where the agent is served and he be appointed to act for it there.

8. SAME.

A return to process issued for a foreign corporation as defendant in an equity suit in a federal court, showing service on an officer of the corporation, is not sufficient to authorize the court to entertain jurisdiction, where it does not appear either by such return or from the record that the corporation was at the time engaged in doing business in the state.

4. WITNESSES—COMPELLING ATTENDANCE—POWER TO REQUIRE CORPORATION TO PRODUCE OFFICER.

A court is without power to compel a corporation to produce one of its officers, who is beyond the jurisdiction of the court, as a witness, the corporation itself having no power, and being under no legal duty, to compel the officer's attendance.

5. PROCESS—MOTION TO QUASH—DUTY TO DETERMINE BEFORE CONSIDERING MERITS.

Defendant corporation appeared specially and filed a motion to quash the service, which was referred to a master for hearing. Jurisdiction over the defendant did not appear from the marshal's return, or otherwise from the record. *Held*, that an order suspending the hearing before the master until defendant should produce its president as a witness, and in the meantime granting a temporary injunction as prayed in the bill, was erroneous, both because in the state of the record the court was without jurisdiction to consider the case on the merits, and also because it was without rightful authority to compel the defendant to produce its officer as an adverse witness or to grant the injunction as a penalty for its failure to do so, there being no evidence that it was responsible for the fact that the officer was without the jurisdiction and could not be served with subpœna.

6. SAME—WAIVER OF OBJECTION—GENERAL APPEARANCE.

When a party appears specially to object to the jurisdiction, or to move to set aside the service of process, he does not waive the illegality in the service if after such motion is denied he answers to the merits, nor by appealing from a decree or order affecting the merits entered by the court while withholding its judgment on the question of its jurisdiction. Such illegality in the service is waived only when, without having insisted upon it, he pleads to the merits.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

On December 23, 1902, the appellee, a corporation of the state of Illinois, filed its bill of complaint for an injunction against the appellant, a corporation of the state of Delaware, of like character with the bill in Illinois Commission Company v. Cleveland Telegraph Company, 119 Fed. 301, 56 C. C. A. 205, to restrain the receiving, obtaining, and distributing of market quotations of the appellee until the right so to do should have been first acquired from the appellee, and subpœna issued returnable the first Monday of February, 1903, with notice of motion for an injunction to be heard on the 29th of December, 1902. The marshal, on December 29, 1902, returned to the subpœna that he had served it by delivering a copy to Charles W. Bickel, secretary of the company, and was unable to find the president or any other officer of the defendant within his district, and had also served copies upon certain named persons designated as "agents of the said exchange." On that date

¶ 6. Effect of appearance, see note to O'Connell v. Reed, 5 C. C. A. 594.

See Appearance, vol. 3, Cent. Dig. §§ 52, 143; Process, vol. 40, Cent. Dig. § 253.

also the appellant, defendant below, appeared specially, and upon the affidavit of Bickel that the defendant is a foreign corporation not doing business in the state of Illinois, and was not on the 26th of December, 1902, and that neither the president nor any other officer of the company was there on that day, and is not now there, transacting business for the corporation or representing it within the state of Illinois, and that the corporation is not authorized or qualified to do business within the state according to its statutes, and that the defendant corporation had not transacted any business within the state of Illinois, moved the court to quash the service of the subpœna on the ground that the return is untrue in fact and insufficient in law, and because defendant corporation is not doing business within the state of Illinois, was not found within the district nor within the state, and is a nonresident corporation. On December 29, 1902, the motion to quash was referred to a master to take proofs upon the motion and report within 10 days. On January 16, 1903, upon application of the complainant below, and upon certain affidavits showing inability to serve a subpœna to appear before the master upon James F. Southard, alleged to be the president of the defendant, the court entered an order reciting the inability to serve the subpœna, and "there is reason to believe that said Southard is evading service of subpœna," that Southard appear, and that said defendant, so far as it is able, cause Southard to appear before the master at a time specified. On January 20, 1903, the master reported that Southard failed and neglected to appear at the time specified. Thereupon the complainant below moved the court "to grant an injunction herein, notwithstanding the defendant's motion to set aside service herein, unless said defendant shall cause its president, James F. Southard, to appear at once for examination" before the master. On January 21, 1903, the court ordered that the defendant below produce Southard for examination before the master at a time specified, and, upon failure so to do, a preliminary injunction should issue. On January 28, 1903, the court entered an order reciting, "It appearing to the court that the defendant herein has not caused its president, James F. Southard, to appear as a witness before Master in Chancery Booth and testify in the above-entitled cause, now, on motion of complainant it is ordered that unless otherwise hereafter ordered by this court the said master be directed to defer the matter of his report upon the reference to him of the motion to quash service herein, until said defendant shall cause the appearance of its said president before him as a witness as aforesaid," and also ordered a temporary injunction restraining the defendant as prayed in the bill of complaint. On February 4, 1903, the defendant below filed its petition, "saving and reserving to itself, however, the question of the jurisdiction of this court over the defendant, and appearing only for the purpose of objecting to the jurisdiction of the court," and, conceiving itself to be aggrieved by the order of January 28, 1903, prayed an appeal to the Circuit Court of Appeals, and with that petition filed its assignment of errors: (1) In entertaining jurisdiction of the defendant; (2, 3) in entering the order pending the motion to quash the writ of subpœna; (4) in holding that the defendant had not complied with the order requiring it to cause Southard to appear as a witness; (5) in making the order of January 16, 1903; (6, 7) in holding that, by reason of its failure to comply with the order to produce Southard as a witness, the temporary injunction should issue; (8) that it appeared that before the issuance of the order the defendant had ceased doing business, and was legally dissolved and out of existence; (9) in issuing the temporary injunction; (10) in taking jurisdiction of a nonresident defendant; (11) in directing the master to defer the making of his report upon the motion to quash until the defendant cause Southard to appear; (12) because the defendant had not been served with subpœna within the jurisdiction of the court; (13) because the persons served with subpœna as agents of the company were not at the time its agents within the jurisdiction of the court, engaged in the business of the company. On February 4, 1903, the court allowed the appeal, and on February 5th a bond on appeal was approved by the court and filed in the cause. On February 26, 1903, the defendant below filed a certificate of the Secretary of State of the state of Delaware showing that the corporation, defendant below, was dissolved January 10, 1903, and on that date the court ordered

that the certificate be filed nunc pro tunc as of January 28, 1903, and further ordered that the order of January 21, 1903, be modified to read as follows: "This cause coming on now to be heard upon the motion of the defendant to correct the order entered herein on January 16, 1903, by striking out of said last-mentioned order so much thereof as required the defendant, so far as it was able, to cause said Southard to appear, and upon the counter motion of the complainant to grant an injunction herein, unless said defendant shall cause its president, James F. Southard, to appear at once before Master Booth for examination, it is ordered that the defendant cause its president, James F. Southard, to appear as a witness before Master in Chancery Booth to testify in the matters in issue upon the reference herein to said master by Friday, the 23d day of January, 1903."

Jacob J. Kern, John A. Brown, and Lloyd Charles Whitman, for appellant.

Henry S. Robbins, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). In every case the question with which a federal court is first confronted is that of its jurisdiction, both over the subject-matter and of the party; and this jurisdiction must affirmatively appear upon the record. So far has this doctrine been carried that judgments have been frequently reversed upon appeal because the records did not disclose the essential jurisdictional facts. Railway Company v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Hancock v. Holbrook, 112 U. S. 229, 5 Sup. Ct. 115, 28 L. Ed. 714; Ayers v. Watson, 113 U. S. 594, 598, 5 Sup. Ct. 641, 28 L. Ed. 1093; Insurance Company v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; Railroad Company v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. These cases are to the effect that it is absolutely essential that the jurisdictional facts appear by the record; that it is error to proceed unless the jurisdiction of the court be so shown; that the absence of jurisdictional facts cannot be waived; that the failure of the record to disclose such facts should be noticed by the court sua sponte, and may be assigned for error by the party at whose instance the error was committed.

The record here discloses diversity of citizenship, showing jurisdiction if and when the process of the court is duly served or if the defendant should voluntarily appear. The defendant below was a corporation of the state of Delaware. There could be no presumption of its presence within the state of Illinois. There were but two conditions in which the court below could obtain jurisdiction over the corporation: The one by voluntary appearance—a condition which did not occur; the other, if the corporation prosecuted its business in the state of Illinois, by service of process upon some officer or agent in that state appointed to there transact and manage its business and representing the corporation in such state. Service upon an agent of a foreign corporation is not service upon the corporation unless it be engaged in business in the state where such agent is served and he be appointed to act for it there. St. Clair v. Cox, 106 U. S. 357, 1 Sup. Ct. 354, 27 L. Ed. 222; Cooper Manufacturing Company v. Ferguson, 113 U. S. 727, 735, 5 Sup. Ct. 739, 28 L. Ed. 1137; Fitz-

gerald & Mallory Construction Company v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Barrow Steamship Company v. Kane, 170 U. S. 100, 111, 18 Sup. Ct. 526, 42 L. Ed. 964; Mutual Life Ins. Company v. Spratley, 172 U. S. 602, 610, 19 Sup. Ct. 308, 43 L. Ed. 569; Conley v. Mathieson Alkali Works (decided May 18, 1903) 23 Sup. Ct. 728, 47 L. Ed. 1113; N. K. Fairbank & Co. v. Cincinnati Railway Company, 4 C. C. A. 403, 54 Fed. 420, 38 L. R. A. 271.

Immediately upon such service by the marshal the defendant below, appearing specially to object to the jurisdiction of the court over it, and upon a showing by affidavits that it had never transacted business within the state of Illinois, that no one of its officers was at the time within the state engaged in the transaction of business for it, and that it had not been authorized or qualified to transact business within that state by the law of the state, moved the court to quash the service of the writ upon the ground that the return was untrue in fact and insufficient in law. The return of the marshal did not show a service sufficient to authorize the court to entertain jurisdiction, because it does not appear by the return or by the record that the corporation defendant was engaged in business within the state of Illinois, or that the persons served were transacting business for it within the state. Therefore it was proper for the court to first ascertain if it had acquired jurisdiction of the person of the defendant, for the determination of that question must necessarily precede any action of the court upon the merits. The court below recognized its duty in this respect by passing consideration of the motion for an injunction, and referring the matter of the motion to quash to a master to take testimony touching the facts essential to the exercise of jurisdiction, and to report within 10 days. It properly refrained from entertaining the motion for an injunction until it was first determined whether it had jurisdiction over the person of the defendant. It should have continued to refrain from any consideration of the merits until the preliminary and fundamental question of jurisdiction had been determined. The complainant was unable to subpœna one Southard, the president of the defendant, as a witness upon the hearing before the master upon the question of jurisdiction. The master reported such inability to the court. Apparently entertaining the suspicion that Southard was evading service of the subpœna, the court ordered the defendant, so far as it should be able, to cause Southard to appear before the master at a time specified. The desired witness still failing to appear, upon motion of the complainant "to grant an injunction herein, unless said defendant shall cause its president, James F. Southard, to appear at once for examination" before the master, the court directed the defendant to produce Southard for examination at a time specified, and entered an order that upon failure so to do a preliminary injunction should issue. At the expiration of the specified time the order here appealed from was entered, which recites that the defendant had not caused its president to appear as a witness as directed, and ordered the master to defer his report upon the motion to quash service until the defendant should cause the appearance of its president before him as a witness, and also directed an injunc-

tion to issue restraining the defendant as prayed in the bill of complaint. We deem this order unwarranted. We know of no legal duty imposed upon a corporation to produce its officer as a witness when the process of the court cannot reach him. The duty of an officer of a corporation is prescribed by law, or by the articles of incorporation, or the by-laws of the corporation. The power of a corporation over its officers has respect only to the duties to the corporation which the law imposes. We know of no legal duty imposed upon an officer of a corporation to appear as a witness against that corporation, except in obedience to the writ of subpœna of a court duly served upon him. We know of no power in the corporation, or any duty devolving upon it, to compel its officer to appear as a witness before a court. We know of no right in a court to compel a corporation to produce its officer as an adverse witness. The law furnishes ample machinery to procure the testimony of any witness, in the service of its writ and by proceedings for contempt for disobedience of the writ, or, if the witness is beyond the jurisdiction of the court, by deposition or upon commission. Besides, the record here discloses no evidence of evasion of service of the process of the court. The suspicion of the court, so far as the record shows, arose from the mere inability of the officers to serve the writ, and the absence of the desired witness from his residence; the fact being, as the record discloses, that the corporation had been dissolved, and that Southard on the 2d day of January, 1903, and eight days before the issuance of the subpœna, left for the South for his health. There is no sort of evidence that the defendant corporation was a party to any attempt of Southard to evade service. The court had not right to proceed to the merits of the case until the question of its jurisdiction had been determined. Nor could it rightfully in advance of such determination, if at all, enjoin the defendant as a penalty for its supposed failure to produce its president as a witness upon the disputed question of jurisdiction. That such was the reason for the issuance of the injunction is plainly shown by the recital of the order. This assurance is made doubly sure by the motion of the complainant for an injunction and the previous order thereon. The modification of this previous order, subsequently to this appeal, cannot affect the order appealed from, upon the face of which we think it is manifest that it was issued as a penalty for the supposed disobedience by the defendant corporation in failing to produce the witness. This conclusion is justified by all the proceedings in the suit. The jurisdiction of the court being challenged, it refrained from any consideration of the merits, and proceeded to an examination of the facts upon which depended its jurisdiction to act at all. It then summarily suspended action upon the challenge to its jurisdiction, because the defendant had not done that which, as we think, the court had no right to require it to do, and thereupon undertook to determine the merits of a pending motion for injunction, when neither the record nor the return of the marshal to the subpœna disclosed the facts upon which the jurisdiction of the court over the person of the defendant must rest, namely, that it was doing business within the jurisdiction of the court.

It is urged that by appealing the defendant below waived its motion to quash, and that such act is tantamount to a general appearance. It is indeed said by some courts that one objecting to the jurisdiction of a court must keep out of court except to object to its jurisdiction, and that an appeal from a judgment is a general appearance to the action. Fee v. Big Sand Iron Company, 13 Ohio St. 563; Ruthe v. Railway Company, 37 Wis. 344; Hodges v. Frazier, 31 Ark. 58; Railway Company v. Heath's Administrator, 87 Ky. 651, 9 S. W. 832. This doctrine has not, however, obtained in the federal courts. It is true a party "may not, in the same breath, dispute the merits of the cause alleged against him and deny jurisdiction of the court over his person" (Crawford v. Foster, 28 C. C. A. 576, 84 Fed. 939); but when a party appears specially to object to the jurisdiction or to move to set aside the service of process, he is deemed not to have waived the illegality in the service, if, after such motion is denied, he answers to the merits. Such illegality in the service is waived only when, without having insisted upon it, he pleads in the first instance to the merits. Thus, in Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237, process in a district court of a territory was served upon the defendant within an Indian reservation. The motion to set aside the service was overruled, and the defendant pleaded to the merits. The Supreme Court reversed the judgment against the defendant, and remanded the cause with a direction to set aside the service. Mr. Justice Field, delivering the opinion of the court, remarked:

"The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or, what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

See, also, Insurance Company v. Dunn, 19 Wall. 214, 22 L. Ed. 68; Removal Cases, 100 U. S. 457, 475, 25 L. Ed. 593; Railway Company v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; Powers v. Railway Company, 169 U. S. 92, 102, 18 Sup. Ct. 264, 42 L. Ed. 673; Louisville Trust Company v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

Here the appellant has at no time—unless by the appeal—consented to the jurisdiction of the court or waived its objection thereto. No act was done which suggests such consent or waiver. The appellant was confronted with an order for an injunction issuing because it had failed to do that which the court had no right to require it to do. It had no remedy save by appeal, the court declining to proceed with the inquiry touching its jurisdiction. Under such circumstances, to hold that an appeal works a general appearance to the suit—notwithstanding it was limited to the jurisdiction

of the court to make the order—would work a grievous wrong, and would subject the party to a judgment upon the merits without remedy, when the record does not disclose jurisdiction of the court, and notwithstanding the constant objection of the defendant to the exercise of jurisdiction. Such result cannot be warranted by the law. A party protesting against jurisdiction may not be compelled to submit to a decree upon the merits when the court withholds its judgment upon its jurisdiction. Indeed, the allowance of the injunction under the circumstances was in effect a denial by the court of the motion to set aside the service, and that without the evidence before it, and solely as a penalty for misconduct, unwarrantably assumed. The only remedy afforded the party in such case is by appeal from the wrongful order which denies consideration of the challenge to the jurisdiction. Within the ruling of Harkness v. Hyde, supra, the party so debarred of his right may raise the question by appeal from a judgment upon the merits.

It is said that the eighth and ninth assignments of error go to the merits. If this were so, the objection would be unavailing, as we read the decisions of the Supreme Court. But the objection is not tenable in fact. The error assigned, that the corporation had been dissolved, went to the question of the right of the court to assume jurisdiction. The error assigned may not be sustainable, but the objection went to the jurisdiction, and not to the merits. This is also true of the ninth assignment.

The order of January 28, 1903, is reversed, and the cause is remanded with direction to the court below to proceed with the hearing of the motion to set aside the service of process.

CUDAHY PACKING CO. v. SKOUMAL.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1903.)

No. 1,843.

1 MASTER AND SERVANT—DEFECTIVE TOOLS—ASSUMPTION OF RISK BY SERVANT.

When a defect in a tool or appliance is called to the master's attention by the servant who is working with it, and the master directs or requests the servant to continue to use it in its defective condition for the time being, promising to have it soon repaired or to supply a better, the servant, by complying with such order or request, cannot be regarded as having assumed the risk of injury therefrom, unless the danger is so great or imminent that a person of ordinary prudence would not have continued to use the defective tool, although requested or ordered to do so.

2 REVIEW ON APPEAL—MISCONDUCT OF JURY—TAKING EXHIBITS TO JURY ROOM.

Where certain tools were introduced in evidence and repeatedly exhibited to the jury on the trial of an action for the personal injury of a servant, largely as bearing on the issue of contributory negligence raised by defendant, the fact that such tools were taken to the jury room, and were examined by the jury while considering their verdict, even contrary to the direction of the court, will not vitiate a verdict for plaintiff, when it does not appear that such action was in any way prejudicial

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¶ 1. See Master and Servant, vol. 34, Cent. Dig. §§ 642, 645, 647.

to the defendant, or that plaintiff was instrumental in causing the exhibits to be so taken by the jury. Especially such verdict will not be set aside on appeal when it has been approved by the trial court.

3. SAME—REMARKS OF COUNSEL—SUFFICIENCY OF RECORD.

The proper method of bringing before an appellate court for review remarks made by counsel, or a line of argument deemed improper, is to call the matter to the attention of the trial court by a seasonable objection, and by taking an exception to the court's action if the objection is overruled, and incorporating the exception, together with a statement of the remarks complained of, or the line of argument pursued, in the bill of exceptions. An appellate court cannot consider such matter where it only appears in the record from motions and affidavits filed after the trial, in connection with a motion for a new trial, and incorporated in the bill of exceptions; the allowance of such bill not being equivalent to a certificate by the trial judge of the truthfulness of the statements made in the papers so filed.

In Error to the Circuit Court of the United States for the District of Nebraska.

Edson Rich and Charles E. Clapp, for plaintiff in error.

Matthew Gering, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. This is an action for personal injuries which Anton Skoumal, the defendant in error, brought against the Cudahy Packing Company, the plaintiff in error, recovering therein a verdict against the defendant company in the sum of $5,000. The plaintiff below filed a petition which contained, among others, the following allegations, in substance: That during the latter part of the year 1899 he was employed by the defendant company to work in its blacksmith shop as a skilled blacksmith; that on January 15, 1900, while the plaintiff was in the performance of his usual duties, the defendant company negligently furnished to the plaintiff and to his helper a hammer and holding iron which were defective and unfit for use, in that the hammer was too highly tempered and brittle, and was somewhat broken and worn upon the edges thereof; that after using the defective hammer and the holding iron for some time prior to January 15, 1900, plaintiff did on that day direct his helper to report the defective condition of the hammer, and request the defendant, through the foreman of its blacksmith shop, to furnish him and his helper with a new hammer that was fit for use, or to repair the hammer which they were using so that it might be further used without danger; that on said day, when this complaint was made to the foreman of the blacksmith shop, he directed the plaintiff to continue to use the hammer for the present, until he had finished the piece of work upon which he was then engaged, assuring him at the time that no immediate danger would be incurred in using it, and promising him that, upon the completion of the job on which he and his helper were then engaged, he would obtain and furnish the plaintiff a new hammer with which to work; that, in reliance upon such assurance and promise, he continued to use the defective tool; that about an hour after such complaint was made and the promise given, and prior to the com-

pletion of the job on which the plaintiff and his helper were then engaged, and while the plaintiff was using the hammer with ordinary care and caution, a fragment from the head thereof flew off, striking the plaintiff in his left eye, and injuring it so that his sight was destroyed, and the eye had to be removed. On the trial of the case, evidence was produced by the plaintiff which tended to establish the aforesaid allegations and all other material allegations of the complaint.

On the trial in the circuit court the defendant company saved exceptions to four excerpts from the charge, on which some reliance seems to be placed for the purpose of obtaining a reversal of the judgment; but a careful consideration of the parts of the charge to which the exceptions relate has satisfied us that the exceptions are not well founded, and that the charge, considered as a whole, was substantially correct, or at least that the plaintiff in error has no just cause to complain. Inasmuch as the paragraphs of the charge which are said to be erroneous are somewhat lengthy, and consist largely of commentaries on the evidence, such as the trial judge was clearly entitled to make, it is deemed unnecessary to quote them in full. The rule of law which was enunciated in the several paragraphs in question was to the following effect: That if Skoumal, the plaintiff below, saw the defects in the hammer prior to the accident, and continued to use it in its defective condition, he thereby assumed the risk of injury, and could not recover, but that he might recover, notwithstanding he was aware of the defects in the hammer, provided the jury were satisfied by the evidence that he caused the defective condition of the hammer to be made known to the foreman in charge of the defendant's blacksmith department prior to the accident, and the foreman, after examining the hammer, acknowledged that it was in a bad condition, but directed Skoumal and his helper to go on with the job then in hand, promising them that a new hammer would then be supplied, and provided, further, that Skoumal, in reliance upon this promise, continued to use the implement, and was injured by a fragment flying therefrom before the job was completed. This statement of the law was supplemented by the further statement, in substance, that, even on the state of facts last supposed, the plaintiff would not be entitled to recover, provided Skoumal, as a sensible man, could see that, owing to the condition of the hammer, there was danger in every blow he struck, because in that event the danger of using the hammer was so imminent that he would be guilty of contributory negligence.

As before remarked, we are unable to discover any material error in these excerpts from the charge, since the law is well settled that when a defect in a tool or an instrument is called to the master's attention by his servant, and he directs or requests the servant to continue to use it in its defective condition for the time being, promising to have it soon repaired or to supply a better implement, the servant, by complying with such an order or request, cannot be regarded as having assumed the risk of getting hurt, unless the risk is so great or imminent that a person of ordinary prudence would not have continued to use the defective tool, although he was requested or ordered to do so. It would be little short of absurd to hold that a

servant voluntarily agreed to assume the risk of being injured by the use of a defective implement or appliance, and to absolve the master from liability therefor, when it appears that he complained to the master of the defect, and the master admitted that the complaint was well founded, but induced the servant to continue using the defective tool or appliance by promising to repair it within a reasonably short space of time, or to supply a better. That a servant will not be held to have assumed the risk of injury incident to working with a defective implement of any sort, under the circumstances last stated, is well settled. Hough v. Railway Co., 100 U. S. 213, 224, 225, 25 L. Ed. 612, and cases there cited; Homestake Mining Co. v. Fullerton, 16 C. C. A. 545, 549, 69 Fed. 923; Green v. Minneapolis & St. Louis Railroad Co., 31 Minn. 248, 250, 17 N. W. 378, 47 Am. Rep. 771; Wood on Master & Servant, §§ 378, 379, 380.

Misconduct of the jury in taking certain exhibits to their room at the conclusion of the trial, and misconduct on the part of counsel for the plaintiff below in his closing address to the jury, are also assigned as reasons for reversing the judgment below.

The record discloses that, when the jury retired to consider their verdict, the hammer which is said to have caused the injury to the plaintiff's eye, and an iron used in connection therewith, called a "flatter," were taken to the jury room, and were examined by the jurors while they were considering their verdict. These two implements had been exhibited to the jury repeatedly during the progress of the trial, because one defense which was interposed by the defendant company was to the following effect: That shortly prior to the accident Skoumal had tempered the flatter, and had made that tool too hard and brittle, and that the injury which he sustained was due to this fact, or, in other words, to the plaintiff's own fault. Whether he had thus tempered the flatter and made it too hard, and thereby occasioned the injury of which he complained, was one of the disputable issues of fact before the jury, and experts gave their opinion as to whether the flatter had or had not been too highly tempered. The fact that these implements were taken to the jury room was made one of the grounds of a motion for a new trial, and affidavits on the part of all the jurors were filed. All of the jurors admitted in their respective affidavits that the hammer and flatter were in the jury room and were examined by the jurors, but none of them deposed that such examination had had any influence upon their verdict, while at least ten of the jurors affirmed that such examination of the two implements as was made in the jury room did not, in their opinion, have any effect whatever upon the verdict that was ultimately rendered. In overruling the motion for a new trial, the trial judge remarked that he had no recollection of having told the jury not to take the hammer and flatter to the jury room; but as reputable parties had testified that the court did so instruct the jury, and as the statement of these parties was in no wise contradicted, and as the court had no personal recollection on the subject, it felt compelled to find as a fact that he did direct the jury not to take the hammer or the flatter to their room. Nevertheless the learned trial judge overruled the motion for a new trial, and directed a judgment to be entered on the verdict; being

satisfied, apparently, that the presence of these implements in the jury room had had no perceptible effect upon the verdict.

The jury were clearly guilty of misbehavior, if, in violation of directions given by the trial judge, the tools in question were taken to their room. But it does not follow that such misbehavior was fatal to the verdict. In our opinion, it ought not to have that effect unless it is reasonable to conclude that the defendant company was in some way put to a disadvantage or was prejudiced by the action of the jury, and did not have a fair trial of the issues involved in the case. It does not seem reasonable to conclude that either party was prejudiced by the action of the jury in taking the hammer and the flatter to their room for the purpose of making a further examination thereof. They were inanimate objects which had been introduced in evidence and frequently exhibited to the jury in the progress of the trial. The presence of the hammer and flatter in the jury room afforded the jurors an opportunity to make a closer inspection thereof than they had been able to make during the progress of the trial, and also enabled them to determine with greater accuracy whether the flatter had or had not been too highly tempered. As they could only be used for such a purpose, and were in a measure helpful to the jury in reaching a right conclusion, we can perceive no sufficient reason why they should have been excluded from the jury room, inasmuch as the object of all trials before a jury is to attain a right result as respects questions of fact. In the case of Hix v. Drury, 5 Pick. 296, 302, it was held that if a paper which has not been introduced in evidence is delivered to the jury, by design, by the party in whose favor the verdict is returned, the verdict will be set aside. In Woodbury v. City of Anoka, 52 Minn. 329, 54 N. W. 187, a request was made during the trial that the jury be taken from the courtroom to view and examine the condition of a certain sidewalk which formed the subject-matter of the controversy. Notwithstanding the refusal of the court to permit the jury to make the examination, two of the jurors did examine it with some care during a recess of the court, and such action on their part was held to be such misconduct as justified the court in setting aside the verdict. Also, in the case of Consolidated Ice Machine Co. v. Trenton Hygeian Ice Co. (C. C.) 57 Fed. 898, it appeared that, on the trial of an action to recover the price of an ice plant sold, where the defense rested largely upon the alleged poor quality of ice which the machine produced, some of the jurors, in passing out of the courthouse at recess, saw a wagon filled with ice which had been produced by the machine, and paused for a time to examine the ice, and smelled and tasted it, with a view of ascertaining if the ice was of good quality. This was held to be misconduct on the part of the jury, but inasmuch as it appeared that such misconduct was known, before the conclusion of the trial, to counsel for the complaining party, against whom a verdict was eventually rendered, and inasmuch as the fact was not brought to the attention of the court until after the verdict had been rendered, the court refused to set the verdict aside.

The foregoing cases have been cited by counsel for the plaintiff in error in support of their contention that the misconduct complained of

in the case at bar was such as necessitates a reversal of the judgment. We think, however, that they do not sustain this contention, for the reason that in the cases cited it is evident that the jurors, or some of them, at least, had acted on evidence dehors the record, that was not introduced during the course of the trial, whereas in the case in hand it appears that the jury merely took to their room certain exhibits which had been introduced in evidence, and that such further examination of the exhibits as was made by the jury, if it had any effect on the verdict, must have aided them in reaching a right conclusion. The alleged misconduct of the jurors tended to promote, rather than to defeat, the ends of justice. In such a case as the one at bar, where an exhibit in the form of a tool, a model, or other inanimate object, which has been offered in evidence or used before the jury in the progress of the trial, finds its way into the jury room, and is examined by the jurors in their retirement, we think it is the better doctrine that, even if such an exhibit is taken by the jury to their room without proper permission, it is not such misconduct on their part as should serve to overturn the verdict. Especially should this be the rule where, as in the case at hand, it does not appear that the prevailing party was instrumental in placing the exhibit in the hands of the jury, to be taken to their room. The opinion last expressed seems to be the one which is entertained, in substance, by other appellate courts both as respects verdicts in civil and in criminal cases. In Russell v. State, 92 N. W. 751, 754, the Supreme Court of Nebraska say:

"The modern practice, * * * both in civil and criminal cases, is to send to the jury room all instruments, articles, and documents, other than depositions, which have been received in evidence, and which will, in the opinion of the trial judge, aid the jury in their deliberations."

See, also, the following cases: Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947; Gresser v. State (Tex. Cr. App.) 40 S. W. 595; Hickman v. Layne, 47 Neb. 183, 66 N. W. 298; Illinois Silver Mining & Milling Co. v. Raff (N. M.) 34 Pac. 544; People v. Page, 1 Idaho, 106; Louisville & Nashville R. R. v. Berry's Adm'x, 96 Ky. 604, 29 S. W. 449.

We are further confirmed in the view that the alleged misconduct of the jury did not materially affect the result of the trial by the fact that the trial judge refused to set the verdict aside and grant a new trial when the action of the jury was called to his attention, as he should have done if he was satisfied by the showing made, or thought it probable, that the conduct complained of was in any material respect prejudicial to the defendant.

The bill of exceptions shows that during the trial the plaintiff below called as a witness one of the defendant's attorneys, and asked him if it was not a fact that he represented the Maryland Casualty Company, of Baltimore, Md., and if he had not written a certain letter to the latter company concerning the case against the defendant company, which was then on trial. An objection to these questions was interposed, which was sustained, and they were not answered. Notwithstanding this fact, it is said that in his closing argument the plaintiff's attorney, referring to the incident, said that he had called one of the defendant's attorneys to the stand and propounded the foregoing questions, which had been excluded by the court, and, if a

judgment was rendered against the defendant company, he did not know whether it would be paid by it or by the Maryland Casualty Company. It is urged that this was such misconduct on the part of counsel for the plaintiff below as entitled the defendant company to a new trial. The statement which the plaintiff's attorney is said to have made to the jury in his closing argument is only disclosed by an affidavit of one of the defendant's attorneys which was made and filed in support of a motion for a new trial about two weeks after the verdict had been rendered. The bill of exceptions proper (and by that we mean the portion of the bill which purports to give an accurate account of what transpired at the trial) does not show that the plaintiff's attorney made the remarks imputed to him, or, if he did, that any objection was made thereto at the time, or that an exception was saved. All that this court knows or can know about the incident is what appears in affidavits that were filed subsequent to the rendition of the verdict, in support of a motion for a new trial. One affidavit contained the statement that the remark in question was made and was excepted to, while a motion that was made at about the same time to strike this affidavit from the files (which motion is also contained in the bill of exceptions) contains the statement that such language as plaintiff's attorney may have used was not excepted to at the trial. Now, it is true that in making up the bill of exceptions, contrary to the usual practice, all of the proceedings in the case subsequent to the trial, including motions that were filed, and affidavits in support thereof, have been incorporated into the bill and made a part thereof; but the allowance of the bill in this form, as respects matters subsequent to the trial, amounts to no more than a statement by the trial judge that such proceedings were had; that is to say, that certain motions and supporting affidavits, as set forth in the bill, were in fact filed. The allowance of the bill in the manner described is not tantamount to a certificate by the trial judge that all of the statements contained in the motions and the affidavits are true. Indeed, it is quite certain that the trial judge did not intend to certify to the truth or falsity of any of the statements contained in the motions and supporting affidavits that were filed subsequent to the verdict, or to do more than certify that such motions and affidavits were filed, since there appears to have been a controversy as to whether an exception was taken at the trial to any remarks which plaintiff's counsel may have made, which controversy was left undetermined. The result is that we feel constrained to hold that the record fails to show, in an authentic form, that an exception was taken during the progress of the trial to the improper remarks said to have been made by the plaintiff's attorney.

The method of preserving the question so that it can be reviewed on appeal, whether counsel on the trial have been guilty of such misconduct as entitles the complaining party to a reversal of the judgment, varies somewhat in different jurisdictions. In Thompson on Trials, § 962, it is said that the confusion of views as respects this question of practice is "not very creditable to the courts." The learned author, after considering the subject at some length, concludes, however, that the correct method of bringing a question of this sort before an appellate tribunal for review is to make a seasonable objec-

tion to the improper remarks of counsel when they are made, or to an improper line of argument when it is adopted, thereby challenging the trial court's attention to the subject, and by taking an exception to the court's action, if the objection is overruled, and by incorporating the exception, together with a statement of the remarks complained of or the line of argument pursued, in a bill of exceptions signed and sealed by the presiding judge. The method of practice so pointed out by the learned author was approved by the Supreme Court in Crumpton v. United States, 138 U. S. 361, 364, 11 Sup. Ct. 355, 356, 34 L. Ed. 958, where that court said:

"It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and in case of refusal to note an exception. Thomp. on Trials, § 962."

The same method of procedure has been adopted and approved in other jurisdictions, and it would seem to be entirely reasonable to require counsel for the complaining party to call the attention of the trial judge to remarks made by opposing counsel, or to a line of argument pursued by him which is deemed to be improper, and to invoke the interposition of the trial judge, and to save an exception to his action in the usual way, provided he refuses to condemn the action of opposing counsel, or to arrest his line of argument, or to grant other suitable relief. Bradshaw v. State, 17 Neb. 147, 151, 152, 22 N. W. 361; McLain v. State, 18 Neb. 154, 24 N. W. 720; State v. Howard, 118 Mo. 127, 146, 24 S. W. 41; State v. Taylor, 118 Mo. 153, 163, 24 S. W. 449; Rudolph v. Landwerlen, 92 Ind. 34, 37; Dowdell v. Wilcox, 64 Iowa, 721, 724, 21 N. W. 147; Learned v. Hall, 133 Mass. 417, 419; Roeder v. Studt, 12 Mo. App. 566.

It goes without saying that a trial judge has the power, and is always at liberty, of his own motion, to reprimand counsel when they make use of language or indulge in a line of argument that is improper, unfair, or that is calculated to arouse the prejudices of jurors, or divert their attention to extraneous matters, or to issues that are foreign to the case, and no trial judge should hesitate for a moment to exercise such power, although his intervention is not solicited; but, when remarks are made by counsel or arguments are advanced that are deemed to be so far improper and prejudicial to the interests of a party that his counsel resolves to assign them as grounds for reversal by an appellate tribunal, he should at least challenge the attention of the trial judge to the matter, and, if adequate relief is not afforded, should thereupon save an exception, and incorporate it in a bill of exceptions. This was not done in the present case, or at least the bill of exceptions does not show that it was done. The remark that is said to have been made by plaintiff's attorney on the trial of the case is subject to just criticism, and should not have been made. We entertain no doubt on this point, and feel free to condemn it. The trial court, in the exercise of its discretion, might have set aside the verdict and granted a new trial because of the language complained of. It did not see fit to do so, however, and its action in this respect indicates, we think, that, in the opinion of the trial judge, the remarks which were made did not prejudicially affect the

rights of the defendant company. This court is in an entirely different situation. The judgment below is presumptively right, and we cannot disturb it except for error of law committed by the trial court, on account of which an exception was duly taken and saved during the progress of the trial. The record, so far as this court is concerned, discloses no such error, and the judgment below must accordingly be affirmed.

It is so ordered.

ATCHISON, T. & S. F. RY. CO. v. PHIPPS.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1903.)

No. 1,914.

1. EVIDENCE—HEARSAY—STATEMENTS.
   Testimony giving a statement by the young daughter of the owner of a building destroyed by fire as to the place where the fire started, made two hours after the fire broke out, and in another place, was inadmissible as hearsay.

2. REVIEW ON APPEAL—ORDER OF INTRODUCTION OF TESTIMONY.
   The admission in rebuttal of testimony which is properly rebuttal evidence is not error for which the judgment will be reversed, merely because other evidence as to the same matter was introduced in chief; the order of the introduction of evidence being a matter in the legal discretion of the trial court, which discretion, in the absence of gross abuse, is not reviewable by the appellate court.

3. SAME—INSTRUCTIONS.
   The refusal of instructions asked is not reversible error, where the rules embodied therein are given in clear language in the charge of the court, which is not excepted to.

4. INSTRUCTIONS—INFERENCE FROM FAILURE TO CALL WITNESSES.
   Where persons who had been subpœnaed as witnesses by both parties, and whose depositions had been taken by defendant, were present during the trial, but were not called by either party, the court properly instructed the jury that they should draw such inference from the fact as in their judgment was fair and reasonable, and properly refused to instruct, as asked by defendant, that the jury had a right to infer from the fact that such witnesses were not called by plaintiff that their testimony would not have been favorable to plaintiff.

5. REVIEW ON APPEAL—FORM OF VERDICT—QUESTION NOT RAISED BELOW.
   A possible irregularity in the form of the verdict, as where the petition contained two counts, on one of which the jury were instructed to find for defendant, and they returned a general verdict for plaintiff, cannot be first urged in the appellate court as ground for reversal of the judgment, where it does not appear that exception was taken at the proper time in the trial court, or that such court was asked to cause the findings to be stated in the desired form.

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

Gardiner Lathrop and Ben Eli Guthrie (George A. Mahan, on the brief), for plaintiff in error.

Bert D. Nortoni, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 3851.

SHIRAS, District Judge. From the record in this case it appears that in September, 1901, William R. Phipps was the owner of a dwelling house and store building, and the contents thereof, situated in the town of Ethel, Macon county, in the state of Missouri; the named town being a station upon the line of railroad owned and operated by the plaintiff in error, the Atchison, Topeka & Santa Fé Railway Company; that on the evening of the 10th of September, 1901, a fire destroyed a frame building used as a restaurant and dwelling by J. W. Lechliter, situated about 150 feet north of the water tank of the railway company; that the fire spread from the Lechliter building to those adjacent thereto, and was thus communicated to the buildings owned by Phipps, the store building and contents being destroyed, and the dwelling being damaged. To recover for the damages resulting from the fire, William R. Phipps brought an action against the railway company, claiming that the fire which destroyed the Lechliter building, and thence spread to his premises, was caused by sparks thrown out by a locomotive engine used by the railway company in the operation of its trains. At the December term, 1902, of the Circuit Court, the death of William R. Phipps was suggested and the action was revived and continued in the name of Martha B. Phipps, as the administratrix of his estate, and at the same term of court the case was tried before a jury.

In the introduction of the evidence the plaintiff maintained the view that the fire which destroyed the Lechliter building originated from sparks thrown out by engine No. 75, pulling train No. 3, known as the "California Limited," which stopped at the water tank within a few minutes of the discovery of the fire; there being evidence tending to show that the engine emitted a large quantity of sparks, which were carried in the direction of, and upon the roof of, the Lechliter building. On behalf of the railway company it was maintained that the fire was communicated to the building from a defective flue therein which received the pipe from a stove used in the restaurant.

As the statute of Missouri (section 1111, Rev. St. 1899) declares that "each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation," the question of the liability of the railway company was narrowed down to the proposition whether it was shown that the fire which destroyed the Lechliter building originated from sparks thrown out from an engine used by the railway company in the operation of its trains, as, under the provisions of the statute, liability for fires communicated directly or indirectly from the engines used in the operation of the railway is imposed upon the company. Upon this issue, the jury found for the plaintiff below, and, judgment having been entered upon the verdict, the railway company brings the case to this court by writ of error; it being stated in the brief of counsel for the railway company that "the questions involved upon this writ of error are the exclusion of certain evidence offered by the defendant (plaintiff in error herein), the admission of certain evidence in rebuttal offered by plaintiff (defendant in

error herein), which was part of her case in chief, and the refusal of certain instructions asked by the defendant."

It is further stated in the brief of counsel that "the first error relied upon is that the Circuit Court erred in excluding the evidence of what one of the daughters of J. W. Lechliter stated in the presence of witness H. C. Phillips, who was defendant's assistant superintendent, at defendant's depot, about quarter to twelve on the night of the fire, as to where the fire occurred." Upon the face of the record, it is shown that the witness H. C. Phillips was asked by counsel for the railway company to state what was said by one of the young daughters of J. W. Lechliter as to where the fire occurred; the statement called for having been made at about a quarter to 12 of the night of the fire, and two hours after the breaking out of the same, when the young girl was in a small room adjacent to the ticket office in the station of the railway. Upon objection the court did not permit the question to be answered by the witness, and an exception was duly noted to the ruling of the court. It is questionable whether, upon the record, the materiality of the evidence sought to be introduced is shown with sufficient clearness to require the court to consider this phase of the error assigned, due to the fact that the bill of exceptions does not show the substance of the offered testimony. To constitute reversible error in the rejection of evidence, it must be made to appear that the evidence offered and excluded was competent, and of such materiality and weight that its exclusion might have caused injury to the party offering the same. Packet Company v. Clough, 20 Wall. 528, 22 L. Ed. 406; Railroad Company v. Smith, 21 Wall. 255, 22 L. Ed. 513; Thompson v. First National Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507; Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286; Buckstaff v. Russell, 151 U. S. 626, 14 Sup. Ct. 448, 38 L. Ed. 292; Origet v. Hedden, 155 U. S. 228, 15 Sup. Ct. 92, 39 L. Ed. 130. The three cases last cited declare the rule to be, in cases where the witness testifies upon the trial, that if the question excluded is of such form as to show clearly that the testimony sought to be elicited would be competent, and might be favorable to the party offering the same, it is not necessary to recite in the bill of exceptions the substance of the expected answer. Doubtless counsel deemed the question excluded in this case to be within this rule, and therefore did not make an offer to show what the substance of the excluded evidence was; but we are not called upon to pass upon the correctness of this view, for the reason that the action of the trial court in excluding, as hearsay, the statement sought to be introduced, is fully sustained by the ruling of this court in National Masonic Association v. Shryock, 73 Fed. 774, 20 C. C. A. 3, wherein the question at issue is very fully and clearly considered.

The second error assigned is that "the Circuit Court erred in permitting plaintiff's witness Miss Lea Heaton to testify in rebuttal as to whether the Lechliter cook stove was hot or cold on the night of the fire; plaintiff having gone into that question as part of her case in chief, and because the same was part of her case in chief." The case of the plaintiff was based upon the allegation that the fire originated from sparks thrown out from an engine operated by the rail-

way company, whereas the defendant sought to maintain the proposition that the fire came from the stove used in the building. Evidence that at the time the fire broke out the stove was cold would more properly be in rebuttal of the defense relied on by the defendant than in support of the case maintained by the plaintiff, and, as it was evidence properly in rebuttal of that introduced by the defendant company, it cannot be said that its admission was error, simply because some evidence upon the particular matter had been given by a witness called by the plaintiff in making out her case in chief. The order in which testimony otherwise competent and material may be introduced is a matter very largely within the control of the trial court, and prejudicial error in its action must be made clearly apparent before an appellate court is justified in predicating error thereon. Thus, in Goldsby v. United States, 160 U. S. 70, 74, 16 Sup. Ct. 218, 40 L. Ed. 343, it is said:

"This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was, and allowed the witness to testify. It was obviously rebuttal testimony. However, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here. Wood v. United States, 16 Pet. 342, 361 [10 L. Ed. 987]; Johnston v. Jones, 1 Black, 209, 227 [17 L. Ed. 117]; Commonwealth v. Moulton, 4 Gray, 39; Commonwealth v. Dam, 107 Mass. 210; Commonwealth v. Meaney, 151 Mass. 55 [23 N. E. 730]; Gaines v. Commonwealth, 50 Pa. 319; Leighton v. People, 88 N. Y. 117; People v. Wilson, 55 Mich. 506, 515 [21 N. W. 905]; Webb v. State, 29 Ohio St. 351; Wharton's Criminal Pleading & Practice, § 566; 1 Thompson on Trials, § 346, and authorities there cited."

It is also assigned as ground for reversal that the court did not give to the jury an instruction asked by the defendant company in the words following:

"If, after considering all of the testimony, facts, and circumstances in evidence, the minds of the jury are left in a state of supposition as to the origin of the fire, the verdict must be for the defendant."

It would seem that the words "in a state of supposition" were not well chosen to express the thought that was probably intended by counsel, for it is very probable, if the court had given this instruction, the jury would have inferred therefrom that, if there was any doubt in their minds as to the origin of the fire, their verdict must be for the defendant. To enable the plaintiff to recover a verdict, it was not incumbent on her to prove beyond all doubt, or even beyond all reasonable doubt, that the fire was caused by sparks emanating from an engine operated by the defendant company. The court, in its charge to the jury, clearly and repeatedly instructed them that, to enable the plaintiff to recover, she must prove by a fair preponderance of the evidence, and to the reasonable satisfaction of the jury, that the fire was started by sparks thrown out by locomotive engine No. 75, operated by the defendant company, and further that "if, from all the facts and circumstances in evidence, the jury are in such doubt as to be unable to find the real cause or origin of the fire, then they should find for the defendant." No exceptions were taken by defendant to the charge given by the court to the jury, and as the rule upon the amount of

proof needed to maintain plaintiff's case was clearly given to the jury, in terms not excepted to by defendant, it cannot be held that it was error to refuse the instruction asked for.

It is further contended that reversible error was committed in the refusal of the court to give an instruction asked by the defendant in the terms following:

"By not calling any of the Lechliter family, in whose building the fire originated, as witnesses as to the origin of the fire, the jury have a right to infer that their evidence would not be favorable to plaintiff."

In support of this assignment of error, counsel for the railway company cite many cases wherein, under varying circumstances, the rule is recognized that where it is within the power of a party to produce competent and material evidence upon a question at issue, which it is not equally open to the other party to introduce, a failure to adduce the same gives rise to the inference that the evidence would be adverse to the party failing to introduce the same. In the consideration of this question, regard must be paid to the circumstances under which the request was made to the court. It is not claimed that the Lechliter family were relatives of the plaintiff, or that they were in the employ of the plaintiff, or in any other manner subject to her influence or control. The record shows that the members of the Lechliter family were present in the court during the trial, having been subpœnaed to attend the trial by both the plaintiff and the defendant. It further appears that the railway company had caused the testimony of the members of the family to be taken by deposition, and these depositions were under the control of the defendant railway company. It also appears that the railway company was permitted to put in evidence the declaration of J. W. Lechliter, the head of the family, made shortly after the fire, in the presence of H. C. Phillips, the assistant superintendent of the railway company, who testified that:

"I went up the street to see if I could find from the people how the fire came to start, and out in front of the buildings nearest the track there was a small group of people, and among others this man who kept the lunchroom, and he was crying. I don't think he had a hat, and he was in his shirt sleeves, as I recollect it. Somebody asked him how it started. He just said: 'I don't know. It is all I had in the world, and just these few cans is left.' That, of course, gave me no information to go on, and later in the evening, when I found that the fire started in this building, I tried to get from some of the family an idea of just how it started. The only statement I could get from any of them, without the direct question, which I didn't care to undertake with them (they were all very much rattled), was when I was standing in the ticket office that night."

It thus appears that the superintendent of the railway company, acting in its behalf, immediately after the fire happened, and undoubtedly before any communication could have taken place between the plaintiff and the members of the Lechliter family, had the opportunity to ascertain what knowledge they had of the origin of the fire; that subsequently, in preparing this case for trial, the railway company took the testimony of the Lechliter family by deposition; that when the case was set for trial the railway company subpœnaed these parties as witnesses on its behalf, and during the trial they were present in

the courtroom, subject to the call of either of the litigants. Under these circumstances the court, instead of giving the instruction asked for by the company, charged the jury as follows:

"You are asked by counsel, in their argument, to draw certain inferences from the fact that one side or the other did not call certain available witnesses to prove certain relevant facts. As already stated by me, you are at liberty to, and should consider such fact, and give to it such reasonable weight and importance, and draw such reasonable inference therefrom, as, in your judgment, it is fairly entitled to. Your attention is also called to other facts of the case, and you are asked to draw certain inferences therefrom, and counsel have asked the court to instruct you that certain inferences should be drawn therefrom. The court, however, is disinclined, except as already stated, to express its views as to what inferences of fact should be drawn from any of the established facts of the case. You are men of experience, and have heard all the evidence, and are fully competent to, and should, draw such inferences as seem to you fair and reasonable from any of the established facts in the case."

In effect, the attention of the jury was directed to the fact that these parties were not called as witnesses, and the jury was instructed that they should consider that fact, and give to it such weight and draw such reasonable inference therefrom as, in their judgment, it was fairly entitled to. The argument of counsel for the railway company, able as it is, has failed to satisfy us that the court erred in refusing the requested instruction, in view of the somewhat peculiar facts out of which the question arose. As already stated, the record shows that the railway company had caused the testimony of the members of the Lechliter family to be taken by deposition, and had subpœnaed them to be in attendance at the trial; and it might very well be that the counsel for plaintiff presumed that they would be called by the defendant, and therefore did not call them. With full knowledge on part of the railway company of the character of their testimony, and with full opportunity to put these parties on the stand as witnesses, the company did not do so. Is it not the fair inference that the company did not call them because it knew that their testimony would not aid the case of the company, and, under these circumstances, was the company entitled to the instruction asked, to the effect that the jury must draw the inference that their testimony would be adverse to the plaintiff's case, or was not the situation fairly met by the court submitting the question to the jury for their consideration in the terms of the charge given? Furthermore, in dealing with many questions that arise in the course of jury trials, it is frequently impossible for an appellate court to know just how the question was presented to the jury in the argument of counsel; and yet it is with reference to this presentation that the trial court should frame its instruction upon the matter at issue, and due weight must be given to this consideration, when exception is taken to the form in which a given point is submitted to the jury. As already stated, we are not satisfied that the company has any just cause for complaint with respect to the manner in which the attention of the jury was directed to the fact that the members of the Lechliter family were not called as witnesses, and the assignments of error based upon the ruling of the court in this particular are therefore not sustained.

Error is also assigned, based upon the failure of the court to give several instructions asked by the defendant company, in which the attention of the jury was called to certain specific matters appearing in the evidence. The pivotal point in this case was the question whether the fire which burned the Lechliter building was caused by sparks thrown out by an engine operated by the defendant company. This question, with the rules of law applicable thereto, was very clearly submitted to the jury in the charge of the court, and in terms not excepted to by the defendant, and reversible error cannot be predicated on the fact that the court did not give certain instructions in the form asked by counsel, even though these instructions may be correct in form and substance. We have carefully considered each of the errors thus assigned, but fail to find ground for holding that the failure to give the same worked prejudice to the defendant, and the assignments are therefore overruled without further elaboration of our views thereon.

It is finally contended that the judgment and verdict in this case are so irregular and erroneous that the same must be set aside, because the same are general in form, whereas the petition or declaration contained two distinct counts; it being claimed that in such cases the verdict should show the finding of the jury on each cause of action declared on. It is true that the petition, in form, contains two counts, the one seeking to recover damages for the destruction and injury to the buildings and their contents, and the other for the damage to the realty, in that it was claimed the fire had destroyed a number of shade trees, thus lessening the value of the realty. The petition shows, however, that the cause of action declared on in each count is one and the same—the escape of sparks from one of defendant's engines, which set fire to the Lechliter building, and thence spread to the premises owned by William R. Phipps. The situation, therefore, is not as it would be in a case wherein a plaintiff declares upon two distinct causes of action, with respect to which the jury might find for the plaintiff on one cause of action, and against him on the other. In such cases there exists good reason for requiring a finding in the verdict on each cause of action. In the case now before us there was but one cause of action declared on, and the court, in its charge, instructed the jury that there was no evidence to sustain the allegation of injury to the shade trees, and that upon the second count the verdict must be for the defendant. All, therefore, that was submitted to the determination of the jury upon the question of the amount of damages, was covered by the first count; the second having been withdrawn from their consideration. There is nothing shown in the record which in the slightest degree tends to support the idea that the jury disregarded the instruction of the court not to award damages for the injury to the realty claimed to have resulted from the alleged destruction of the shade trees. If, according to the contention of counsel for the railway company, the jury had found for the plaintiff on the first count in the petition, and for the defendant on the second count, the claim could have been well made that the verdicts were inconsistent, because the findings were adverse as to the one cause of action declared on in the two counts. If counsel

had deemed it essential that the verdict should show on its face that no damages were awarded under the second count, such a finding could have been secured on the coming in of the verdict. A possible irregularity of the kind suggested in this case cannot be first brought up in an appellate court and be successfully urged as ground for the granting a new trial; it not appearing that exception was taken at the proper time in the trial court, or that the trial court was asked to cause judgment to be entered in the desired form. National Bank v. Butler, 129 U. S. 223–232, 9 Sup. Ct. 281, 32 L. Ed. 682.

Finding no substantial merit in the several errors assigned, the same are overruled, and the judgment of the Circuit Court is affirmed.

UNITED STATES v. BONNESS et al.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1903.)

No. 1,839.

1. UNITED STATES—CONTRACT FOR SALE OF LOGS—SELECTION OF TREES BY GOVERNMENT AGENT.

Where the United States, through its agents, selected logging superintendents, who were intrusted with supervision of the cutting of timber on an Indian reservation, and the duty of determining the particular trees which came within the definition of "dead and down timber," which duty required the exercise of judgment and discretion, and such judgment and discretion were honestly exercised, the government is bound thereby, and cannot charge one to whom it contracted to sell the logs after they should be cut and banked with liability beyond the contract price, on the ground that some of the logs which were cut and banked, and which the purchaser took possession of under his contract, were cut from living green trees.

In Error to the Circuit Court of the United States for the District of Minnesota.

Charles C. Houpt, U. S. Atty.

A. Y. Merrill and R. J. Powell, for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. The questions at issue in this case before the trial court grew out of certain contracts relative to the cutting of dead timber on the Chippewa Indian Reservation, in the state of Minnesota.

Under date of January 23, 1901, a written agreement was entered into "by and between Captain W. A. Mercer, Seventh Cavalry, acting U. S. Indian agent, Leech Lake Agency, for and on behalf of the Chippewa Indians, party of the first part, and Lee West, of Bena, Minn., party of the second part," whereby the party of the first part agreed to sell to the party of the second part, under the rules and regulations prescribed by the Secretary of the Interior, December 21, 1900, the merchantable dead timber, standing or fallen, cut from certain named sections and parts thereof forming part of the Chippewa Indian Reservation, the logs to be banked at Portage Lake and

Leech river, unless some other place or places should be mutually agreed upon, payment therefor at the rate of $6.50 per thousand feet for the white pine, and $5.50 per thousand feet for Norway pine, to be made before the removal of the logs, and not later than April 15, 1901. It will be noticed that under the terms of this contract the purchaser of the timber, Lee West, had nothing to do with the cutting of the timber, that matter being left under the control of Captain Mercer under the rules approved by the Secretary of the Interior under date of December 21, 1900, a copy of which was attached to the contract between Captain Mercer and Lee West, and expressly made part thereof, in which rules it is provided that the acting Indian agent should have supervision of the logging, with power to appoint foremen for the logging camps, and scalers to measure the logs when cut; it being further provided that the agent might place in charge of logging districts, the limits to be defined by the agent, three logging superintendents, whose duty it would be to supervise all logging operations within their districts.

It further appears that on January 4, 1901, Captain Mercer, as acting Indian agent, for and on behalf of the Chippewa Indians entered into a written contract with one William Douglass for the cutting, hauling, and banking of the dead pine timber suitable for sawlogs, standing, lying, or being on certain named quarter sections of land, forming part of the Indian reservation, and on the 23d of January, 1901, a similar contract was entered into between Captain Mercer and one Henry B. Sherer for the cutting and banking the dead pine timber on other named sections and parts thereof of the reservation. The timber to be thus cut and banked by Douglass and Sherer was the timber agreed to be taken and paid for by Lee West under the contract entered into by him with Captain Mercer.

A large quantity of timber was cut by Douglass and Sherer and banked as required by their contracts, which was taken possession of by Lee West and Frederick W. Bonness, who were, as copartners, engaged in the lumber business, and to whose benefit the contract entered into by Lee West with Captain Mercer inured, and who paid for or tendered payment for the logs so taken at the price named in the contract of purchase.

On behalf of the United States a claim was asserted that in the cutting of the timber by Douglass and Sherer these parties had cut some 398,400 feet of white pine and 83,560 feet of Norway pine from live trees, and which did not come within the description of dead and down timber, and as the logs coming from such live or green trees had been taken possession of by the defendants, West and Bonness, it was an unlawful conversion thereof by the defendants, as under the contract of purchase they were only entitled to the timber cut from the dead and down trees found upon the sections and parts thereof included within the contract of January 23, 1901. Based upon this claim, this action was brought in the name of the United States against West and Bonness in the Circuit Court for the district of Minnesota, and at the March term, 1902, the case was tried before a jury, the verdict being in favor of the defendants.

Upon the face of the record it appears that two ultimate proposi-

tions of fact were submitted to the jury: (1) Were there any live or green trees cut and delivered to the defendants? which proposition included the definition of the term "dead and down timber" as used in the contract; (2) if so, what was the quantity and value thereof? which would call for the rule to be followed in measuring and ascertaining the quantity of timber in the trees wrongfully cut.

If upon the first proposition it was found by the jury that in fact live or green trees, not coming within the fair definition of dead or down timber, had been cut by either Douglass or Sherer, and had been taken possession of by the defendants, then the legal question would arise whether the latter would be responsible for the actual value thereof.

Upon the legal proposition the court instructed the jury that "the cutting of living trees suitable for lumber upon Indian reservations is contrary to law, and the purchaser of logs cut from such living trees from the person who wrongfully cut them does not acquire title to them, as the trespasser could have no title to convey"; and further, that, "if you find from the evidence that living green trees were so unlawfully cut in violation of the act of Congress and banked by Douglass and Sherer on Portage Lake and the Mississippi river, and that such living green trees were received by the defendants or either of them, then the plaintiffs are entitled to a verdict for the value of such living green trees at the place where they were banked, and from which they were taken by defendants. * * *"

These instructions, to which no exceptions were taken, and which were certainly as favorable to the government as could be reasonably asked, narrowed the issue of the liability of the defendants down to the one question of fact, to wit: Did the timber cut by Douglass and Sherer and taken by the defendants include any living green trees, not coming within the term "dead and down timber," as used in the act of Congress, which provided for the cutting of such timber upon the Indian reservation? The definition of "dead and down timber" given by the court to the jury, was, in substance, that adopted by this court in the case of United States v. Pine River Logging Co., 89 Fed. 907, 32 C. C. A. 406, and no exception is now urged thereto.

It thus appears that the issue of fact whether any trees other than those coming within the terms "dead and down" had been cut was sent to the jury with a proper definition of the meaning of the term, and with respect to this issue it is said in the brief of counsel for the United States: "The issue submitted to the jury was not the amount of timber cut and removed, but the kind. The evidence is so conflicting that the jury might properly have returned a verdict for either party, but, having found for the defendants, their determination must remain undisturbed, unless the charge of the court contains reversible error."

Much time was taken in the trial before the jury in the introduction of evidence upon the methods followed in scaling the logs cut, and exceptions were taken to some rulings of the court upon matters connected with this question; but it is apparent that we are not called upon to consider any errors assigned except those that bear upon the one question of fact, to wit, the kind of trees that were cut and taken

into possession by the defendants. Upon this issue the jury found, in substance, that the logs taken by the defendants did not include any wrongfully cut from living green trees, and therefore the question of the rule to be followed in ascertaining the quantity of green trees wrongfully cut was not reached or considered by the jury. The only error assigned which bears upon the issue upon which the verdict of the jury was based is the sixth, and is in the words following:

"(6) There was also error in this: That the court, as a portion of the general charge, charged the jury as follows: 'Now, gentlemen, I think it obvious that when these contracts were made it was not the intention of any of the parties that a determination as to what timber came under the classification of dead and down timber should necessarily be decided by a lawsuit and by a jury. I do not believe either of the parties had that in their minds. In the nature of things, this was a matter that must be determined by somebody, and by men going into the woods, as to what trees they should cut or should properly be cut. Whom was that to be determined by? Necessarily it must be determined by the men who are intrusted to do the cutting and to look after the cutting, and those men were all selected by the government. The question must be determined by men intrusted with the cutting of the trees; it could not be otherwise. It could not practically be otherwise. I say it was intrusted to the loggers under the supervision of the logging superintendents, whose duty it was to go from time to time to the different camps to see to it that these men used proper judgment and discretion with reference to cutting the trees. The contract devolved the discretion especially upon them. It was a matter of discretion, and in the nature of things it must be so. A logger seeing an injured tree, and presumably having some knowledge of the matter, would examine to determine in his own mind what that injury was —whether it was serious, and what its effect would be; whether the tree was so injured that it ought to be cut, or whether the injury was so slight and trifling that the tree would still grow and thrive, and that it ought to be allowed to stand. Whomever under the contract was given that discretion was the proper one to exercise it, and, if he exercised it honestly and faithfully, then that ought to be the end of the matter. No person should come in afterwards, after the trees had been cut under the exercise of the discretion of the man to whom the power to exercise that discretion was given as to cutting the timber, and by any fanciful theory with reference to certain views that he might imagine ought to be taken of the matter upset what had been done. Business cannot be transacted in that way. It is obvious to you, gentlemen, that such must be the case.'"

In determining whether the court erred in this portion of its charge, the nature of the case and of the issues embraced therein must be kept in mind. It is not charged that the defendants had any connection with or control over the cutting of the timber. It is not charged that the defendants connived with any one else in any scheme to secure the cutting of logs from living trees.

The theory of the government was that if in fact living green trees were cut by Douglass or Sherer, which passed into the possession of the defendants, the latter would be liable for the value thereof, and the court instructed the jury that such was the law of the case. The court, however, further instructed the jury, in effect, that as the defendants had nothing to do with the cutting of the timber, and as the evidence showed that such cutting was done under the supervision of persons appointed by the government, and as the determination of what particular trees could be lawfully cut was a matter for the exercise of judgment and discretion, the government would be bound by the conclusion reached by the persons to whom the cutting of the tim-

ber had been intrusted, so long as such judgment and discretion were honestly exercised. In so ruling the trial court substantially followed the doctrine laid down by this court in the already cited case of United States v. Pine River Logging Co., wherein it was said:

"The first of these instructions might be upheld if the court intended to say, and was understood as saying, that the government was not entitled to recover for timber cut and removed from the reservation in those instances where, as the result of honest mistakes of judgment on the part of the logging superintendent which were committed while he was giving due attention to the performance of his official duties, certain injured trees were classified as dead timber, and removed, which in fact ought not to have been so classified. If thus understood, the instruction was substantially correct. The determination of what timber was 'dead timber,' in the eye of the statute, as that phrase has heretofore been defined, involved the exercise of judgment and discretion on the part of the logging superintendent; and, as he had been appointed to decide such questions, his decisions thereon, if made in good faith, after the exercise of due diligence to advise himself concerning the character of the timber which was being cut and delivered, ought to be regarded as binding upon the government. Elliott v. Railway Co., 40 U. S. App. 61, 21 C. C. A. 3, 74 Fed. 707; Lewis v. Railway Co. (C. C.) 49 Fed. 708; Wood v. Railroad Co. (C. C.) 39 Fed. 52, and cases there cited."

Counsel for the government contend that the trial court erred in the instructions excepted to, for that "it is the settled law of this court that the government cannot be estopped or barred of any of its rights for the laches or negligence of its servants"—citing in support of this contention the case of United States v. Winona & St. Paul Ry. Co., 67 Fed. 969, 15 C. C. A. 117.

The declaration made in that case, that "the United States is not bound by any statute of limitations, nor barred by any laches or negligence of its officers in a suit to enforce the rights or to protect the interests vested in it as a sovereign government," cannot be questioned when the facts call for the application of the principle thus stated; but this rule is not the one to be applied in cases like the one at bar.

The question in this case is whether the United States is to be held bound by the action of persons to whom it had intrusted the supervision of the cutting of logs on the Indian reservation, in determining the particular trees that came within the definition of "dead and down timber," it being admitted that such action involved the exercise of judgment and discretion, and that such discretion had been honestly exercised by the agents of the government. It is not sought to bind the government by the laches, negligence, or dishonesty of its agents, but by the results of the action of its agents acting within the scope of the authority conferred upon them, upon a matter of fact requiring the exercise of knowledge and discretion, and in a case wherein it is not shown that the agents acted dishonestly or with any purpose to defraud the government. Carried to its legitimate result the contention of counsel would necessitate the holding that the government cannot be bound in any case by the action of its agents, no matter how faithfully and honestly the duty imposed upon them may have been performed.

In Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106, a question arose as to the effect of an order issued by a quartermaster of the

United States fixing the distances that were to govern in estimating the payment to be made to Kihlberg for the transportation of army supplies under a contract which provided that payment was to be made according to the distance ascertained and fixed by the chief quartermaster of the district of New Mexico. In passing upon the force to be given to the action of the quartermaster in fixing the distances, it was said by the Supreme Court:

"There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive, and to the contractor oftentimes ruinous, litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

The ruling in the case cited was approved and applied by the Supreme Court in United States v. Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284; the rule being recognized that, in the absence of fraud or of mistake or negligence so gross as to justify the inference of bad faith, a court is not justified in setting aside the decision or action, upon a question demanding the exercise of judgment and discretion, of a person to whom, by the understanding of the contracting parties, the matter is intrusted for decision or control, and this rule was enforced, in the two cases just cited, in controversies to which the government was a party.

In the case at bar the trial court clearly and repeatedly instructed the jury that Douglass and Sherer had no right to cut living green trees, and if logs of that character were cut and taken into possession by the defendants the latter could get no title thereto, and were liable to the government for the value thereof. It being the fact, however, that, in carrying out the cutting of the dead and down timber, the question would constantly arise whether a given tree or trees came under the classification of dead and down timber—a question which must be decided and the decision acted upon while the loggers were at work—the court instructed the jury that the decision was "intrusted to the loggers under the supervision of the logging superintendents, whose duty it was to go from time to time to the different camps to see to it that these men used proper judgment and discretion with reference to cutting the trees. The contract devolved the discretion especially upon them. It was a matter of discretion, and, in the nature of things, it must be so. * * * Whomever under the con-

tract was given that discretion was the proper one to exercise it, and, if he exercised it honestly and faithfully, then that ought to be the end of the matter." These instructions to the jury are fully sustained by the rule recognized by the Supreme Court and by this court in the cases cited, and the exception thereto is without merit.

The jury having found on this issue that no living green trees had been wrongfully cut, as already stated, the errors assigned on the rulings of the court with respect to the proper mode of measuring the trees become wholly immaterial, and need not be considered by us. Upon the pivotal point in the case, and upon which the jury found for the defendants, we find no error in the rulings of the trial court, and its judgment must therefore be affirmed.

WILSON v. TOWNLEY SHINGLE CO.

(Circuit Court of Appeals. Eighth Circuit. October 8, 1903.)

No. 1,563.

1 PATENTS—INFRINGEMENT—SHINGLE-EDGING MACHINE.

The Sears patent, No. 335,635, for an attachment to shingle machines for edging shingles, consists of a combination of mechanical elements, all of which were old, to accomplish a result which was not new, since similar machines had long been used to trim boards to a uniform width. The patent is therefore not of a primary character, and, if it discloses patentable invention, must be limited to the precise construction shown, and is not infringed by a machine in which any element of the patented machine is lacking.

2. SAME—SUFFICIENCY OF PROOF.

A case of infringement is not made out where the undisputed testimony shows that the alleged infringing machine was made and in use prior to the filing of the application for the patent sued on, and there is no evidence to carry the date of invention back of such filing.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

W. F. Hill (H. F. Auten, on the brief), for appellant.
N. F. Lamb and J. F. Gautney, for appellees.

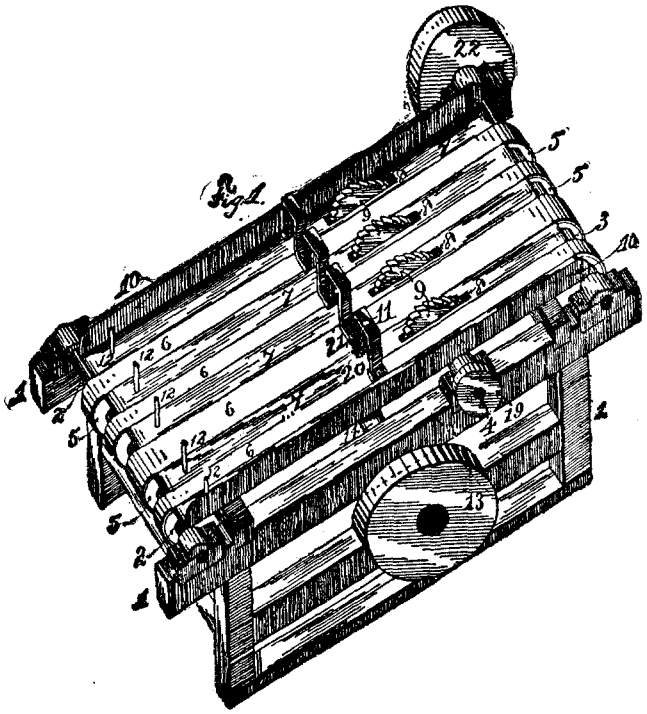
Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

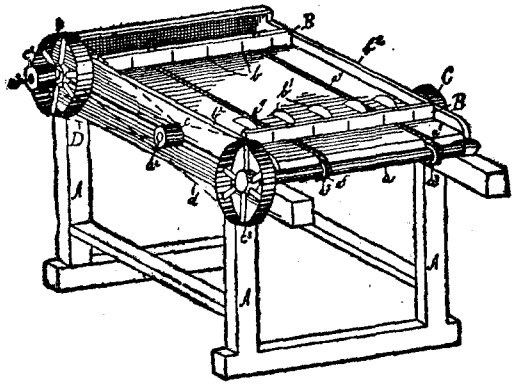
THAYER, Circuit Judge. This is a patent suit, being a bill filed by T. O. Wilson, the appellant, against the Townley Shingle Company, a firm consisting of M. L. Townley and N. H. Townley, appellees, to restrain the infringement of a patent. Two patents are found in the record, and considerable testimony relating to each, but a grave doubt arises in our minds as to whether the bill charges an infringement of one of these patents or both. As originally filed, the action was founded on letters patent No. 335,635, dated February 8, 1886, and issued to James N. Sears for "a certain new and useful attachment to shingle machines for edging shingles." The bill was

in the usual form. It alleged that this patent to Sears had become the property of the complainant, Wilson, by assignments theretofore regularly made; that the Sears patent, subsequent to its acquisition by the complainant, had been infringed by the defendants; and that the complainant was entitled to an injunction against further infringement, and to an accounting of damages and profits, for which he prayed. After the defendants had answered, denying all of the material allegations of the original bill, and more than a year after the filing of that bill, the complainant asked and obtained leave to amend. This was done by filing a supplemental allegation to the effect that since the complainant acquired the Sears patent he had obtained another patent for improvements thereon; being letters patent No. 459,031, dated and issued September 8, 1891. In the amended pleading the complainant did not allege that the invention or improvement covered by the last patent had been infringed, while the original bill charged specifically the infringement of the Sears patent, and none other; the allegation in that respect being that the defendants had done certain acts "in infringement of the said exclusive rights secured to the said James N. Sears by the letters patent aforesaid, and granted and assigned by him to your orator, as hereinbefore set forth." Moreover, the patent that was issued September 8, 1891, contained no reference to the Sears patent, but on its face purported to be a patent for an independent device for edging shingles, which the complainant had invented. It follows, as a matter of course, that if the bill does not properly charge the defendants with an infringement of the patent issued to the complainant on September 8, 1891, the present appeal does not properly involve any consideration of the infringement of that patent. Counsel for the appellant seem to contend, however, that the machines which the defendants make and use are a copy of the machine described in the patent to Wilson of date September 8, 1891, and that the making and use of such machines is an infringement of that patent as well as the Sears patent. At one place in their brief, after referring to the Wilson patent, No. 459,031, they say "and this is the machine that defendants habitually copy now when they wish to make and run a dimension shingle maker." There is no evidence in the record, so far as we can ascertain, that the defendants ever made or used any other machine than the one which is thus claimed to be a copy of the Wilson machine. Nevertheless, if we correctly understand counsel for the appellant, it is urged that the use of this machine operates as an infringement of the Sears as well as the Wilson patent. We have deemed it best, therefore, to consider this contention, waiving for the time being the suggestion above made that the bill, when properly interpreted, does not charge an infringement of the Wilson patent.

Cuts representing the respective machines covered by the Sears and Wilson patents will be found on the adjoining page. We have not been favored with any cut representing the machines used by the defendants, but must rely on very general oral descriptions of the same. This defect in the record renders it difficult to institute a critical comparison between the three devices.

Referring first to the cut representing the Sears machine, it will be observed that it consists of a rectangular table or frame, with a shaft at each end carrying pulleys, an intermediate shaft carrying saws, to which a pulley, 19, is attached, and another intermediate countershaft to which the pulley numbered 13 is attached. Over the pulleys, borne by the shafts at each end of the frame, run endless belts, indicated by figures 6 in the drawing. Between the pulleys and secured to the frame are spacing boards, 7, which may be of the same





width or different widths. Slots are cut in these spacing boards, through which the saws protrude. Metal carriers are fastened to the belts by rivets so as to move with them and push the shingle against the saws. When in operation the butts of the shingles are placed against certain pins (indicated by figures 12 in the drawing), which are set at the rear end of the spacing boards. As the belts bring the carriers around, they serve to push the shingles forward and bring them into contact with the saws. The object of the device, as it seems, is to trim the shingles and make them of an uniform width. The patentee claims, in combination, first, the structure or frame; second, the spacing strips or boards, having slots for the saws, and pins set at the rear end thereof; third, the saws secured on the shaft; fourth, the belts working over pulleys; and, fifth, the carriers secured to the belts—"all constructed and arranged substantially as shown and described, and for the purposes set forth."

Referring to the drawing representing the machine covered by the Wilson patent, it will be observed that it consists of a rectangular table or frame, with shafts at each end, carrying wheels or pulleys, and an intermediate shaft carrying saws which protrude for a short distance through slots in the top of the table or frame. The shafts at the respective ends of the table carry sprocket wheels, a^3, while over these sprocket wheels pass two endless sprocket chains, a^5, which run in grooves in the top of the table. Secured to these sprocket chains are wooden carriers, B, consisting of straight pieces of wood having slots sawed therein so that they will readily pass over the saws. In operating this machine the operator stands at the rear end, places the butts of the shingles against the carriers, B, which push them against the saws, which in turn trim them to uniform widths. The claim of this patent is, in substance, for a shingle-edger, consisting of a frame having saw-slots and chain-grooves in its upper side or top; side-strips (indicated in the drawing by b^2) to prevent shingles from sliding off from the table; the three shafts above described; the sprocket wheels; the sprocket chains; the slotted carriers; the various pulleys or wheels that are borne by the shafts and disclosed by the drawing; and also the several belts by which various parts of the machine are actuated. The location of these belts is indicated by the dotted lines in the drawing on the left-hand side of the frame or table.

There is testimony in the record, which is wholly undisputed, that, long before the issuance of the patents in suit, circular saws mounted on a shaft, either singly or in gangs, had been employed to edge boards and to cut lumber into strips of equal or varying widths; also that sprocket chains, propelled by sprocket wheels, and having metallic or wooden carriers attached thereto to convey materials to gang saws, had been in use for an equal length of time. If there was no such testimony as this, we could probably take judicial notice of the facts in question, because they must have been observed by all persons of average intelligence who have seen planing mills, saw mills, box factories, and machines for cutting laths, in operation. Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200. All the elements of the machine covered by the combination described and claimed in the

Sears patent are undoubtedly old. Moreover, the work done by that machine is not a new kind of work, since the trimming of shingles so that they will be of the same width is strictly analogous to the cutting of boards or slabs into strips of the same width. The Sears patent, therefore, is not of a primary character. He simply made use of old mechanical devices in constructing a machine for trimming shingles when the same devices had long been employed for the purpose of trimming boards and cutting them into strips. If it be true, therefore, that the elements which make up the Sears combination had never, before the date of that patent, been placed in precisely the same relation to each other as he placed them, yet it is by no means certain that the construction of his machine called for the exercise of the inventive faculty. In view of the state of the art, it would seem, rather, that any person who desired to trim shingles, after they were sawed, so that they would be of the same width, would have had little difficulty, by the exercise of ordinary mechanical skill, in producing a machine that would do that work. The construction of such a machine would not seem to have been a difficult undertaking. It merely involved the placing of old and well-known mechanical devices in such a relation to each other as would naturally suggest itself to a mechanic who was accustomed to work in planing mills or sawmills, when he was advised of the end to be accomplished. In view of the considerations to which we have last adverted, it is certain, we think, that the patentee of the machine in question cannot invoke a broad construction of the claims of the patent, nor a liberal application of the doctrine of equivalents, no matter what view may be taken concerning the question of invention and the patentability of the Sears machine. The case is one where, even if the inventive faculty, as distinguished from ordinary mechanical skill, was exercised, yet, as the invention is not primary, and the patent of doubtful validity, the patentee should be limited to the specific form of machine which he produced, and describes in his specification. He accomplished nothing which entitles him to protection, save as against those who reproduce his machine, or reproduce it with merely colorable evasions of his claims. Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; Morley Machine Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 32 L. Ed. 715; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Stirrat v. Excelsior Mfg. Co., 10 C. C. A. 216, 61 Fed. 980.

The claim of the Sears patent to which the charge of infringement relates is a combination claim, consisting of five elements. It goes without saying that, if any one of these elements is not found in the machines in use by the defendants, they do not infringe the Sears patent. Now, in his specification, Sears carefully describes what he terms in one place "spacing-boards," and in another place "spacing-strips," having pins set in the rear end thereof, against which the thick ends of the shingles are placed. He also specifically claims these spacing-boards or strips, with the pins set therein and protruding therefrom, as one of the material elements of his combination. The defendants' machine, on the other hand, as described by the

various witnesses, has no spacing-boards or spacing-strips with pins set therein. The top of the table or frame of the defendants' machine is a plain surface inclined at an angle of about 25 degrees, along which two sprocket chains, to which wooden carriers are attached, travel lengthwise of the table. No spacing-boards or spacing-strips are found in the structure, nor are there any pins set in the table against which the ends of shingles are placed when the machine is in operation. Several other differences in the method of constructing the two machines have been pointed out. For example, the defendants' machines have no countershaft such as is found in the Sears machine. The Sears machine also has a greater number of pulleys, and the power to run it is applied somewhat differently. But without reference to these minor differences, we think the fact that the defendants' machines have no spacing-boards with pins in the ends thereof, such as are described and claimed in the Sears patent, and also shown in the drawings of that patent, differentiates the two machines, and exempts the defendants from the charge of infringement.

The shingle-edging machines of which complaint is made, that had been used by the defendants in some of their mills for nearly 10 years before the bill of complaint was filed, bear a strong resemblance to the machine described in letters patent No. 459,031, which was issued to Wilson, September 8, 1891, on an application filed March 14, 1891, although they are not in all respects alike. The chief differences to be noted are these: The top of the frame of the defendants' machine is inclined at an angle of 25 degrees, while the top of the table or frame of the machine as described in the patent appears to be nearly level. Again, the defendants' machines have one shaft at each end, which turn in the same direction, while the Wilson machine has corresponding shafts that turn in opposite directions. Moreover, there seems to be considerable difference in the arrangement of the belts by which the respective machines are actuated. These differences might or might not serve to differentiate the two machines, but we deem it wholly unnecessary to consider or express an opinion on that point. One of the defendants, who appears to have been called as a witness by the complainant, in the course of his examination testified, in substance, that his firm commenced using shingle-edging machines in the early part of the year 1890; that they constructed the machine in question themselves, according to their own ideas, purchasing the necessary irons therefor; and that they had been using such machines in their mills up to the date of his examination, which appears to have been taken in January, 1901. No effort was made by the complainant to disprove these statements, and permission was given the complainant to take photographs of the machines then in use by the defendants in their mills, to which the testimony related. No such photographs appear to have been taken, or, if they were, they have not been incorporated in the record. We must accordingly assume that the statements so made by the witness aforesaid are entirely trustworthy, and as the Wilson patent was not issued until September 8, 1891, and as the application therefor was filed on March 14, 1891, it appears that the de-

fendants had constructed and were using the machine which is now said to be an infringement of the Wilson patent for about a year before that patent was applied for and issued. No attempt was made by the complainant to show the actual date of his invention, and in a case of this sort we will not presume that the invention was made prior to the time when the defendants constructed and began to use in their mills the shingle-edging machines which they are now using. If such be the fact, the complainant should have established it by competent evidence, or shown that the defendants did not construct their shingle-edging machine at the time stated, nor until subsequent to the date of Wilson's alleged invention.

It follows from what has been said that, even if the bill be construed as charging the infringement of the Wilson patent as well as the Sears patent, the charge is not sustained by the proof, while the proof does show that, if the defendants' machine is substantially like the Wilson machine, he was not the first inventor thereof, but the credit for the invention is due to the defendants. The decree below was for the right party, and should be affirmed.

It is so ordered.

L. E. WATERMAN CO. v. LOCKWOOD et al.

(Circuit Court of Appeals, First Circuit. October 22, 1903.)

No. 447.

1. PATENTS—INVENTION—FOUNTAIN PENS.

Claims 8, 9, and 17 to 26, inclusive, of the Waterman patent, No. 604,690, for a fountain pen, relate solely to details in construction, involving only mechanical skill, and are void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 123 Fed. 303.

Fred C. Hanford (Walter S. Logan, on the brief), for appellant.

Oliver R. Mitchell, for appellees.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This appeal is based on patent No. 604,690, issued to Lewis E. Waterman on May 24, 1898, on an application filed on August 12, 1895. The subject-matter of the patent is described as a new and useful invention in fountain pens and vessel closures. The patent relates entirely to details, of which it covers a great number, requiring 26 claims. Those now in issue are 8 and 9 and 17 to 26, each inclusive. For the reason which will appear we find it necessary to insert only the more generic claims 9 and 19, as follows:

"(9) In fountain pens, a cap having within its open mouth a conical seat or chamber for the conical end of the fountain, also provided at its mouth with

an externally beveled elastic annular lip engaging the conical end of the fountain at and near its base."

"(19) In fountain pens, a holder provided with a tapered hollow end and with a cap which is elastic and flexible at and near its mouth."

The Circuit Court apparently made some distinction between claims 8 and 9 on the one hand and the remaining claims on the other; but, so far as we are now concerned, the pith of all of them is the same. They differ only in the fact that they apply to different parts of a fountain pen, while they serve the same purpose and involve the same principle. The patentee so understood the matter, as he said in his specification, "I make a similar joint in a similar way between the cap, C, and the fountain, F."

The details are worked out in several different ways in the claims which we have not quoted. For example, in claim 8 the two members making the joint are described as "external and internal conical members," and the external member is described as provided at its open end "with an elastic externally beveled annular lip that engages the opposite part of the internal member with elastic pressure," etc. The specification describes these details at great length. In fact, a careful reading of it shows that what the patentee devised was the working out from point to point of mechanical minutiæ with more or less skill.

All those portions of the patent submitted to us relate to matters which were common in the arts, and common aside from the arts in the technical meaning of that word; and the details, therefore, concern merely mechanical skill, and in no degree inventive faculty. Therefore the case is in line with Rubber-Tip Pencil Company v. Howard, 20 Wall. 498, 507, 22 L. Ed. 410, and with Perry v. Revere Rubber Company (passed down in this court on June 12, 1900) 103 Fed. 314, 43 C. C. A. 248. It is clear that none of the claims in issue cover anything which involves patentable invention.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

AMERICAN SALESBOOK CO. et al. v. CARTER-CRUME CO. et al.

(Circuit Court, W. D. New York. October 20, 1903.)

No. 207.

1. PATENTS—SUIT FOR INFRINGEMENT—EVIDENCE OF PRIOR ART.
In a suit for infringement, in which the validity of the patent is in issue, the court will take judicial notice of other patents introduced in evidence in another suit in ascertaining the state of the art.

2. SAME—VALIDITY—DETERMINATION ON DEMURRER.
Where the want of novelty of a device is manifestly apparent on the face of the patent, the issue may properly be determined at the threshold of the case on demurrer.

3. SAME—INVENTION—MANIFOLDING SALES BOOKS.
The Beck patent, No. 647,934, for a manifolding sales book, the only element of novelty being the cutting out of a thumb space in the side of the carbon sheet to permit the removal of the duplicating sheet without soiling the same or the hands, which result was also accomplished by prior devices, is void for lack of patentable novelty.

4. SAME—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
The commercial success of a patented article can only be considered on the issue of invention, where such issue is in serious doubt.

In Equity.

M. B. Philipp and H. H. Rockwell, for complainants.

Duell, Megrath & Warfield (C. H. Duell, of counsel), for defendants.

HAZEL, District Judge. This suit is brought to restrain infringement of patent No. 647,934, granted to Warren F. Beck, April 24, 1900, for an improvement in a manifolding sales book and holder. The defendants have demurred to the bill on the ground that the patent is void upon its face, and that it lacks invention or novelty. It is not disputed that manifolding sales books have long been in general use. Everything in the device described by the specification is practically conceded to have been old or fully covered by antecedent patents at the time of its invention, except that feature described in claims 2 and 3, which provide for cutting out a portion of the carbonized sheet to partly expose the sales sheet underlying the carbon sheet at or near its free end. By the arrangement described in the specification, the user of the manifolding sales book by slight thumb pressure is enabled to withdraw and remove the leaf next the carbon sheet with great facility, and without suffering the annoyance of soiling his fingers or any of the separate sheets underlying the transfer or carbon sheet. The court fully appreciates that the field of invention is necessarily limited, and for that reason the simplest alteration or change in the prior art is of the utmost importance. It may fairly be inferred from an examination of the specification of the patent in suit that manifold sales books, which preceded the patent, require manipulating the transfer sheet with the fingers, and that some annoyance attended the operation for the reason that, by repeated contact with the carbon sheet, both the fingers of the user and the sale

¶ 4. See Patents, vol. 38, Cent. Dig. § 39.

sheets as well are apt to become soiled. The object of the patentee, as stated in the specification, is to construct the parts in such a manner as to adapt them to meet this difficulty and obviate the necessity of such handling. But this idea, as will be seen presently, was not original with the inventor. To carry out the object of the patentee, the method particularly set forth in the specification was conceived, namely, to fasten the carbonized sheet or duplicating sheet at the upper end in such a way as to overlap the free end of the sales sheets, which are fastened at the lower end. At the upper right-hand part of the carbon sheet a small portion is cut away, giving the appearance of a semicircular space of sufficient dimensions to permit the free use of the thumb in the operation of withdrawing the underlying sheet. It is evident by this method that the thumb space exposes the underlying leaf or sheet, and enables the user to remove consecutively each sheet without soiling the fingers or any sales sheets. As has been said, invention and novelty are claimed only for the additional feature of thumb spacing. The controverted question appears plainly from the bill, the patent in suit of which profert is made, and from certain other patents, namely, the Carter reissue patent, No. 10,359, and Frink patent, No. 288,048, which were recently considered by this court on a former hearing between these parties, involving the validity of claims 4 and 5 of patent No. 406,845, granted July 9, 1899, for manifold sales books. Carter Crume Co. v. American Salesbook Co. (decided June 20, 1903) 124 Fed. 903. For the purpose of ascertaining the state of the art, judicial notice will be taken of these patents and of the records on file in this court in that case. Authority for so doing may be found in Cushman, etc., Co. v. Goddard et al., 95 Fed. 664, 37 C. C. A. 221. By such records it appears that the patents referred to were in evidence in the former suit to illustrate the state of the art. In view of the conclusions here announced, it is undoubtedly better to dispose of the issues raised by the demurrer in conformity with the apparently well-settled practice of courts of equity in suits for infringement than to await any evidence on final hearing, which probably would not be of sufficient force to support the presumption of novelty and invention to which the patent is entitled. Whether the patent is void upon its face may be determined by what is commonly known with respect to the art and the functional result achieved by the suggested patentable element. I am clearly of the impression that the new element under consideration is not novel. Its claim to recognition has not that sure foundation upon which the life of a patent must depend. There is nothing peculiar or new in cutting away a portion of a sheet of paper to enable the fingers or thumb to dexterously and conveniently turn over a leaf or sheet of paper or withdraw the same from a group of leaves or sheets secured or lightly held together. No new result is added by such a combination. The most that can be said for it is that it has superior advantages which permit drawing or removing sales sheets with alacrity and with convenience. This is not enough, especially when the patent beyond doubt lacks patentable novelty. Richards v. Chase Elevator Co., 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225; Duer v. Corbin Cabinent Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707;

National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544. It is quite true that want of novelty is a question of fact. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719. And, moreover, the patent affirmatively carries with it the fact of invention and novelty; but whenever it can be said that, despite the approval of the patent office, want of novelty in manifestly apparent upon the face of the patent, the issue raised by the demurrer is properly determinable at the threshold of the case. Richards v. Elevator Co., supra; Beer v. Walbridge, 100 Fed. 465, 40 C. C. A. 496; Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200; American Fibre-Chamois Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 662. The expired Carter patent, dated January, 1882, to which reference has been made, was conceived to obviate the necessity of handling the transfer sheet, and to avoid soiling the fingers and the sales sheet. Apparently, then, the sales sheets may be withdrawn by the method pointed out in pre-existing patents without the liability of soiling. The patentee's trifling variation is not such a valuable contribution to the art as to entitle him to a monopoly. By way of analogy, it may be said to be familiarly known that playing card cases have thumb or finger spaces so as to enable the cards to be easily withdrawn from the card cases. Envelopes having finger depressions at their upper edges to allow a quick and convenient withdrawal of papers between their folds are very old and very familiar. Hence, in my opinion, invention and novelty are clearly negatived, and under no perceivable state of the evidence can the plaintiff finally succeed in establishing infringement.

The court is not unmindful of the fact that the manifold sales book under consideration has met with large commercial success and is extensively used by the public. The essential feature upon which success and public appreciation alone depends, namely, invention and novelty, is clearly lacking, and therefore the utility achieved by the device cannot be considered to offset the want of invention. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

The principle that the success of a patented article is only persuasive in turning the scale in cases of grave doubt respecting the invalidity of a patent scarcely needs citation of authorities. The conclusion here announced is reached irrespective of complainant's antecedent patented manifolding sales book (Exhibit A), referred to by defendant to further show the prior state of the art. Inasmuch as the patent referred to at the hearing is not regularly before the court, no judicial notice may be taken of it. Bottle Seal. Co. v. De La Vergne Bottle & Seal Co. (C. C.) 47 Fed. 59.

The submitted record upon an application to the Supreme Court for certiorari in an action at law in the Ninth Circuit in the case of this complainant against Bullivant, and in which an opinion of the Circuit Court of Appeals is reported in 117 Fed. 255, affirming the decision of the Circuit Court, and holding the patent in suit invalid for want of novelty, has not been considered. But such a judgment by a court of co-ordinate jurisdiction and by the Circuit Court of Appeals upon a question such as here presented may well be persuasive of the conclusion here reached. It is contended by complainant that the de-

cision of the Circuit Court declaring the patent void for want of novelty ought not to be persuasive here, for the reason that the stipulated facts in the Bullivant Case do not accurately and sufficiently disclose the great advantage of the patented sales book in controversy over those manufactured and sold prior to the alleged patented invention. In reply to this contention, it is sufficient to repeat that this decision is based upon the palpable invalidity of the patent on its face. This conclusion is fortified and strengthened by earlier patents, to which reference has been made. The Bullivant Case and the denial by the Supreme Court of the petition for writ of certiorari (American Sales Book Company v. Bullivant, 23 Sup. Ct. 855, 47 L. Ed. 1184), however, certainly strengthen the expressed conviction that the patent is absolutely void. The demurrer to the bill is sustained, and the suit dismissed, with costs.

HARTFORD FIRE INS. CO. OF CONNECTICUT et al. v. PERKINS, Insurance Com'r.

(Circuit Court, D. South Dakota. November 6, 1903.)

1. FOREIGN CORPORATIONS—STATUTES—CONSTITUTIONALITY—RIGHT TO CONTEST.
Since a foreign corporation is entitled to do business in the state only at the discretion of such state, and under such terms and conditions as it may see fit to enforce, such corporation is not entitled to contest the constitutionality of a state statute imposing terms on which it may be allowed to do business within such state.

2. SAME.
Whether a statute prohibiting insurance companies from combining to establish rates, etc., and providing for the revocation of the license of a foreign company failing to comply therewith, was unconstitutional as to domestic companies, and therefore was void in toto, could not be determined in a suit by a foreign insurance company having no right to contest the constitutionality of the law.

On Demurrer to Bill.

Preston & Hannett, for complainants.
Philo Hall, Atty. Gen., for defendant.

CARLAND, District Judge. This is a bill in equity filed in this court by the Hartford Fire Insurance Company, the Phœnix Insurance Company of Brooklyn, the Royal Insurance Company of Liverpool, the German American Fire Insurance Company, and the Springfield Fire & Marine Insurance Company, all foreign insurance companies and corporations, against John C. Perkins, commissioner of insurance for the state of South Dakota, for the purpose of perpetually enjoining said commissioner from enforcing the provisions of an act of the Legislative Assembly of the state of South Dakota, approved March 9, 1903 (Sess. Laws S. D. 1903, p. 183, c. 158), and to have said act declared unconstitutional and void, as being in con-

¶ 1. Status of foreign corporations, see note to Republican Mountain Silver Mines v. Brown, 7 C. C. A. 419.

flict with both state and federal Constitutions. The act referred to is as follows:

"Section 1. Combinations Prohibited—Penalty for Violation. Any combination, agreement, confederation, compact or understanding made and entered into directly or indirectly, by or between two or more fire insurance companies insuring property against loss or damage by fire and loss or damage from the elements, transacting business within this state, or between officers, agents or employés of any such companies, relating to the rates to be charged for insurance, regulating or fixing the minimum price or premium to be paid for insuring property located within this state, the amount of commission to be allowed agents, for procuring insurance or the manner of transacting the business of fire or other casualty insurance within this state, is hereby declared to be unlawful, and any such company, officer or agent violating the provision shall be deemed guilty of a misdemeanor, and on conviction thereof in any court having jurisdiction shall pay a penalty of not less than one hundred dollars nor more than five hundred dollars for each offense, to be recovered for the use of the general fund of the state, and any such company, corporation or association so offending shall not be permitted to transact business within this state.

"Sec. 2. Affidavit must be Made When Called For. Any fire insurance company, corporation or association desiring to transact business within this state shall, in addition to the requirements now provided for by law, furnish the insurance commissioner of this state on or before the first day of July in each year, and at any other time during the year when called upon by the insurance commissioner of this state, as one of the conditions for being permitted to transact business within this state, an affidavit subscribed and sworn to by the president or secretary or managing officer of such corporation or association before competent authority, stating that said company of which he is an officer has not violated any of the provisions of the foregoing act, naming them, and such affidavit shall be in the following form:

"State of ———, County of ———, ss.:

"I, ———, being first duly sworn, depose and say, that I am one of the managing officers of the ——— company or association, and that said association has not entered and will not enter into any combination or agreement with any other fire insurance company or companies whatsoever, by which there is any understanding of whatsoever kind or character, either directly or indirectly, tending to fix or establish a uniform price or premium for fire insurance in the state of South Dakota, or any agreement whatever, either directly or indirectly, relating to the rates to be charged for insurance within said state.

"Sec. 3. Any Officer or Employé of Insurance Companies may be Summoned to Appear before Commissioner. The commissioner of insurance of this state is hereby authorized to summon and bring before him for examination under oath any officer or employé of any fire insurance company transacting business within this state suspected of violating any of the provisions of this act; and on complaint in writing made to him by two or more residents of this state charging such company under oath upon their knowledge or information and belief, with violating the provisions of this act, said insurance commissioner shall summon and cause to be brought before him for examination under oath any officer or employé of said company; and if such examination and the examination of any other witnesses that may be produced and examined, the insurance commissioner shall determine that said company is guilty of a violation of any of the provisions of this act, or if any officer shall fail to appear or submit to an examination after being duly summoned, said commissioner shall forthwith issue an order revoking the authority of such company to transact business within this state, and such company shall not thereafter be permitted to transact the business of fire insurance in this state at any time within one year from the time of such revocation.

"Sec. 4. Testimony not to be Used against Person Making the Same. The statements or declarations made or testified to by any such officer or agent in the investigation before the commissioner as provided in this act, shall

not be used against any person making the same in any criminal prosecution against him, and no person shall be excused from testifying for the reason that his testimony so given will tend to criminate him.

"Sec. 5. Repeal. All acts and parts of acts in conflict with the foregoing provisions are hereby repealed.

"Approved March 9, 1903."

The defendant has demurred to the bill for want of equity, and the cause is now before the court after argument upon bill and demurrer. The bill alleges that complainants are, and have been for many years last past, engaged in the business of insuring property against loss by fire in the state of South Dakota, and have always heretofore complied with, and are now complying with, all laws in force in the state of South Dakota regulating or appertaining to foreign insurance corporations except the act hereinbefore referred to, which as to complainants is alleged to be unconstitutional and void. The specific portions of the state and federal Constitutions which it is claimed are violated by said act are as follows: First, it is claimed that the act violates the state Constitution, in that it confers judicial power upon the insurance commissioner; second, that it violates article 14 of the amendments to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law, and denies to them the equal protection of the laws; third, that it violates section 10 of article 1 of the Constitution of the United States, in that it impairs the obligation of contracts or the liberty to make contracts.

Counsel for complainants in their brief use the following language:

"Ever since the decision of Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, it has been settled that a corporation created by one state, or by a foreign government, can exercise none of the functions or privileges conferred by its charter in any other state or country, except by the comity and consent of the latter. It follows that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest, and the foreign corporation must assent to the terms imposed by the state. The state has the absolute right, we admit, to exclude such foreign corporation, or, having granted it a license to do business within the state, to revoke it, in its discretion. With the question of the expediency or policy of the statutes imposing these conditions upon foreign corporations the courts have little to do."

With this statement of the law this court fully concurs, with the exception that instead of the words "little to do" this court would say "nothing to do." If the sole power to say whether a foreign insurance corporation shall do business within the state of South Dakota is vested in the Legislative Assembly of such state, how can any law passed by the Assembly, which affects the right of foreign insurance corporations to do business in the state in the future, be called unconstitutional? The power to exclude a foreign insurance corporation from the state, or to prescribe the conditions upon which it may do business in the state in the future, is subject to no limitation of state or federal Constitutions. Either this is true, or the law as stated by counsel is incorrect; for there cannot exist at the same time the absolute power to exclude a foreign insurance corporation

if such power is subject to limitation. To say that a law, which absolutely excludes a foreign insurance corporation from the state or imposes conditions upon which the corporation may do business in the state in the future, is unconstitutional, involves a contradiction of terms, for the reason that all the right the foreign insurance corporation has to do business in the state must be found in whatever law the Legislative Assembly passes in that behalf. If such law would be unconstitutional, if attacked by a citizen of the state of South Dakota, still it would avail a foreign insurance corporation nothing to attack it, as such corporation is not a citizen entitled to all privileges and immunities of citizens in the several states. I am now speaking of legislation which prescribes rules for the future.

In the case of Doyle v. The Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148, a law of Wisconsin provided that before a foreign insurance corporation could do business in that state it should sign an agreement that in the event of its being sued in that state it would not remove the case to the federal courts, and if said foreign insurance corporation should violate said agreement it should be the duty of the Secretary of State to immediately cancel the license of said corporation to do business within the state. The law was confessedly invalid, so far as it sought to deprive the insurance company of the right to remove its cases to the federal courts, as was held in Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365. Still the Supreme Court in the case first cited said:

"The effect of our decision in this respect is that the state may compel the foreign company to abstain from federal courts or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. That state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant, under the laws or the Constitution of the United States, by its exclusion from the state, is infringed, and this is what the state now accomplishes."

Counsel for complainants, in order to avoid the unquestioned law with reference to the power of the state over foreign insurance corporations, say in their brief:

"Complainants hold that this anti-compact law, in its general frame, scope, legislative purpose, operation, and effect, is to regulate and restrict all insurance companies doing business in the state, and with the prohibitory restrictions it conflicts with the Constitution of the United States and the state of South Dakota. There is nothing in this act that separates foreign insurance companies from other insurance companies, so the purpose of the act is directed to all insurance companies alike. If this act, for the reasons alleged in the bill of complaint, conflicts with the Constitution, both state and federal, as against domestic companies, then it is unconstitutional and void as to all other insurance companies."

The weakness of this proposition is found in the fact that it overlooks the principle that courts do not listen to a party whose objection to a law is not that his own rights are affected, but that the rights of some other party, who is not complaining, are. If this law which is attacked is unconstitutional as to domestic insurance companies, they may waive their right to attack it. Cooley's Const. Lim. (5th Ed.)

216. Certainly, until the domestic insurance companies do complain of the law, no court will, at the request of some third party, determine that the law is or is not unconstitutional as to them.

In the case of the People v. Brooklyn, etc., Ry., 89 N. Y. 75, the court says at page 93:

"A statute is assumed to be valid until some one complains whose right it invades. The landowners are not here complaining, and we do not know that they ever will. They have the power to waive a constitutional provision made for their benefit. Possibly they have already done so, or may in the future, we cannot know, and until they come and present their contract and invoke the constitutional protection no tribunal is called upon to grant it. The state and the landowners must be left to settle their own controversy. This one is between the state and the railroad companies. It is only when some person attempts to resist the operation of the act, 'and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained.' In re Wellington, 16 Pick. 96, 26 Am. Dec. 631. A legislative act may be entirely valid as to some classes of cases and clearly void as to others. So that we are to leave the landowners to vacate their contract with the state, if they have one, when they please and in their own way."

The same doctrine is stated in Cooley's Const. Lim. (5th Ed.) 197, and is elementary law.

Clearly, these complainants have the option either to cease business in the state of South Dakota or comply with the law in question. They have no constitutional rights that are infringed by it, and, if they have not, they cannot be heard to say that other corporations have. The attention of the court has been called to the cases of Niagara Fire Ins. Co. v. Cornell, 110 Fed. 816, in the United States Circuit Court for the District of Nebraska, and Greenwich Ins. Co. v. Carroll, 125 Fed. 121, in the Circuit Court, for the Southern District of Iowa. The opinions of the presiding judge in those cases have been examined, but I cannot concur in the result reached.

The demurrer is sustained.

THE CITY OF BIRMINGHAM.

OCEAN S. S. CO. v. ROSS.

(District Court, E. D. New York. October 20, 1903.)

1. COLLISION—STEAMSHIP AND ANCHORED DREDGE.

A dredge, at work during the day in deepening the channel of the Savannah river, at night drew to the southward some 200 feet from the center line and outside of the usually navigated channel, where she was anchored in accordance with her usual custom, exhibiting appropriate lights and a green light to indicate that passing vessels should go to the north of her. A steamship passing up the river saw her lights, including the green light, when at a distance of 2,300 feet, but failed to make sufficient allowance for the ebb tide which set her to the southward, and she came into collision with the dredge, sinking her. The night was clear, the wind light, and no unusual conditions existed to prevent the steamship from passing the dredge in safety, which she would have done had she kept in the usual channel. *Held* that, in the absence of any unusual conditions requiring it, the dredge was not in fault for failing to move to a greater distance from the channel, but that the collision was due solely to the fault of the steamship.

In Admiralty. Cross-libels for collision.

Benedict & Benedict and R. D. Benedict, for libelant Ross.

Wheeler, Cortis & Haight and Charles S. Haight, for Steamship Co.

THOMAS, District Judge. The above actions involve a collision between Dredge No. 7, anchored in the Savannah river, and the inbound steamship City of Birmingham, shortly after 4 a. m. on April 15th. The weather was clear, there was no wind, and the tide was strong ebb. The libelant, Ross, was using the dredge for deepening the river, pursuant to a contract with the government. On the previous afternoon the dredge had been drawn from its working position adjacent to the central line of the channel to a position to the southward thereof. While working the dredge was held in place by five lines, the stern line leading directly upstream, two breast lines leading from each side directly away from the dredge, at a point somewhat aft of the bow, and two quarter lines made fast six or eight feet forward of the stern, and leading forward. The lines were 500 or 600 feet in length, and were made fast to heavy anchors, which were placed at points marked by buoys. While the dredge was at work all the lines were kept taut for the purpose of holding her stable. When the dredge stopped work at night, the anchors remained unchanged, but the dredge was hauled either to starboard or port, by slacking the lines on one side and drawing them in for a distance on the other side. A spud, which was a heavy timber 24 inches square and about 45 feet long, extending up and down through the center of the dredge, with a sharp steel point at the lower end, was sunk into the bottom of the river to assist in holding the dredge in place. The presence of the dredge at night was denoted by three white lights hung in a vertical line, under which was a green light, if approaching steamers were expected to pass to the north of the dredge, and a red light, if they were to pass to the south of the dredge. The drift of the tide was somewhat diagonally across the channel, whereby it tended to carry to port the Birmingham, after she turned Buoy No. 9, but as she approached Buoy No. 9 she felt the tide on her port bow. The buoy was about 2,300 feet from the bow of the dredge, or some seven lengths of the steamer, which was 320 feet long. After rounding the buoy, and thus falling under the influence of the ebb tide, she drifted southerly, her speed having been reduced to half speed shortly after passing or just before passing Buoy No. 9, and, although she reversed and went backward at full speed before the collision happened, yet she struck the bow of the dredge slightly to the starboard of the center of her bow, moving her some 25 or 30 feet northerly and westerly, so that she was lying athwart the stream, whereupon she shortly sank. The damage was of such a nature as to break off the spud, four timbers which were 4½ inches square, the head log, which was 16 by 18 inches, and cut through the forward plank, 6 by 12 inches, and into the bottom log some 6 inches. The starboard breast line was broken, and the stern line was so slackened that it was thereafter raised from the water and cut.

Two questions arise: First. Was the location of the dredge the proximate cause of the accident, and culpable? Second. Did the steamship negligently contribute to the collision?

Capt. Kirwan, of the steamship Lexington, bound upstream, about four hours before the collision, passed the dredge about 20 feet on his port hand, as he estimated. He testified: "She was near the range, but she was a little to the southward. She was to the southward of the range, but near it. I should say not more than 50 feet southward of it." This evidence illustrates the general contention of the steamship company that the dredge was in the center of the channel, or not more than 50 or 100 feet southerly thereof. The exact location of the dredge after she sank is known. Her bow was then between 80 and 90 feet at its nearest point from the center line of the channel, while her stern was 180 feet from the center line of the channel. There is considerable evidence, much discussion, and more speculation, whether the dredge, after having been pushed to her port hand by the collision, was again carried farther to the southward by the ebb tide before she settled down, or whether her final location showed her nearer to the center of the channel than she was at the time of the collision. The witnesses for the libelant testify that the dredge was hauled out from 200 to 250 feet southerly of the center line of the channel. Finney, the captain of the tug that tended upon the dredge, placed the port side of the dredge within 72 feet of the starboard breast anchor, which was 340 feet from the center of the channel. Capt. Berg, of the steamship, testified, "It looked to me as if she was right in the channel;" while Dreyer, the mate, put her from 50 to 100 feet south of the range line. The evidence of Berg and Dreyer shows such inability to appreciate distances on the night in question as renders unacceptable their estimate as to the distance of the dredge from the center line of the channel, while the estimates of the witnesses for the dredge, in themselves open to criticism and doubt, are more in accord with known conditions. It is not probable that the persons who saw the dredge as she was anchored, even in the daytime, gave sufficient attention to the matter to determine within 25 or 50 feet as to her exact location, while in the night so accurate observation, if not impossible, rarely happens; and to such considerations must be added the usual erroneous estimates of distances upon the water made by witnesses both at night and in the daytime. With all the evidence before the court, it is impossible to determine with accuracy whether the dredge was drawn 180, 200, or 225 feet from the center of the channel. The location of the dredge after she was sunk indicates that her starboard side was at least 180 feet from the center line of the channel. The dredge was drawn out on the evening before the accident by pulling on the starboard, breast, and quarter lines. The starboard quarter line ran forward to an anchor located about 250 feet south of the center line of the channel. The evidence tends to show that the starboard bow of the dredge did not touch this line after it was drawn out. The captain of the dredge drew a diagram purporting to show the positions of the lines, whereby he made the starboard quarter line lead away from

the dredge, but afterwards corrected his diagram so as to make such line run close to the dredge. He testified as follows: "Q. You said that the starboard quarter line lay almost directly ahead? A. Almost; yes, sir." Eratich, another witness for the dredge, stated that "the starboard quarter line swung a little rightwise." It is considered that the starboard quarter line did run somewhat southerly of the starboard side of the dredge, and this view is confirmed by the fact that, if the dredge were as far south as the starboard quarter line, the steamship, in approaching the dredge as she did, would have passed in such proximity to a shoal that there is strong probability of her grounding.

Upon the whole evidence it is believed that the dredge was about 200 feet south of the center line. This left from 175 to 200 feet of clear water between her and the center line, on the north of which line was navigable water for some 400 feet. The channel was deepened by dredging for a distance of 120 feet on each side of the range line for the purpose of allowing ships of large draft to use such channel. But to the north and south of such limit there was navigable water, and, while it was the intention of vessels passing that point to keep on the range if there was no obstruction, yet it was quite safe to pass to the north or south of the range for a distance of several hundred feet, according to the draft of the vessel. Very much evidence was given as to the former custom of the dredge and other dredges in drawing out of the channel. Such evidence was offered by the steamship company for the purpose of showing, as Twiggs, the government inspector on the vessel, had stated, that she drew out the usual distance; that such usual distance was on the central line, or very near thereto. If the captain of the steamer knew of this custom, there was greater demand that he keep farther to the north for the purpose of avoiding the dredge. The steamship company contend quite correctly that there was a full opportunity for the dredge to pull several hundred feet farther to the southward. The government inspector insisted vigorously that that could not be done, because there was a shoal under her starboard side. This error he in the end renounced. The dredge could, without serious difficulty, have been drawn much farther to the southward, but this would have required the change of her anchors, and would have caused some delay both in moving her at night and restoring her to her position for work on the following morning. However, that would have been merely a matter of inconvenience, and the time consumed would not have been of great importance, if she were seriously obstructing navigation.

The problem resolves itself into this: The dredge had been withdrawn to the southward of the deeply dredged channel, and there was an abundance of room for the vessels to pass in either direction. She was not in a position where vessels would ordinarily navigate, although they might do so under the pressure of unusual conditions. She maintained the usual lights showing her presence, and exhibited the green light, which indicated to the approaching steamers that they should go to the northward of her. Before reaching Buoy No. 9, and probably a mile away, the steamship

Birmingham had seen the white lights of the dredge, and upon reaching Buoy No. 9 saw her green light. Further up the river was a red light, and in the neighborhood of Buoy No. 9 was another red light, both on the range. The simple problem for the captain of the Birmingham was to pass the green light. There was no unusual embarrassment to navigation. The conditions were precisely what he might expect to find during good weather at that time and on that tide. He knew or should have known the influence of the tide upon his vessel. His problem was simply to keep far enough to the northward to pass the green light. He left Buoy No. 9 about 50 feet on his port hand, and he never had the green light of the dredge to the southward of the red light. The steamer rounded Buoy No. 9 southerly of the range line, and never was on that line before the collision. Notwithstanding the elaboration of the evidence and the briefs submitted, it does not seem as if the case offers a serious problem. A dredge, half a mile away, signaled that an approaching steamship should go to the northward of her, and yet the steamship, with plenty of notice, made such a turn that she never got to the northward of the dredge. It seems a simple proposition that an object, clearly seen during good weather, under usually favorable conditions, should be passed, in the exercise of ordinary care. The learned counsel for the steamship contends that, although the light was seen, yet the captain of the steamer could not know how much it was to the southward of a central line. Its signal declared that it was to the southward of the central line, and directed the captain of the Birmingham to pass to starboard. There was ample water to pass to the starboard, even with the dredge on the range line; but Berg, captain of the steamship, could not help knowing that the green signal indicated that the dredge was southerly of the range line. The excuse that the ebb tide carried him to the southward is not available, for he knew that the tide was there. There was no occasion for his turning 50 feet off Buoy No. 9, nor was there any propriety in his waiting until the tide actually struck his starboard side, and was appreciably taking him to the southward, before he put his vessel hard aport. His turning too quickly around Buoy No. 9, and his failure to keep the bow of his vessel up against the tide at an earlier time, was his initial fault. It is useless to conjecture when he first slowed his wheel. He puts it at one place before turning the buoy. The mate puts it at a place after turning the buoy. The evidence of both as to how far the vessel ran before she was stopped and backed baffles possible understanding. It would seem finally, from the captain's evidence, that he did not stop and back until he was very near the dredge. Indeed, on account of the presence of the shoal there was a point of time when it would be dangerous to stop and back; and just when it should have been done, or whether, when he saw that he had been carried far to the southward, he should have gone full speed ahead, need not be decided. It is decided that he came into his danger by his own negligence in not taking a proper position in turning Buoy No. 9, or, after turning the buoy, before the tide began to carry him to the southward. His failure to do so was the proximate cause of the

accident, inasmuch as he had a plain opportunity to see where he should go, he did see where he should go, and failed to exercise proper skill and judgment in making provision for his passage by the dredge. This and other dredges had been operated for some time in the river. Other vessels passed them, and it certainly was not an unusual feat in navigation.

There is no intention of deciding that a dredge or any other vessel may, for its mere convenience, take up any position in the channel of a navigable stream, and hold another vessel responsible that shall collide with it in such a position. But when a dredge engaged in systematically deepening a channel through a long period of time has withdrawn herself beyond the limits of the usually navigated channel to an extent that accords with her usual practice, and anchored in a space that may be, but is not usually, demanded, and at the time in question is not needed, by passing vessels, and thereupon signals to such vessels that they shall pass on a certain side, and there is nothing to prevent such passage except the tide usually obtaining at the time and place, there seems no occasion for holding that the mere presence of the dredge contributed to the accident. If there were unusual conditions that made it necessary for the steamship to use that part of the channel appropriated by the anchored vessel, another question would arise.

The libelant, Ross, should have a decree, and the libel of the Ocean Steamship Company should be dismissed.

In re SHRIVER.

(District Court, E. D. Pennsylvania. October 26, 1903.)

No. 1,477.

1. BANKRUPTCY—DISCHARGE—FINDINGS OF REFEREE.
   A finding of facts on an issue as to the right of a bankrupt to a discharge, made by a referee who has seen and heard the witnesses, should be upheld, except when it clearly appears to be wrong, since much may depend upon the truthfulness as well as the accuracy of the witnesses.

In Bankruptcy. On exceptions to report of referee refusing discharge.

Hopper & Buckman, for the bankrupt.
Maurice W. Sloan and John Houston Merrill, for the trustee.

J. B. McPHERSON, District Judge. The facts found by the referee abundantly justify his conclusions, and, after a careful consideration of the testimony, I am unable to say that the facts have not been correctly ascertained. In such an inquiry as this much depends upon the truthfulness (not merely the accuracy) of the oral testimony. In determining this question, the referee, who has heard the witnesses and has observed their bearing and their manner of testifying, enjoys so great an advantage over the judge who only reads the written report of the witnesses' words that I should not be justified in overruling his findings, unless I entertained a clear conviction that he had

erred. The best that I can say, however, for the earnest and capable argument on behalf of the bankrupt, is that I have sometimes felt inclined to believe that it might be correct; but I have nevertheless always returned to the position that the general rule should be followed, and that a finding of fact that depends upon oral testimony, and has been made by a tribunal that has seen and heard the witnesses, should be upheld, except when it clearly appears to be wrong.

The report of the referee is approved, and the discharge of the bankrupt is refused.

GRAY v. NEW YORK NAT. BUILDING & LOAN ASS'N.

(Circuit Court, D. Connecticut. October 22, 1903.)

No. 994.

1. EQUITY—HEARING BEFORE MASTER—OBJECTIONS TO FINDINGS OF FACT.
A party dissatisfied with a master's findings of fact should make his objections thereto to the master, and where that is not done the court cannot consider an exception to a finding on the ground that facts were omitted which should have been found.

In Equity. On exceptions to report of special master.

George E. Hall, in pro. per.
E. H. Rogers, for defendant.

PLATT, District Judge. At the oral hearing on October 16th disposition was made of all questions which arose, aside from the exceptions of George E. Hall filed August 10, 1903. He therein excepts to the third finding of facts, and quotes certain testimony taken before the master in support of his exception. I think it is too late now to make such an exception. He should have complained to the master if he felt that he was injured by the omission of any fact. I am bound to accept the report as conclusive on the essential facts. The exception is overruled.

The claimant then excepts to the first and second conclusions of law. The first refers to his claim for services in the Sullivan loan, the second to his claim for services and disbursements in the case of Sughrue v. Hall. The trouble with the claimant's contention is that under both exceptions he is practically endeavoring to force upon the court conclusions of fact which the master with great care avoided. The argument to me was a very proper one to have made on the trial before the master, and I have no doubt that it was made with vigor. It is beyond my power, however, to change the facts, and upon those facts the master's interpretation of the law is unassailable.

The exceptions are overruled.

BEACH et al. v. MACON GROCERY CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 17, 1903.)

No. 1,267.

1. RECEIVERS—UNAUTHORIZED TAKING OF PROPERTY—COSTS AND EXPENSES.
Where property of a defendant is taken from his possession by a receiver against his consent under an erroneous order which he successfully resists in an appellate court, he is entitled to the return of such property without charge of any kind against it or against him by reason of the proceedings. He cannot justly be charged with the cost of keeping stock so taken on the ground that it was not an expense of the receivership, but one incurred for the preservation of the property, and especially where he was actually subjected to loss by being deprived of the use of the stock.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Georgia, in Bankruptcy.

See 116 Fed. 143; 120 Fed. 736.

John P. Ross, for petitioners.

Olin J. Wimberly (John I. Hall, on the brief), for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This litigation was begun by the creditors of Asa N. Beach filing a petition in involuntary bankruptcy and an ancillary bill in the District Court against him, praying the appointment of a receiver to take charge of his property. It was alleged that Julia M. Dixon claimed to be the owner and was in possession of a large part of the property, but that her claim was fraudulent and unfounded, and that the property was in fact owned by Asa N. Beach. An ex parte order was made appointing a receiver as prayed for. Answers were filed by Beach and Miss Dixon denying the averments of the bill, and motions were made seeking the discharge of the receiver. These motions were denied by the court. On the application of the receiver, and against the objections of Miss Dixon, the receiver was ordered to sell part of the property, which he did, and the sale was confirmed. Beach and Miss Dixon joined in a petition to superintend and revise these orders. Their petition was granted by this court, and the several orders of the District Court were reversed. In the sale by the receiver Miss Dixon had bought the property which was claimed by her, and regained possession of it. This court directed that where parts of the property claimed by her had been sold by the receiver and purchased and paid for in cash by her, the receiver should be directed to return to her the money so paid by her, and that she be allowed to retain possession of the property as original claimant in adverse possession, and not as purchaser at the sale. On the question of the costs and expenses of the receivership the court made an order taxing the Macon Grocery Company, Inman Smith & Co., and J. Regenstein, the petitioners who instituted the proceedings in bankruptcy and filed the ancillary bill, "with the costs in this court, and with the costs of the proceedings on the ancillary bill to appoint a receiver, and with the costs of the receivership, including the com-

pensation of the receiver and his expenses, to be ascertained and allowed by direction of the District Court." Beach v. Macon Grocery Company, 116 Fed. 143, 53 C. C. A. 463.

The mandate of this court having gone to the District Court, questions were raised as to the construction of the order made by this court. The property seized by the receiver consisted in part of 15 mules, 1 horse, 2 mares, 2 colts, and some cattle and hogs. The receiver took this property, or nearly all of it, from the possession of Miss Dixon on a farm in the country, and carried it into the town, where it was kept at a cost of "$13 or $14 a day." It was agreed that the expenses of the keeping of this stock and feeding it while so in the possession of the receiver amounted in the aggregate to $325. Construing the order and mandate of this court, the learned judge of the District Court adjudged that the petitioners and complainants in the bankruptcy court should pay to the defendants in the court below "the amounts heretofore allowed and paid out by the receiver, out of the funds in his hands, for costs of the receivership, embracing the receiver's compensation and the receiver's own expenses." But the learned judge added "that the same does not embrace or apply to the expenses of the receivership in the necessary preservation and keeping of the estate and property in his hands, which last it is ordered and adjudged is a proper charge against the fund, and shall be deducted from the amount which is to be refunded." Beach and Miss Dixon, defendants in the court below, filed the petition that is now before the court seeking to revise this order. In addition to reciting the facts relating to the order sought to be revised, reference is made to the record in the first case (116 Fed. 143, 53 C. C. A. 463), and the record in that case is made a part of the petition.

The District Court held, as we have stated, that the expenses of the receivership in the necessary preservation and keeping of the estate and property in his hands should be deducted from the amount which the receiver was to refund to the defendants. Construing that order by the record in the case, it means that the receiver should retain $325, the amount paid out for keeping the stock which had been taken from the defendants' farm by the receiver and kept by him, as he states in his report, at a cost of $13 or $14 a day. It will be observed that the order of this court was not confined to the compensation of the receiver and the costs of the receivership. It includes also "his expenses." As no particular expense or expenses are enumerated, the order necessarily includes all of the expenses of the receivership. That it was not intended that any part of the money paid into court by Miss Dixon to obtain possession of her property should be retained by the receiver on any pretext is clearly shown, we think, by the third paragraph of the order. It is there said that the receiver should be directed to return to her the money so paid by her, and that she be allowed to retain possession of her property she had bought at the receiver's sale as original claimant in adverse possession, and not as purchaser at the sale. It is not ordered that the receiver be directed to return the money, less any expenses or costs of the receivership, or less any charges or disbursements. The plain direction is that her money should be returned to her. We think, therefore, that a

proper construction of the order and mandate of the court, considering both sections 3 and 6 of the order, does not permit the receiver to retain the $325 expenses paid by him in taking care of the stock.

It is a principle of general application that, if the appointment of a receiver is erroneous or void, and the adverse party does not acquiesce in it, but continues to contest it to a successful termination, any compensation which may have accrued to the receiver in the meantime, and his expenses incurred in the administration of the estate, should be taxed to the parties who applied to have the appointment made. On the other hand, if the appointment of the receiver is sustained, and the applicant obtains the relief sought by him in the pending suit, the items of expenses growing out of the receivership are proper charges against the unsuccessful defendants, and are chargeable and payable from his property in the possession of the court. We do not understand that the learned counsel for the respondents controverts these general rules. His position is that, the expenditure in question, having been made to preserve the property, is not an expense of the receivership within the meaning of the mandate, and that under the circumstances of this case the $325 paid to feed and care for the stock is not "an expense of the receivership." Authorities are quoted to sustain this contention. Excerpts from three cases are quoted. On examination of the cases we think that they do not sustain the contention.

The point decided in Cassidy v. Harrelson, 1 Colo. App. 458, 29 Pac. 525, is but an affirmance of the general principle that, "a receiver having been appointed by the court on application of the interveners in a cause wherein they were not entitled to intervene, the costs incident to the appointment were properly chargeable against them"; that is, against the unsuccessful parties. The court did say, as quoted by counsel, in the course of the opinion:

"It is probably true that there are many items of expense which would be incurred in the care and custody of the cattle, in the shape of ordinary expenses incident to the running of the herd, which could not legitimately be taken as a part of the costs of the receivership. Under the circumstances the only costs which should be taxed against the interveners because of the application are those which are the legitimate and unavoidable incidents to the appointment."

The statement of the case shows that the cattle referred to were running on what is known as the "Carizo Range," an extensive pasture, and that the order appointing a receiver was "based on a consent filed." In the case at bar the defendants resisted the appointment until they had it vacated. In the Colorado case, the possession of the cattle was merely technically changed without inconvenience to the defendant, and this done by a consent order. In the case at bar stock needed on the farm for the plow, and fully able to earn their keep, were taken from the possession of the defendants.

In People v. Jones, 33 Mich. 303, the receiver made certain expenditures which were allowed by the court, and counsel quote the case as being analogous to the case at bar. The case can have no weight in this connection, because the facts are not analogous, and for the further and conclusive reason that the court in allowing the credit

claimed by the receiver said that it was proper to allow them, "there being no objection urged to the allowance of these expenditures."

The only other case quoted by counsel is Weston v. Watts, 45 Hun, 219. In that case the opinion of the court was delivered by Daniels, J. It contains a strong, and, we think, a correct, statement of the general principles which should govern in taxing the costs and expenditures of receivers. The court said:

"To take a person's property from him by an unauthorized proceeding, and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the courts had the power to do that. Cases are not uncommon where the result would be ruinous to the injured individual."

After citing and commenting on numerous cases which sustain the general rule, the court disposed of the question before it, saying:

"The claim now made in behalf of the receiver has, by no law, been imposed upon the defendant. Neither is there any equitable principle which should require him to pay, before he can secure a return of his property, the expenses of the unlawful proceeding by which it has been taken and withheld from his possession. To require that payment from him or his property would be a wrong which the court has neither the power nor the disposition to inflict upon him. It may be a hardship upon the receiver himself, but it is one of the risks which he has voluntarily assumed. He could have avoided it by declining to accept the appointment or protected himself against the loss of his commissions and expenses by first requiring security from the plaintiffs for their payment. If they cannot now be made to pay, it is more just and equitable that the receiver shall be deprived of his fees and expenses than it would be to require the defendant to defray the expenses of an unauthorized proceeding, and the cost of depriving him thereby of the possession of his property."

From the concurring opinion of Bartlett, J., counsel quote a sentence to which our attention is called:

"There might be cases where a receiver was erroneously appointed, but not under such circumstances as to make the appointment absolutely void, which would warrant an order that his disbursements be paid out of the fund; as, for example, where the property consisted of a herd of cattle for which the receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it if the animals had remained in his own custody."

This is a mere illustration used by the learned judge in a case which did not involve the question. The illustration refers to a herd of cattle, excluding the idea of horses or mules for the plow. "That there might be cases" where such rule would apply may well be admitted, for such a case would occur, for example, where the receiver was appointed by consent. But when dealing with the real question before the court Bartlett, J., in the same opinion held that "it would be a pretty severe rule, even if constitutional, which should compel a litigant to pay the expense of having his own property illegally taken out of his custody for a while."

We find no authority that indicates that it would be just or equitable to make the expenses in question a charge upon the funds in the hands of the receiver. The receiver was appointed by an ex parte order. He went to the farm of the defendant, and took possession of her property. The larger part of it was such property as was useful and needed on the farm. It is a matter of common knowledge that horses

and mules for the plow are worth more than their food during the plowing season. It appears from the record in a petition filed by the receiver that Miss Dixon was willing to keep and feed the stock after it was seized if she were allowed to have the mules and horses worked on the farm. It is a matter of common knowledge that it is much less expensive for the farmer to take care of his stock upon the farm than it is to board them at a livery stable. If it should be held that, although the defendant succeeded in having reversed and set aside the order appointing the receiver, he was responsible for the expenses of the receiver in buying feed for the stock, the application of such rule, it seems to us, would lead in many cases to the greatest injustice. If the litigation was protracted, and some considerable time elapsed before the order appointing the receiver was vacated, the expenses would often more than equal the value of the property. Besides, such charge once being allowed upon the theory that it is a charge necessary to the preservation of the property, other charges could come in on the same principle. Blacksmiths' bills and veterinaries' accounts and the like would soon be insisted on as coming within the rule. We cannot sustain such contention. The property having been taken from the defendants against their consent under an erroneous order, which they resisted successfully in an appellate court, the only proper course is to return the property without charge of any kind against it or against the successful defendants. The defendants should be put in their former condition as nearly as possible. Instead of any sum being taxed againt the defendants under such circumstances, they would be entitled in some jurisdictions to recover damages, in a proper action, for being deprived of the use of the property. The petitioners who instituted the proceedings and secured the appointment of a receiver are properly and equitably chargeable with the costs and expenses incurred by their wrongful application. In the event of their insolvency, any expenses incurred by the receiver should fall on him, and not on the defendants. He need not become receiver unless he chooses, or he may require a bond of indemnity before accepting the position. In a case, therefore, where the receiver has been wrongfully appointed, and the order subsequently vacated, it would be more equitable that the receiver himself should sustain the loss or expenses of the receivership paid by him than that they should be taxed to the successful defendants.

It is ordered that the decree of the District Court of date March 9, 1903, be so revised and amended that no deduction for any expenses of the receiver for keeping property of A. N. Beach or Julia M. Dixon be made from the amount which should be refunded to said defendants in the court below pursuant to the previous opinion and mandate of this court. The costs of this court and of the District Court must be paid by the respondents herein.

ARBOGAST v. AMERICAN EXCH. NAT. BANK OF CHICAGO et al.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 957.

1. BANKS—ACTS OF PRESIDENT—AUTHORITY—REPUDIATION.
Where the directors of a bank had not authorized its president to make an agreement to extend time to a debtor or to refrain from selling pledged stock for the liquidation of the debt, and the circumstances raised no implication of authority, and such agreement by the person who was president was never ratified, the bank was not bound thereby.

2. SAME—SALE OF COLLATERALS—GOOD FAITH.
After more than eight months had elapsed since a debtor's assignment without any payment having been made on the debt for which collaterals had been deposited, the creditor deposited the collaterals with its attorney, with directions to realize thereon, and he notified the assignee that unless the claim was paid promptly he would sell the collateral. After an extension had been refused and the assignee was unable to pay, the attorney notified him of a bid of $30,000 for the collateral, and after the assignee acknowledged his inability to find a better one the attorney sold the collateral for that price. *Held*, that the sale was valid.

3. SAME—ADEQUATE REMEDY AT LAW.
Where certain stock was delivered to a bank as credit for a loan, and, the loan not having been paid, the stock was sold for an alleged inadequate price, and plaintiff charged that the directors and officers of the bank had participated in a campaign inaugurated by its president to bear the stock, but failed to prove that any one connected with the bank, except the person who was president, knew of or took part in such campaign, the debtor had an adequate remedy at law for damages against the persons who depreciated the stock in the market, and he was therefore not entitled to relief in equity by redemption from the bank's sale.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In 1893 Schumacher owed the American Exchange National Bank $30,000, and deposited as collateral security 1,000 shares of American Cereal Company stock owned by him, with authority to the bank to sell it at public or private sale, without demand or notice, if the debt was not paid at maturity. On December 17, 1896, the debt being long past due and unpaid, the bank sold the collateral at private sale to Walter D. Douglas for $30,000. In this suit, begun about a year later, Schumacher's assignee sought to redeem the stock on the grounds (1) that the sale was made in violation of a contract between Schumacher and the bank, and (2) that the sale resulted from a conspiracy among the defendants to depreciate the stock and obtain it at less than its true value. From a decree dismissing the bill for want of equity, this appeal was taken.

George W. Ross and Charles P. Abbey, for appellant.
Charles B. Keeler and Charles A. Clark, for appellees.

Before JENKINS and BAKER, Circuit Judges, and BUNN, District Judge.

BAKER, Circuit Judge. 1. The evidence of the alleged contract is this: One Stuart was president of the bank, and also treasurer of the American Cereal Company, of which Schumacher was president. For many years he had been a friend and associate of Schumacher. In May, 1896, the affairs of Schumacher, who had been on the verge of failure since 1893, reached a crisis. At the Great Northern Hotel in Chicago, Schumacher held a meeting with some friends and advisers.

Stuart attended. Schumacher's attorney, after the situation was reviewed, stated that whether an assignment for the benefit of creditors should be made at that time depended on the probable disposition of the various holders of Schumacher's collaterals to extend time, and asked Stuart what course his bank would take if an assignment were made. Stuart replied:

"You know that my relations with Mr. Schumacher and the relations of the bank have been very friendly for many years, and you can always rely on us to do all in our power to protect the interest of the estate. If an assignment is made, our bank will be the last to force a sale of the pledged stock."

Thereupon Schumacher assigned.

The bank was not bound. The directors never authorized its president to make such a contract, and never ratified his action, if it is assumed that he was undertaking to act as bank president, and not merely as Schumacher's friend. The facts warrant no implied authority for holding the bank to Stuart's promise. It never received any pecuniary or other consideration, without surrendering which it could not disclaim Stuart's action. And if Schumacher changed his position, through reliance on Stuart's unauthorized promise, he must look to him.

2. More than eight months having elapsed with nothing paid on interest or principal by the assignee, the directors placed Schumacher's notes and collaterals in the hands of the bank's attorney, with directions to realize thereon. On December 7, 1896, he notified the assignee that unless the claim were paid promptly he would proceed to sell the collateral. The assignee was unable to pay, and asked 60 days in which to endeavor to find means for taking up the claim. The extension was refused, and on December 11, 1896, the attorney notified the assignee of a $30,000 bid. The assignee acknowledged his inability to make or find a better one, and thereupon the sale was made.

There is nothing in the record to impugn the good faith of the bank and its attorney in making the sale. The directors and officers, other than Stuart, are not shown to have known of or participated in Stuart's campaign to bear American Cereal Company stock. The evidence of the alleged conspiracy among the appellees fails. It is only by long-drawn inferences and suspicions, rather than by satisfactory proof, that the purchaser Douglas is connected with Stuart's alleged design. But if it were otherwise, the bank and the other defendants not having participated in the alleged fraud, we think the plaintiff had an adequate remedy against the wrongdoers for damages in an action at law, wherein it would have been as easy as here to prove the true value of the stock at the time of the sale.

From a careful study of the record we discover no error in the decree, and it is accordingly affirmed.

UNITED STATES v. DRIGGS.

SAME v. MILLER.

(Circuit Court, E. D. New York. September 28, 1903.)

1. CRIMINAL LAW—LIMITATION OF PROSECUTION—PAYMENT TO MEMBER OF CONGRESS FOR PROCURING GOVERNMENT CONTRACT.

Rev. St. U. S. §§ 1781, 1782 [U. S. Comp. St. 1901, p. 1212], make it a criminal offense for any member of Congress to receive or agree to receive any money, property, or other valuable consideration for procuring or aiding to procure any contract from the government, or to receive any compensation for services rendered in relation to any claim or contract in which the United States is a party. Section 1781 also makes it an offense for any person to give or agree to give any money, property, or other valuable consideration for the procuring or aiding to procure such contract by a member of Congress. *Held*, that the delivery to a member of Congress of a nonnegotiable note made by a government contractor, promising to pay a certain sum as the proceeds of the contract were received, executed pursuant to an agreement to pay such member for his services in procuring the contract, did not constitute the giving or receiving of "property" or a "valuable consideration," within the meaning of the statute, such note being made unlawful and invalid by the statute itself; and that indictments under the statute, based on payments subsequently made and received in accordance with the terms of the note, were not barred by limitation, where such payments were made within three years, although the note was delivered more than three years prior to the finding of the indictments.

Criminal prosecutions. On demurrers to indictments, under Rev. St. U. S. §§ 1781, 1782 [U. S. Comp. St. 1901, p. 1212].

William J. Youngs, U. S. Atty.
Hugo Hirsh, for defendant Driggs.
Kellogg & Rose, for defendant Miller.

THOMAS, District Judge. Section 1781, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1212], provides:

"Every member of Congress * * * who, directly or indirectly, takes, receives, or agrees to receive, any money, property, or other valuable consideration whatever, from any person for procuring, or aiding to procure, any contract, * * * from the government or any department thereof, * * * for any person whatever, * * * and every person who, directly or indirectly, offers or agrees to give, or gives, or bestows any money, property, or other valuable consideration whatever, for the procuring or aiding to procure any such contract, * * * shall be punished," etc.

Section 1782 provides:

"No Senator, Representative, or Delegate, after his election and during his continuance in office, * * * shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, * * * or other matter or thing in which the United States is a party."

Some, but not all, of the indictments allege the following facts, which by the demurrers are conceded only for the purpose of raising questions of law:

At a time prior to May 25, 1899, the Edward J. Brandt-Dent Company made a contract with the United States to furnish 250 or more

machines, called automatic cashiers, and on the last-named date such company executed the following instrument:

"Watertown, Wis., May 25, 1899.

"For value received, we promise to pay George F. Miller or order, twelve thousand five hundred dollars without interest on receipt of the proceeds of sale of 250 or more automatic cashiers, sold May 19, 1899, to the United States Post Office Department."

This instrument was, on or about the time of its date, delivered to the defendant Miller, who was the agent of the obligor; whereupon it was delivered by Miller to the defendant Edmund H. Driggs, who procured, or aided in procuring, the contract from the government. The instrument of July 26th embodied in part an agreement made by such obligor, through its agent Miller, with Driggs, whereby Driggs undertook to procure or aid in procuring such contract. As the government received and paid for the cashiers from time to time, Miller, acting always as the agent of such company, received from it numerous drafts, payable to his order, and indorsed the same to Driggs as his compensation for procuring or aiding in procuring the contract from the government; whereupon Driggs caused the drafts to be cashed, and kept the proceeds.

The defendant Miller is charged in certain indictments, drawn under section 1781, for making such delivery of certain of such drafts to Driggs, and Driggs is charged separately in several indictments, drawn, some under section 1781, and some under section 1782, for receiving drafts from Miller; the charge being that Miller gave, and Driggs received, such drafts for procuring such contract while Driggs was a member of Congress. All the specific deliveries and receipts of drafts upon which the indictments are based were within three years next preceding the finding thereof. When the contract was made, and the instrument of May 25, 1899, delivered to Miller, and by Miller to Driggs, it is alleged that Driggs was a member of Congress. Each defendant demurs to the indictments severally found against him.

The demurrers should be overruled. The important questions are (1) whether Driggs was a member of Congress when the offenses charged in the indictments were committed; (2) whether the statute of limitations has run against the actions or any of them.

The indictments charge sufficiently that Driggs was such member, and that Miller had knowledge thereof. Therefore the first question cannot be determined at this time, although, if the facts be as claimed by the defendants, a decision of the matter before the trial might be due both the government and the defendants. It may be that the objection that the statute of limitations has run against the actions cannot be taken by demurrer, but that objection has not precluded the court from examining and deciding the question, and it is concluded upon the facts as gathered from certain of the indictments (although several of them do not show such facts) that the actions are not barred. It is not deemed necessary to state at any considerable length the reasoning by which this decision is reached.

The instrument dated May 25, 1899, was not negotiable, and therefore no value could be added to it by transferring it. In any case,

whether it was "property" or a "valuable consideration," within the meaning of the statute, so that an indictment could be based upon it within three years after its delivery to Driggs, depends upon its nature and value at the time of such delivery. At the outstart it is obvious that the instrument of May 25, 1899, embodied in part the agreement pursuant to which Driggs undertook to procure the contract from the government, and fixed the condition and times when he should receive compensation therefor. Although it be a fragment of such agreement, and such agreement was originally not in writing, the instrument of May 25th has the same qualities as if it contained all the terms of the agreement. An indictment, otherwise correct, charging that the defendants offended by making the agreement, or by being parties thereto, would have been valid, if found within three years from the time of making it, as section 1781 in terms forbids such an agreement to be made. But an indictment based upon the instrument as embodying the agreement is quite different from an indictment for giving or receiving "money," "property," or "other valuable consideration" upon the theory that such agreement was itself "property" or "other valuable consideration." The defendants contend that such agreement was in itself "property" or "other valuable consideration"; that it represented the money that was thereafter paid and upon which the present indictments are based; that the defendants could have been indicted, not only for making the agreement, in part embodied in the instrument, but also for giving or receiving a thing of such value as the instrument itself has; that a conviction or acquittal on an indictment for giving or receiving it would have been a bar to an indictment for thereafter receiving the money provided for by the agreement; and upon such premises they base the argument that the statute of limitations began to run from the time the instrument was delivered, and not from the time that the several payments were made. This contention rests wholly upon the theory that the agreement was itself "property" or "other valuable consideration." But the instrument has no validity, because it was the very thing against which the statute was aimed. It had in legal theory no value for the purposes of sale; it was not enforceable against the makers; its payment depended entirely upon an unconscionable readiness of the makers to meet an illicit promise, given as a part of a corrupt bargain, for corrupt practices. The instrument was tainted and made worthless by the statute itself. Could the same statute stamp as something valuable, as property, a writing whose existence it had inhibited? The statute declares that a member of Congress shall not agree "to receive any money, or property, or other valuable consideration whatever, from any person, for procuring * * * any contract * * * from the government." If a member of Congress and such person enter into an agreement to do this very thing, how can the agreement be regarded as property or a valuable consideration? Does the statute refuse the agreement life by prohibiting it, and at the same time, upon its interdicted birth, breathe life into it, and give it the characteristics, the protection, and the equality of property? According to such argument, the statute kills

and quickens the same agreement at the same instant. It stifles while it animates. It precludes its existence, and, being defied, attaches worth to its reality. Leavened and vitiated by guilt, and imbued and vivified by virtue, by the same statute! One seeks in vain for fit expression of the contrariety. It must be remembered always that the very same statute—the same section—that commands that it shall not be, is invoked to vitalize it into a valuable entity. The very same agreement for making which the defendants, under the statute, could be indicted, is exalted, by defendants' contention, to the state of lawful "property" or "other valuable consideration," so that the defendants, under the same statute, could be indicted for giving or receiving it as such. The forbidden agreement denounced by this section, and demanding the full punishment provided for it, is claimed to have properties that give it worth, so that the parties to it may be punished by the same section for giving and receiving it as if it had merit and excellence. A statute that at one and the same time could make the creation of an agreement a felonious offense, and yet esteem the very same agreement as property and a valuable consideration between the felons, would be curious in law and logic. It would be difficult to think well of a statute that should say to two men: "I will punish you for making an agreement, and yet I will regard that agreement as property and as a valuable consideration if you do make it, and also punish you for passing the agreement from one to the other, simply upon the ground that it is such 'property' or 'other valuable consideration.'" Such alleged conjunction of validity and invalidity, such compounding of unlawful existence and legal existence, such fusing of corruption and incorruption into the same agreement, by the same statute, is not understandable. A statute that proclaims that an agreement is so noxious to the public good that the parties to it should be imprisoned for making and delivering it one to the other should not be interpreted to mean that such agreement is in any degree recognized by the law as sane, useful, and marketable. The statute prohibited an agreement to do the act, and also giving or receiving compensation for doing it. It made either a punishable offense, but it did not intend to make the agreement property or a valuable consideration. Valuable consideration for what? For agreeing to do the act? That would make the agreement a valuable consideration for its own making. Of course, the mutual promises contained in the agreement might sustain it, if the statute did not punish on account of those very promises. But it is not intended to refine the argument. The occasion demands no niceties of reasoning. The very statement of the defendants' proposition should demonstrate its invalidity. It is so abhorrent to moral and legal conceptions, so inimical to plain reason, that some technical rules, elsewhere wholesome and properly applied, but now skillfully invoked by defendants' counsel, must be broken through and discarded, and ultimate vital judgments allowed to prevail. If any one shall decide, or has decided, that a statute may be interpreted to denounce an agreement as impossible of worthy existence, and after it has come forbidden into the light declare that it has such worthiness that it may be regarded as "property"

or "other valuable consideration," for the purposes of the same statute, the responsibility of such decision shall not rest upon this court. The contention that an agreement by this statute can be a ground of punishment (1) because it exists at all, and (2) because it is a valuable consideration, and should be ranked with property recognized by law, cannot be approved. The statute means by "valuable consideration" not the unlawful agreement to do the act denounced by the statute, but some valuable thing, like money, property, or the notes or obligations of third persons or corporations.

But it may be urged that the instrument does not embody the agreement between the parties. It was given to Miller, the agent of the makers, for delivery to Driggs. It was not issued or uttered by delivery to Miller. He received it as agent, from a principal, for the very purpose of delivery to Driggs. To what end? To show by writing, in whole or in part, what agreement the makers, through Miller or otherwise, had made with Driggs. It embodied that agreement in part. To what extent it contains it is unimportant.

These considerations lead to the conclusion that, while the defendants could have been indicted for making the agreement in part embodied in this instrument, they could not have been indicted for receiving or giving it, upon the theory that it was "property" or "other valuable consideration." In point of time, as each payment was made an offense under the statute was committed, and so far as such payments were made within three years before the indictments were found the indictments may be based thereon.

Orders will be entered overruling the demurrers, with leave to the defendants to plead over.

NATIONAL FOLDING BOX & PAPER CO. v. ROBERTSON'S ESTATE.*

(Circuit Court, D. Connecticut. October 29, 1903.)

No. 1,019.

1. PATENTS—DAMAGES FOR INFRINGEMENT—INCREASE BY COURT.
A court is warranted in exercising the discretionary power given by Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395], to increase the damages found to have been sustained by a complainant by the infringement of a patent, where the infringement was palpable, and defendant persisted in it after full knowledge of the patent and an opportunity to settle, and has shown a determination to litigate to the end, and to cause all the delay and expense possible.

In Equity. Suit for infringement of patent. On defendant's exceptions to master's report, and complainant's motion for increased damages under Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395]

See 112 Fed. 1013.

Walter D. Edmonds, for complainant.
Charles W. Comstock, for defendant.

PLATT, District Judge. The master has performed his duties under the accounting with exemplary and painstaking care and pa-

* Rehearing denied February 2, 1904.

tience. My labors have thereby been much lessened. His action in regard to the four accounts, where he allows only the profits which the defendant admits, rather than the damage which the complainant claims, evidences the exceeding caution which characterized his progress. The criticisms upon the report which the defendant embodies in its exceptions do not commend themselves to my mind. The exceptions are overruled.

Upon Complainant's Motion for Increased Damages. The discretion of the court is invoked, and certain facts are presented which it is claimed should affect that discretion favorably to the complainant. The defendant continued making and selling even after the last plain notice from complainant's attorneys. It knew the plaintiff as a competitor, and had knowledge of the patent in suit under which its boxes were made. It knew that Gair had been enjoined from making a similar box. It is not conceivable that an infringement could have been carried on so extensively without, at the very least, inducing the purchaser to believe that he would be protected from personal loss. To so act as to induce such belief without actually becoming responsible for the results would be even worse than to have guarantied the customer against loss in plain terms. The probable course of action adopted by it, and which is forced upon me as a conclusion by an almost irresistible inference, did a harm both to the owner of the patent and to the defendant's customers. The defendant appears to have been treated with consideration by the plaintiff's manager, Mr. Walton. It is fair to say that it might have averted the consequences of a palpable infringement by a payment of $2,000, and was given an opportunity to make a counter proposition thereto, if it had so desired. It is quite evident that it decided, in cold blood, to fight to the last ditch, rather than pay any considerable sum; and it has, without question, carried on such a warfare, and the end is not yet. In that battle the issue of noninfringement has never been suggested. Resort has been had to every expedient, possible or seemingly impossible, which could make for delay and expense. It is true that all these doings have been expensive to itself as well as to the complainant, but the discretionary power with which the court is invested by the statute means more than a power to punish the wrongdoer. The deterrent effect of the punishment upon others should not be overlooked. Our patent laws are thought by many persons to furnish inadequate relief to the patentee. The inventor of moderate means, after sustaining his rights by litigation, is really at the threshold of his contention. The terrors of the accounting loom up before him with something of the force which in olden times the suggested horrors of the inquisition must have presented to the Christian martyr. It would seem to be the time to read a lesson somewhat sharply to the parties who indulge too freely in such experiments as are disclosed upon the record in this action. The defendant is not taken unawares. The plaintiff gave due notice of his intention long before the conclusion of the controversy. A person may be regarded as acting "wantonly" who acts without regard to propriety or the rights of others, or is careless of consequences, and yet without settled malice. Looking at the case in all its lights, the defendant appears to

have been "stubbornly litigious," or at least, to have "caused unnecessary expense and trouble." Day v. Woodworth, 13 How. 372, 14 L. Ed. 181.

The court cannot increase profits in equity actions. Covert v. Sargent (C. C.) 42 Fed. 298. In the master's report, he finds that $66.59 are "profits derived by defendant." I do not think I can increase that item. The balance, $1,454.02, are damages, and are subject to discretion. The difficulty that the master experienced in arriving at the damages, owing to the lack of identification of the infringing boxes in the books of account, makes it quite possible that the actual damage may have been in excess of that found. This fact, and the other fact that the plaintiff has been kept out of his due for a long time, count heavily as additional reasons for the demand made upon the court's discretion. It is, therefore, in and under all the circumstances of the case, considered a fair exercise of discretion to increase the damages to $4,362.06. To this will be added the profits, found to have been $66.59.

Let a decree be entered for $4,428.65. Interest on the amount found to be due by the master should be computed from the date of his report. Interest on the larger amount resulting from the exercise of the court's discretion should commence from the date of the decree.

BRILL v. NORTH JERSEY ST. RY. CO.

(Circuit Court, D. New Jersey. November 9, 1903.)

1. DECREE—OPENING—NEWLY DISCOVERED EVIDENCE.

A defendant applied for the opening of an interlocutory decree, sustaining certain patents and finding infringement, on the ground of newly discovered patents alleged to anticipate or limit those in suit, and for a rehearing of the case after the introduction of such additional patents. *Held*, that the application must be denied on three independent grounds; first, because it did not appear that any search prior to the hearing was made on the part of the defendant for patents germane or allied to those in suit according to their proper and usual location, arrangement and classification in the patent office; secondly, because it appeared by the admission of the solicitors of the defendant that they had knowledge for more than a week before the signing of the decree of the existence of the alleged newly discovered patents and withheld that knowledge from the court until several days had elapsed after the decree was signed, although both parties by their solicitors were present before the court at the time and had knowledge of the formulation and settlement of the terms of such decree; and, thirdly, because from an examination of the patents sought to be introduced, in connection with the expert and other affidavits and the record of the case, it appeared that those patents were immaterial so far as the result embodied in the decree was concerned.

(Syllabus by the Court.)

See 124 Fed. 778.

Duell, Megrath & Warfield, for petitioners.

Edmond Wetmore, Francis Rawle, and Joseph L. Levy, for complainants.

BRADFORD, District Judge. An interlocutory decree was made in this case October 14, 1903, sustaining and finding infringement

of claims 6, 10, 11, 13, 14, 15, 30, 80, 81 and 87 of patent No. 627,898, granted to George M. Brill, dated June 27, 1899, and claims 13 and 17 of patent No. 627,900, also granted to George M. Brill, dated June 27, 1899, and awarding an injunction and an accounting. The North Jersey Street Railway Company has applied by petition for the opening of the decree and a rehearing of the case to the end that it may file an amended or supplemental answer setting up certain alleged newly discovered matter, consisting of patent No. 112,897, granted to Chauncey S. Buck, dated March 21, 1871, and patent No. 104,876, granted to Addison Overbagh, dated June 28, 1870. This application must be denied on three several and independent grounds.

First. The affidavits before the court do not negative laches on the part of the defendant in failing to produce the Buck and Overbagh patents in evidence in due course prior to the hearing of the case, but, on the contrary, strongly tend to establish such laches. The firm of Duell, Megrath & Warfield, the present solicitors of the defendant, became such prior to the hearing, but not until after the close of the evidence on its behalf. Mr. Warfield, one of that firm, in his affidavit, says:

"The facts relative to the Buck and Overbagh patents are within my personal knowledge, as I was the one who discovered such patents. * * * From time to time since our firm took charge of this case I have examined the patents in the truck art for the purpose of seeing if anything existed which had not been brought to the attention of the court, and it was almost an accident that led to the discovery of the Buck patent."

He does not state when or the circumstances under which the patents, now sought to be introduced, were discovered, nor the nature of the accident which resulted in the discovery of the Buck patent. Nor does he indicate the means or method resorted to by him or any other person for the purpose of ascertaining the existence of any patent or patents germane to the defence of anticipation or prior art. Edgar Peckham, president of the Peckham company, which manufactured the infringing truck mechanism, in his affidavit says:

"Before our company commenced to manufacture the trucks complained of herein and which have been held to be infringements upon some of the claims of the two patents in suit, I instructed our then solicitor and counsel, J. E. M. Bowen, now deceased, to make a thorough investigation to determine whether such trucks would be infringements upon any then existing patents, and also to thoroughly develop the prior art so that we might know what, if anything, was patentable. Mr. Bowen made such investigation and submitted the result to us. Among the patents developed by this examination was the Thyng patent, No. 4,276, November 18, 1845, but his search did not disclose any of the patents now sought to be brought to the attention of the court herein. After this suit was commenced Mr. Bowen, under our instructions, made a further examination, in order to set up any prior patents bearing upon the subject which he might discover in the answer herein. Such examination did not disclose the patents now sought to be called to the attention of the court. After that Mr. Bowen died and we retained Henry P. Wells in place of Mr. Bowen. Mr. Wells stated to me that he would like to make a further investigation, and I instructed him to do so and to make it as thorough as possible. I was informed by Mr. Wells that he caused such examination to be made, with the result of finding certain patents which we set up in an amendment to the answer, but such examination did not disclose any of the patents now sought to be brought to the attention of the court. Mr. Wells, in the summer or early fall of 1901, was obliged, owing to ill health,

to give up the defense of this suit, and our company retained Duell, Megrath and Warfield, who have since acted for the defendant herein. * * * Our previous attorneys were instructed to make the most extensive and thorough research possible, and we were informed that they had so done."

Mr. Peckham does not state that he has any personal knowledge of what was done by any of the solicitors of the defendant in any effort to ascertain what the records and papers of the patent office would disclose touching the defence of anticipation or prior art set up in this case. It appears that his statements on the subject of examinations made for patents pertinent and material to the defense were wholly based upon information derived from others. Nor does he even aver on information and belief the method of conducting such investigation nor the extent to which it proceeded. These two affidavits contain in substance all that is brought forward to relieve the defendant from the imputation of laches. On the other hand, the complainant has produced a number of affidavits, wholly uncontradicted, clearly showing the usual and proper method for conducting an examination in the patent office to ascertain the existence of patents relating to any art or branch thereof. Among them are those of George R. Simpson, who for more than eight years has been examiner in charge of division 34 of the patent office; Howard A. Coombs, an assistant examiner from May, 1896, to September, 1903; W. W. Hite, who for more than seven years has been chief of the draftsman's division of the patent office; O. Ellery Edwards, Jr., an assistant examiner for more than six years; and William F. Hall, John H. Holt, J. Granville Meyers, Jr., William N. Cromwell and A. V. Cushman, all of whom are familiar with the system of classification of patents in the patent office and have been actively engaged in searching the records of the office for patents, anticipatory or illustrative of the prior art, for periods ranging from seven to fourteen years. It satisfactorily appears from the affidavits and exhibits on the part of the complainant that the Overbagh patent was included in sub-class 240 of class 105, in division 34, of the patent office, and the Buck patent in sub-class 243 of the same class in the same division; that class 105 has the heading "Railway Rolling-stock"; that sub-class 240 specifies "Equalizing-levers" under the headings "Trucks" and "Electric-motor"; that sub-class 243 specifies "Bogies" under the headings "Trucks" and "Four-wheel"; that the above classification and sub-classification of the two patents were in existence prior to the time of the institution of this suit, and have ever since remained unchanged; that both of the patents were properly so classified; that both of the Brill patents in suit properly belong to class 105 in division 34 and to sub-class 239, specifying "Bogies" under the headings "Trucks" and "Electric-motor," and are now so classified, and, although it does not appear when they were first so classified, in the absence of evidence to the contrary, it may fairly be assumed that such classification was promptly made in the due performance of official duty; that the Brill patent No. 627,899, which was divisional in its relation to the patents in suit, was duly included in sub-class 243, class 105, in divi-

sion 34; that all United States patents are classified in the patent office in accordance with the arts to which they appertain, and are properly and intelligibly sub-classified; that one set of copies of all United States patents so classified is distributed among the several examining divisions of the patent office for the use of the patent office examiners, and another complete set properly classified is placed in what is termed the "attorneys' room of the United States patent office"; that copies of the patents as arranged and located in the patent office are readily accessible in the attorneys' room according to their classification and sub-classification to attorneys and others making search as a matter of right, and to attorneys in the examiner's room as a matter of courtesy; that to have fully ascertained the prior art in its relation to the patents in suit a search should have been made extending through class 105 and especially the sub-classes including the designations and headings above mentioned. A due and careful search for patents, relative to those in suit, according to their proper and usual location, arrangement and classification in the patent office, would have seasonably disclosed the Buck and Overbagh patents. There is, however, no direct or sufficient evidence that such a search was made on the part of the defendant. Such omission constituted laches fatal to the granting of the present application.

Secondly, it is admitted by the solicitors for the defendant that copies of the Buck and Overbagh patents were in their possession for at least a week before the signing of the interlocutory decree October 14, 1903. The solicitors for both parties were present at the formulation and settlement of the terms of that decree, yet neither the Buck nor Overbagh patent was mentioned to the court, nor was it in any manner stated or intimated that an application would or might be made for a rehearing of the case. The defendant should be precluded from asserting the materiality to the case of the very patents of which it had knowledge prior to the signing of the interlocutory decree, and copies of which, in its possession, it withheld from the knowledge of the court until after the decree was signed. The conduct of the defendant amounted to a statement by it that the Buck and Overbagh patents would not have changed the result had they been adduced in evidence. The elements essential to a technical estoppel probably are not present. But, aside from any question of estoppel, or of the materiality of the evidence now sought to be introduced, I am satisfied that the granting of the present application would establish a precedent tending to encourage laches and wholly irreconcilable with the due, prompt and economical administration of justice.

Thirdly, it is extremely doubtful whether the Buck and Overbagh patents are of such a nature as to invalidate or otherwise affect the patents in suit, or either of them, with respect to the claims which have been sustained and held infringed. An examination of the patents sought to be introduced, in connection with the expert and other affidavits and the record of the case, leads me to believe that those patents are immaterial so far as the result embodied in the

interlocutory decree is concerned. It would answer no useful end, especially in view of the conclusions above reached, to elaborate this branch of the subject.

The petition must be denied with costs.

THE MENOMINEE.

(District Court, E. D. New York. September 23, 1903.)

1. COLLISION—DAMAGES—TOTAL LOSS OF FISHING VESSEL—PROSPECTIVE CATCH.
In case of the total loss of a vessel by collision, damages are limited to the value of the vessel, with interest thereon and pending freight, or charter hire in the nature of freight; and the rule applies to a fishing vessel sunk while on a fishing voyage, and totally lost, except as to her outfit, and the value of her prospective catch during the remainder of the season or of the expedition cannot be allowed as an element of damages.

In Admiralty. Suit for collision. On exceptions to report of special commissioner as to damages.

Wing, Putnam & Burlingham (Harrington Putnam and Edward S. Dodge, of counsel), for libelants.

Convers & Kirlin (J. Parker Kirlin and Edward E. Blodgett, of counsel), for claimant.

THOMAS, District Judge. The steamship Menominee, by her own fault, collided off Nantucket with the fishing schooner Lucille, whereby the latter was lost, and practically everything on board, including 33 barrels of mackerel, and the effects of the master and crew. "Her two large seine boats were saved, the crew escaping in one, which was afterwards picked up by a fisherman after the Lucille's crew had boarded the Menominee, and the other being found later by the same fisherman, fast by her long painter to the sunken schooner. Each boat had one of the Lucille's seines in it at the time; and seines and boats, together with a few smaller articles picked up, were brought to Gloucester, and delivered to the owners, one of the boats being somewhat damaged."

The special commissioner found the following damage:

Value of Lucille	$ 5,500 00
Outfit	2,797 40
Captain's effects	236 65
Probable catch	1,500 00
Use of seines and boats	23 00
Total	$10,057 05

Because of a stipulation between the parties that the claimant should pay 75 per cent. of the provable damages, the commissioner found that the libelant was entitled to recover the sum of $7,542.84, with interest from August 1, 1901, to June 1, 1903, amounting to $829.72. Inasmuch as the commissioner had allowed for loss of

¶ 1. See Collision, vol. 10, Cent. Dig. §§ 282, 287.

probable catch on the voyage interrupted by the collision, interest was allowed from the time of the probable termination of such voyage, and not from the date of the collision.

The report of the commissioner is approved, without further discussion, except as to the probable catch, and, if any amendment of the libel is necessary on account of the assessment of the value of the Lucille at $5,500, it may be made.

The allowance of the sum of $1,500 for probable catch, which includes the value of the 33 barrels of fish on hand at the time of the collision, should be considered. If such item as a whole should not be allowed, the 33 barrels of fish, at the market price ascertained by the commissioner, should be included in the decree. The commissioner finds that the Lucille "left Gloucester July 1st, fully manned and equipped for a mackerel seining voyage, provisioned for about six weeks, though the ordinary length of such a trip is about a month. She had already struck fish, and had taken and salted down 33 barrels of them, which were on board at the time of the accident." The collision happened on July 7th. The libelant claimed the loss of probable catch for the entire season; that is, for the July voyage, and also for a prospective voyage in August and September, and probably October. The commissioner allowed only for the loss of probable catch on the July voyage.

In The Umbria, 166 U. S. 404, 421, 17 Sup. Ct. 610, 41 L. Ed. 1053, it is stated that, as a general rule, "in cases of total loss by collision, damages are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision. The probable net profits of a charter may be considered in cases of delay occasioned by a partial loss, where the question is as to the value of the use of the vessel pending her repairs. In such cases the net profits of a charter, which she would have performed except for the delay, may be treated as a basis for estimating the value of her use." Had this been other than a fishing vessel, earnings that she might have made, but not assured by definite contract, would not have been allowed; and the question is whether, in the case of a fishing vessel, totally lost except as to her outfit, net profits, nonexistent but apprehended, shall be allowed by reason of the fact that it may be inferred from her own catch up to the time of her loss, and from the average catch of other vessels in the same vicinity, that she would have had similar good fortune, had not the injury occurred. Where a vessel is under charter, or has made such engagements as insure her freight, the owner of the vessel is deprived of vested existing property if the ship be precluded by the fault of another from continuing her voyage. The enjoyment of such property may be prevented by the possible contingency that the vessel may be unable, by reason of injurious vicissitudes, to perform her stipulations, or by the failure of the party who has assured the freight. But there would be a presumption that such vicissitudes or failure would not arise. If a vessel were going from port to port seeking freight which was not assured her by contract, it would not be concluded that she would be entitled to recover prospective freight, basing the conclusion upon the inference that it would have been

earned because at the time of the collision she had earned some freight, or upon former similar voyages she had made such earnings, or because other vessels at the same time, and pursuing the same traffic, had made such earnings; although in some instances the history of such vessel and of similar vessels may be used for the purpose of ascertaining the value of the loss of use of an injured vessel, where demurrage damages are permissible. The present question is not, what would be the juster rule of damages? but, what is the existing law? By what reasoning, or by what allowable solicitude for fishing smacks, should there be an application of one rule for fishing vessels and another for ambulatory vessels seeking freight at different ports to which they might come?

In The Hope (D. C.) 5 Fed. 822, and The Freddie L. Porter, Id., affirmed in 8 Fed. 170, the District Court held that in the case of a vessel chartered for a fixed term of time, totally lost by collision while in the performance of her employment, and before the contract had expired, the owners were entitled to recover as damages the net profits which they would have realized under the agreement for the whole period if the vessel had not been lost. This decision followed the principles laid down in The Canada, Lushington, 584, that there should be allowed "the gross freight, less the charges which would have been necessarily incurred in carrying such freight, and which were saved to the owners by the accident." There was a similar decision in The Rebecca, 1 D. & H. 356, by Judge Betts. In each case there was a total loss of the vessel. So, in the case of The Heroine, 1 Ben. 226, Fed. Cas. No. 6,416, where the vessel was injured by collision, Judge Blatchford considered that "the freight which the injured vessel was in the act of earning and has lost is allowed as a just measure of compensation," but that there must be deducted from the freight the vessel was engaged in earning the expenses she would have incurred if the voyage had been successfully performed. These decisions accord with that in The Baltimore v. Rowland, 8 Wall. 377, 386, 19 L. Ed. 463.

In The Gleaner, 3 Asp. Mar. Cas. 582, it appeared that while the fishing smack the Maud and Florence was engaged in drift-net fishing in the North Sea the fishing smack Gleaner ran into and fouled her nets; that they became so entangled that, after attempting to haul them in for some hours, the crew of the Maud and Florence cut them adrift, saving only 10 nets out of 60. The Maud and Florence was then laid up for the winter, as the fishing season lasted but four weeks longer, and the owners were unable to procure in time nets to enable them to resume their fishing. In an action for damages, in addition to a recovery for the nets themselves, there was an allowance of £72 for loss of four weeks' fishing. In making this allowance it was said:

"It is to be borne in mind that a smack of this class is solely used for net fishing, and if its nets are destroyed, and cannot be renewed at once, the smack itself is necessarily laid up unemployed for a certain time at the very period of the year when it would otherwise be profitably employed. According, therefore, to the ordinary principle on which demurrage and compensation for nonemployment is allowed in respect of a vessel disabled by injury to her hull and gear, some compensation is clearly due to the plaintiffs

in this case under that head; and, this being so, I have considered that the ordinary rule of allowing so much per ton per day is not applicable to a vessel of this class, which is not constructed and is never employed for the conveyance of cargo or passengers, or in earning freight in the common sense of the term, and that the plaintiffs are entitled to recover the probable net amount they were prevented from earning by the customary use of their smack and its fishing gear."

The defendants did not object to the report.

In the case of The Mary Steele, 2 Lowell, 370, Fed. Cas. No. 9,226, decided in the United States District Court of Massachusetts, it appeared that the libel was filed by the owners and crew of the schooner Hattie N. Reed and by the owners of a seine used in connection with such schooner in the mackerel fishery against the schooner Mary Steele, wherein it was charged that the Steele damaged the seine, whereby it was rendered useless, so that the libelants were obliged to carry it to Boston to be repaired, whereby they lost their trip, and were detained one week, and suffered damage. It was held that in assessing the collision damages the probable profits of the trip should be allowed, as the seine could neither be repaired nor replaced in less time than a trip would require, and it was of so great value that to assess it as total loss would exceed the damage incurred by the loss of the trip. Judge Lowell stated:

"As to the mode of ascertaining the value of the time lost there seems to be no other that can be applied than the probable profits. The schooner had a much larger number of men than merchant vessels carry, and different outfits. There is no customary rate of hire or market price for such vessels, and cannot be, from the mode in which the business is conducted."

In The Columbia, 9 Ben. 254, Fed. Cas. No. 3,035 (E. D. of N. Y.), it appears that an excursion steamer, coming from Rockaway to New York, overtook off Coney Inland a schooner on her return from a catch of menhaden, and towing behind her two boats holding her seine. The steamer struck one of the boats and carried off the seine, whereby both were lost. Upon a reference to ascertain the damages evidence was taken to show the probable amount of menhaden the schooner would have caught in the three-days delay that was necessary to get another seine and boat, it being just at the height of the fishing season. The commissioner found damages for the net lost and for the boat lost and certain interest, and also "for the fish, being one-sixth of the three-days estimated catch, at $1.10 per M," which finding was affirmed by the District and Circuit Courts.

In The Risoluto, 5 Asp. Mar. Cas. 93, damages for collision on July 6, 1881, between a bark and fishing brig, were involved. The brig was on the Great Bank of Newfoundland, and by reason of the collision she had to put into St. Pierre Miquelon, for repairs, whence she did not get back to the fishing grounds until the 26th of August, 1881. In addition to the cost of repairs, the plaintiffs claimed as demurrage 30,000 francs, grounding such claim on the basis of the loss of fish which average catches of other vessels showed the brig would have taken from the 6th July, 1881, the date of the collision, to the 26th August, 1881, or 30,000 cod, at an average of 1 franc per cod. The registrar reported that the loss sustained by the plaintiffs

amounted to the sum stated for loss of fish during the period mentioned. From the report the defendants appealed to the court, and notice of objection was filed in the registry by the defendants, the chief ground as to the demurrage allowed being that the registrar had estimated the loss of fishing on wrong principles, and had received improper evidence. The report of the registrar was affirmed.

In Guibert & Sons v. The British Ship George Bell (D. C.) 3 Fed. 581 (United States District Court for the District of Maryland), the question here involved arose. The libel was filed by the owners of the French brig Briha against the British ship George Bell for a collision in consequence of which the fishing vessel was sunk with all property on board. The ship Bell was solely to blame, and the case was referred to a master to compute the damages. The libelants excepted to the master's report, among other things, because the master disallowed their claim for the probable "catch" which, with reasonable certainty, they would have taken if they had been permitted to fish for the remainder of the season. The master's report showed that there remained 30 days of the fishing season, in which with reasonable certainty those on the Briha might have taken 15,000 fish additional to the cargo then on board. It was held that the master properly rejected the claim. The learned judge said:

"It is clearly to be excluded, under the rule hereinbefore adverted to. The probable earnings of a vessel have sometimes been considered in cases of partial loss in collisions, when there was no other means of ascertaining the loss to the owner by the detention of his vessel while being repaired; but in cases of total loss interest from the date of destruction is given in lieu of the profit which might have been gained by the owner by the subsequent use of his vessel."

In The Columbus, 3 W. Robinson, 159, it was held that:

"Where a vessel is sunk in a collision, and compensation is awarded by the court of admiralty to the full value of the vessel, as for a total loss, the plaintiff will not be entitled to recover anything in the nature of a demurrage for loss of the employment of his vessel or his own earnings in consequence of the collision."

The action was brought by the owners of the fishing smack the Tryall for damages for a collision in consequence of which the Tryall was sunk. She was raised at the expense of the owner of the Columbia and carried into Rye Harbor. The full value of the vessel was allowed, but the claim for a sum which her owner stated he would have earned for wages as master of the smack, and for a sum which he claimed as the average profits of the same from the time of the collision, was rejected. Dr. Lushington said:

"I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss, and, the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel. When I first read the papers in this case, I looked with much care and attention to see whether any precedent could be found, whether any single instance had occurred in the numerous cases which have arisen, not only in my own time, but in that of my predecessors; but I have found none; and the learned counsel who has argued the case on behalf of Mr. Woodward [the libelant] does not appear to have been more successful in his researches."

The learned counsel for the claimant also cites the unreported case of The City of Rome, Ad. Div., 11th May, 1887, cited in Marsden on Collisions, p. 135. The text states:

"A fishing smack recovered, besides the value of her nets and gear, which she was obliged to cut adrift, the amount she might reasonably have expected to earn during the rest of the season [citing the Gleaner, 3 Asp. Mar. Law Cas. 582; The Clarence, 3 W. Rob. 283, 286; The Risoluto, 8 P. D. 109]. But it was held by Sir J. Hannen in a recent case that, where the boat is totally lost, * * * the prospective catch of fish could not be recovered, and the damages were confined to the value of the boat and gear."

In the unreported case of Negre v. The Obdam, the damages claimed by the libelant were (1) for loss by collision, (2) her salt and supplies, (3) the estimated catch for the season, (4) the fish and oil on board, and (5) the personal effects of the master and crew. The Obdam was held liable, and an order of reference to ascertain the damages was made. The commissioner disallowed the amount claimed for damages for loss of profits on the voyage. The libelant excepted "to the failure of the commissioner to allow the expected profits of the voyage," but the court overruled the exceptions, and confirmed the commissioner's report. (Dist. Ct., E. D. of N. Y.)

In Brown v. Hicks (C. C.) 24 Fed. 811, it appeared that the libelant entered into an agreement with the agent of the bark "to proceed from the port of New Bedford to Mahe, Seychelles Islands, by steamer, and on his arrival there to take charge, as master, of the bark Andrew Hicks, and perform a whaling voyage in said bark, not exceeding three years in duration, and return with said bark to the port of New Bedford," and the agent agreed to pay him "one-fifteenth lay or share of the net proceeds of the cargo obtained by said bark during the term of his service as master thereof." The voyage not proving successful, the agent recalled the bark before the expiration of three years. It was held that the libelant was entitled to recover damages, and that the measure of damages was the sum which his lay would probably have amounted to, calculated upon the basis of the average catch of vessels on the ground from the time the libelant received directions to proceed home to the expiration of the three years, deducting the time it would take for the return voyage to New Bedford. Parsons v. Terry, 1 Low. 60, Fed. Cas. No. 10,782, was cited in support of such holding. There it was held that, where the master and owner of a whaling vessel had contracted for a cruise of four seasons at a certain lay, and was wrongfully deprived of his command at the end of three seasons, he could recover against his co-owners for damages for his removal the probable value of his lay for the season on which he was about to enter when displaced.

The result of the inquiry is that the attention of the court is called to no case where a vessel was lost by collision and there was an allowance of damages for the use of the vessel after her destruction, except for pending freight or for charter hire, which is in the nature of freight. Where the vessel was not regarded as a total loss, and compensation made therefor, demurrage according to the usual rule is allowed, and in the case of fishing vessels such demurrage or

damages for detention have been ascertained by considering her probable net earnings in the enterprise to which she was devoted. So, where there has been a contract to employ a person upon a fishing expedition, from which he was entitled to recover for his services a certain share of the profits of the catch, his injury has been measured by the probable profits of such catch. In the present case, however, the libelants demand to recover not only for the total loss of the vessel and all property lost or injured at the time, but also for her use or earnings during the immediate voyage in which she was engaged and the voyages which she might further make during the season thereafter. Such a rule would keep the vessel afloat after her destruction, and credit her with fish in the sea apprehended only in expectation. It is sustained by no known rule of law, or by no recognized authority. The libelants seek to strengthen their position by the fact that the outfit, bearing in value so considerable a ratio to the vessel, was saved, and that it was rendered useless for the balance of the season. But such a principle is not applied in ordinary cases of collision. The fact that some of the necessary implements for operating the vessel were saved would not authorize the court to give damages for the total loss of the vessel and also demurrage for a loss of use. Interest from the time of the injury takes the place of the value of the use of the vessel and whatever was damaged in connection therewith. Therefore the report of the commissioner is modified to the extent of disallowing whatever was found for loss of probable catch, and substituting therefor the value of the 33 barrels of fish, at the price per barrel as found by the commissioner, with interest on the amount of damages from the time of the collision.

FOSTER v. PREFERRED ACCIDENT INS. CO.

(Circuit Court, E. D. Pennsylvania. November 6, 1903.)

No. 10.

1. LIFE INSURANCE—VALIDITY OF CONTRACT—INSURABLE INTEREST OF BENEFICIARY.

A person may effect insurance on his own life in good faith, paying the premiums therefor himself, and have the policy made payable to any beneficiary he chooses, and in such case the company cannot set up the want of insurable interest of the beneficiary to defeat the policy.

2. SAME—ESTOPPEL TO PLEAD DEFENSE.

A life insurance company is estopped to set up the want of insurable interest of the beneficiary in a policy taken out and maintained by the insured, although it contained a clause that "all claims under this policy shall be subject to proof of interest" where the company had knowledge of such lack of insurable interest from the beginning, the beneficiary being described in the policy as the "friend" of the insured, but issued the policy, and continued to receive the renewal premiums thereon without objection.

At Law. On motion by defendant for judgment on reserved point notwithstanding the verdict.

¶ 1. See Insurance, vol. 28, Cent. Dig. § 138.

Melick, Potter & Dechert, for plaintiff.
Richard C. Dale, for defendant.

J. B. McPHERSON, District Judge. This is a suit upon a policy of accident insurance taken out in August, 1900, by Charles S. Partridge, whereby the defendant promised, inter alia, to pay $2,500 to "Mrs. Mary G. Foster, friend," if the insured should die as the result of an accident. Upon this policy the insured paid nine quarterly premiums, and died from accident on September 8, 1902. The defense is the beneficiary's want of insurable interest, and upon that point the undisputed facts are as follows:

The insured was an attorney at law, and resided in Florida, where Mrs. Foster also had her residence until she removed to Philadelphia not long ago. He came to live with her family when he was 18 years old, received his legal education in the office of her husband, and was considered a member of the family until the day of his death, although there was no relationship, and although he had not been living in the same household with Mrs. Foster for several years before he died. He paid nothing for his boarding during the 10 or 12 years of his actual residence in her house, and was in all respects on the footing of a near and affectionately regarded relative by blood. When he died he owed Mrs. Foster $250, which he had borrowed two or three years before. At the time the policy was taken out, he wrote a letter to Mrs. Foster, of which the following portion refers to the insurance:

"Sanford, Florida, August 13, 1900. My dear Mrs. Foster: I have taken out an accident policy in the sum of $5000.00 in the Preferred Accident Assurance Company of New York City, Capt. Manley of this place Agent, who can give all particulars. I have had the policy made payable to you, so that in case of any accident resulting in death you can collect the money. I do this as my mother is getting old and it would be a burden for her to have it on her mind. I wish you would dispose of the money in case anything should happen as follows: Send my mother $2000, take $2000 for yourself and the other thousand use to pay any debts etc. that may come up. Whatever of the balance there might remain from the $1000 you are also to keep. I think that makes the insurance matter plain."

Mrs. Foster had nothing to do with taking out the policy, and paid none of the premiums.

Whether these facts would have supported a policy taken out and maintained by Mrs. Foster on the life of the insured may admit of question. I express no opinion upon this subject, nor upon another possible question, namely, whether the testimony should have been submitted to the jury to determine the good faith of the transaction, its freedom from the element of speculation. The defendant did not ask that the case should be passed upon by the jury. On the contrary, the good faith of the parties was not disputed, the sole defense being that the beneficiary had shown no insurable interest whatever, and that the court should so declare as matter of law. The defendant's argument is that it makes no difference what the form of the transaction may be—whether the policy be taken out by the insured himself or by the beneficiary; in either case the result is that the beneficiary has acquired an interest in the contract and in the life of the insured, and therefore that public policy denies to the plaintiff the right to re-

cover, unless her interest is shown to be such as is recognized by the law as insurable. It is undoubtedly true that during the discussion and development of the doctrine of insurable interest the courts have used language which supports this argument. For example, in Gilbert v. Moose's Adm'rs, 104 Pa. 74, 49 Am. Rep. 570, the Supreme Court of Pennsylvania declared:

"As a beneficiary merely, having no interest in the life, it seems to us very clear that he [referring to a stranger in blood, in whose favor the policy was issued] could lawfully have no interest in the policy; for if we admit the contrary, if we admit that one may insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wagering policies goes by the board. The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured."

The Supreme Court of the United States has also used similar language in several cases, of which Crotty v. Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, is an example. It is there said:

"It is the settled law of this court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced. Cammack v. Lewis, 15 Wall. 643 [21 L. Ed. 244], in which a policy of $3,000 taken out to secure a debt of $70, was declared 'a sheer wagering policy.' Connecticut Mutual Life Insurance Co. v. Schaefer, 94 U. S. 457, 461 [24 L. Ed. 251], in which it was said: 'In cases where the insurance is effected merely by way of indemnity—as where a creditor insures the life of his debtor for the purpose of securing his debt—the amount of insurable interest is the amount of the debt.' Warnock v. Davis, 104 U. S. 775 [26 L. Ed. 924]."

Upon the other hand, both these courts have distinctly declared otherwise in words that are quite as clear. Thus, in Connecticut Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, it is said:

"There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend. * * * The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."

So, in Ins. Co. v. Robertshaw, 26 Pa. 189, Mr. Justice Sharswood used the following language:

"For myself, I can see no good reason why a man having an insurable interest may not insure it, and present the policy as a gift to a friend; and, if such an agreement to give be made at the very time of the contract, why may not the policy be made at once in the name of the donee, the whole transaction being bona fide, no fraud on the company intended?"

In Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192, the court said:

"Can there be a doubt that he intended the policy for his friend when he made the application? Had it been made so in form, had he instructed the company to make the loss payable to John F. Scott in case of his death, the transaction would have been perfectly legal, and open to no objection as a wagering policy. The validity of such policies has never been doubted."

In Carpenter v. Ins. Co., 161 Pa. 15, 28 Atl. 944, 23 L. R. A. 571, 41 Am. St. Rep. 880, the point decided in Gilbert v. Moose's Adm'rs, supra, is declared to be this:

"Can one having no interest in the life of the insured, for the purpose of speculation only, acquire, by assignment or otherwise, such title to the policy as the law will enforce?"

In none of these cases was the point decided that is now presented, and the dicta on the one side may be fairly held to balance the dicta on the other. But there is a line of decisions which deal with the precise question now before the court. That question is whether, in a suit on a policy that was taken out and maintained by the insured on his own life, but in favor of a third person as beneficiary, the company may set up the beneficiary's want of insurable interest? Or, to state it in another form, the question is not to whom does the money properly belong—to the estate of the insured or to the beneficiary? but, should the company be allowed to raise that point? The courts of numerous states have upheld either the complete validity of such a policy, or, at all events, its validity against the company, who will not be permitted to set up the beneficiary's want of insurable interest. In Campbell v. Ins. Co., 98 Mass. 381, where the policy was in favor of a sister-in-law, the court said:

"The policy in this case is upon the life of Andrew Campbell. It was made upon his application. It issued to him as 'the assured.' The premium was paid by him, and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. The contract (so long as it remains executory), the interest by which it is supported, and the relation of membership, all continue the same as if no such clause were inserted. It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured. The defendants raise no question as to her right to bring this action if the policy can be supported for her benefit."

In Provident Life Co. v. Baum, 29 Ind. 236, where the policy was in favor of a brother, the trial court ruled that it was wholly immaterial whether the beneficiary had any interest of a pecuniary nature in the life of the insured. This instruction was held to be correct, the Supreme Court saying:

"It cannot be questioned that a person has an insurable interest in his own life, and that he may effect such insurance and appoint any one to receive the money in case of his death during the existence of such a policy. It is not for the insurance company, after executing such a policy, and agreeing to the appointment so made, to question the right of such appointee to maintain the action."

A similar question was decided by the Supreme Court of Illinois in Benefit Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558. Blue was the beneficiary, and the association pleaded, in answer to his suit upon the policy, that he was not a creditor of the insured, had no pecuniary interest in his life, and no well-founded expectation of pecuniary advantage to be derived from his continuing to live. Upon demurrer, the plea was held to be insufficient, because the insured "had a clear right to procure a policy on his life, and, unless some principle of public policy is violated, he could make it payable in case of death to any person whom he might desire." In Heinlein v. Ins. Co, 101 Mich. 254, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409, the court refer with approval to section 112 of May on Insurance, in which the author states the law to be that, if the per-

son whose life is insured pays the premiums, there can be no doubt as to the validity of the policy, even if the beneficiary has no interest, since the insured's own interest supports the policy. The Supreme Court of Vermont has taken the same view of the question in Fairchild v. Life Ass'n, 51 Vt. 624. The plaintiff had no insurable interest in the life of the decedent, but this was held to be unimportant, as the policy had been taken out and maintained by the insured, although made payable to the plaintiff. The court quoted with approval from Provident Life Co. v. Baum, supra, and added, "Nor can the insurer set up as a defense to an action brought upon such a policy by or for the benefit of the beneficiary * * * a want of insurable interest in the plaintiff." The New York Court of Appeals is of the same opinion: "If the contract is with the party whose life is insured, he may make the loss payable to his own representatives, or to his assignee or appointee." Rawls v. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280. And in Connecticut, where a policy was payable to the insured's affianced wife, the court said:

"Surely [the deceased] had an insurable interest in his own life, and he obtained the insurance on it; and we know of no law to prevent him from making the policy payable, in case of his death, to the person to whom he was affianced." Lemon v. Ins. Co., 38 Conn. 294

In Pennsylvania the dictum heretofore quoted from Scott v. Dickson has been twice repeated with approval (Hill v. United Ins. Ass'n, 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807; Masonic Ass'n v. Jones, 154 Pa. 105, 26 Atl. 253), and in Overbeck v. Overbeck, 155 Pa. 5, 25 Atl. 646, the point was finally decided. In Texas, where the doctrine of insurable interest is peculiar, it nevertheless agrees in this respect with the decisions just referred to:

"If the company has issued a policy upon the life of a person, payable to one who has no insurable interest in the life insured, * * * the insurance company must, nevertheless, pay the full amount of the policy, if otherwise liable, because it has so contracted; and it is no concern of the insurer as to who gets the proceeds." Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107.

In other states the same opinion is held, as will be seen by referring to the cases collected in the notes to section 112 of May on Insurance (4th Ed.) and to 3 Amer. & Eng. Enc. of Law (2d Ed.) pp. 958, 959, and notes. The doctrine is an exception to the general rule that an insurable interest must exist in order to qualify one to be a beneficiary under a life policy, but, so far as I know, it is maintained in the state courts wherever the question has arisen.

In the federal courts, also, the same view is taken. It was said by Judge (now Mr. Justice) Brown, in Langdon v. Ins. Co. (C. C.) 14 Fed. 272:

"But there is no case, to my knowledge, which holds that a party may not insure his own life, and make the policy payable to any one he may select, though such person may have no legal interest in his life."

Accordingly he sustained a recovery on a policy made payable to a brother-in-law, with no insurable interest. This case was succeeded

by Lamont v. Grand Lodge (C. C.) 31 Fed. 177, in which Judge Shiras, of the Northern District of Iowa, takes a similar position:

"A person has an insurable interest in his own life, and a policy issued thereon is his property, and by will or any other proper mode he can designate the person to whom, at his death, the proceeds of the policy shall be paid; and the right of a person to thus provide for the future of another cannot be questioned. Public policy requires that a person having no insurable interest in the life of another shall not be permitted to speculate on such life, and thereby become interested in its early termination; but public policy does not forbid a person from in good faith making provision for the future of another in whom he may be interested, even though the latter may not have an insurable interest in his life. If this were not so, then a person would be debarred from giving a legacy or bequest by will to one who had not an insurable interest in his life, because thereby the legatee would become interested in his early death. To prevent the evils resulting from allowing persons having no interest in prolonging the life of another to speculate on such life, the rule is adopted that one having no insurable interest in the life of another shall not be permitted to contract, either directly or indirectly, for the payment of a sum upon the death of the other; but it has never been held that public policy forbids a person from insuring his own life, and by will or otherwise controlling the disposition of the proceeds of the policy. In such case the beneficiary has no part in the contract of insurance, and has no control over it."

A decision to the same effect is Ingersoll v. Knights of Golden Rule (C. C.) 47 Fed. 272, where insurance by the deceased on his own life for the benefit of a brother was said to be "clearly authorized." So, also, in Robinson v. United States Accident Ins. Society (C. C.) 68 Fed. 825, recovery was permitted upon an accident policy that was taken out for the benefit of a stranger, and several of the foregoing cases were referred to with approval. In the same volume, at page 873, 16 C. C. A, 51, is the report of Ins. Co. v. Barr, in which the Court of Appeals for the Eighth Circuit adopts the same view:

"The insurance was obtained by the deceased on his own life, obviously for his own benefit. He had the right to designate the person to whom the indemnity should be paid in case of an injury resulting in death, and, having done so, and the company having agreed to pay the indemnity to the person thus designated, it cannot now insist that such person shall prove an insurable interest in the life of the deceased as a condition precedent to recovery."

The precise question did not arise in Kentucky Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42, a case before the Court of Appeals for the Sixth Circuit; but the disposition of the court can be readily detected, I think, from the discussion on pages 101 and 102. The most recent case in the federal courts of which I have knowledge is Fidelity Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193, in which the Court of Appeals for the Fifth Circuit supported a policy taken out in favor of a brother, and went so far as to say that in such a case "it is immaterial what arrangement is made between them for the payment of the premiums."

In the face of these citations, it is impossible, I think, to give much weight to such general expressions to the contrary as may be found here and there among the earlier contributions to the discussion. They are all dicta, and whenever the question has come to be argued, considered, and decided, the decision has been without exception, so far as I know, in favor of the beneficiary. Swick v. Ins. Co., Fed. Cas. No. 13,692, which is sometimes cited as an opposing

decision, was a case where the policy was assigned, and therefore presents a different question, although the case does contain the dictum, that "no life policy is valid if taken for the benefit of a person who has no insurable interest in the risk." Moreover, if the question were of the first impression, I should incline to sustain the policy. In many instances a beneficiary does not know that the policy is in his favor, and where this is the fact no temptation from this source can arise to put an end to the life insured, nor does the beneficiary suffer any moral decadence because the passion of cupidity and of speculative gain has been aroused. But, obviously, the knowledge or ignorance of the beneficiary on this point could not be safely made the test of his interest; otherwise it would be in the power of any person to destroy his interest at any moment merely by communicating the fact that the policy was drawn in his favor. But the principal reason, as it seems to me, for holding such a policy to be unobjectionable, is the fact that the insured retains control of the contract. He pays the premiums year by year, or at the appointed time, and it is therefore in his power to bring the contract to an end whenever he may desire. If he permits the policy to lapse, he defeats at once the interest of the beneficiary, and he may do this at pleasure. For these reasons, and also in reliance on the unbroken line of the decisions, I am of opinion that an insurable interest was not necessary to enable the plaintiff to recover upon the policy in suit.

Nor is this conclusion affected by the further argument that, whatever the general rule of law may be, the policy in suit contains a provision under which the company may successfully set up the plaintiff's want of insurable interest. That provision is this: "All claims under this policy shall be subject to proof of interest." As it seems to me, the company is estopped from taking advantage of this provision. Whatever effect it may have in a case where the company has no knowledge of the lack of insurable interest upon the part of the beneficiary until after the death of the insured, it cannot be held to be available where such lack of interest was communicated to the company at the time the insurance was taken out, and where the company has received renewal premiums with continued knowledge of the fact. In such a case all the elements of estoppel by conduct are present. The company had timely knowledge of the fact of which it now desires to take advantage, but, without interposing any objection, either when the policy was issued, or afterwards as it came to be renewed, put the insured in a worse position by taking and retaining his money under the guise of a contract which it must have had no real intention to fulfill. The company was under a duty to speak if it meant to insist upon the provision, and therefore, having misled the insured by its silence, and by receiving his money, it must be held to have waived the proof of interest on the part of the beneficiary. To my mind it is so clear that the company is estopped from setting up this defense that further discussion of the subject seems to be unnecessary.

The defendant's motion for judgment notwithstanding the verdict is therefore refused. (Exception to defendant.)

BADISCHE ANILIN & SODA FABRIK v. A. KLIPSTEIN & CO. et al.

(Circuit Court, S. D. New York. October 12, 1903.)

1. FOREIGN CORPORATION—PROOF OF INCORPORATION.
The testimony of lawyers of a foreign country that certain acts, documents, and records proved had the effect of creating complainant a corporation under the laws of such country is sufficient, prima facie, to establish the corporate character of complainant; and the court will not undertake to construe the statutory law of such country for itself, and therefrom to determine that such testimony is incorrect.

2. PATENTS—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR DECISION.
When a patent has once been sustained by an appellate court, a subordinate court, dealing with the same patent subsequently, inquires first whether the second record contains anything not before the appellate court, and, if it finds something new, inquires next whether the new matter is of such a character that it may fairly be supposed that the appellate court would have reached a different conclusion, had it been advised of its existence. The authority of its decision is not limited to the facts and defenses discussed in its opinion, but extends to all that were before it in the record.

3. SAME—PRIOR USE—DATE OF INVENTION IN FOREIGN COUNTRY.
As against an infringer, the patentee in a United States patent for an invention previously made by him and patented in a foreign country may, to avoid alleged use in this country before the date of the foreign patent, show the date of the application for the foreign patent, for the purpose of showing the actual date of his invention.

4. SAME—CONTEMPORANEOUS APPLICATIONS—GENERIC AND SPECIFIC CLAIMS.
An inventor has the right, by contemporaneous applications, to a generic and specific patents; and, when he has thus applied, he does not lose the right to his generic patent because one or more of the specific patents may happen to be issued first. Nor does he lose such right by the subsequent filing of an amended or new application changing the specification of the generic invention, where the patent is still sought for the substance of the invention as originally claimed.

5. SAME—PROOF OF INFRINGEMENT—SALE BY CORPORATION.
Proof of the sale of an infringing article at the place of business of a corporation by one there found apparently engaged in his ordinary occupation as salesman, and who gives appropriate instructions as to the method of use of the article, is prima facie proof of infringement by the corporation.

6. SAME—SALE TO COMPLAINANT'S AGENT.
The sale of an infringing article to an agent of the owner of the patent, while it may not afford a basis for the recovery of damages or profits, constitutes an infringement, which entitles such owner to an injunction; and where two such sales are proved, made at different times from a stock on hand, the seller apparently supposing that the purchaser was buying in the regular course of business, it is sufficient to support an inference that other similar sales were made, and to warrant a decree for an accounting, in the absence of any evidence to contradict or explain the transactions.

7. SAME—INFRINGEMENT OF PATENT FOR CHEMICAL COMPOUND—PROOF OF IDENTITY.
Where a competent expert has analyzed an alleged infringing chemical compound, applying the tests given in the specification of the patent, as well as others, and testifies, as a result of such analysis, that the compound is that of the patent, such evidence is sufficient, prima facie, to prove infringement.

8. SAME—VALIDITY AND INFRINGEMENT—DYESTUFF.
The Julius patent, No. 524,254, for an unsulphonated water-soluble safranine azo naphthol dyestuff, considered, and *held* valid as against the

defenses of anticipation by prior patents and publications, prior use, and insufficiency of description; also *held* infringed as to claims 1, 2, and 4.

In Equity. Final hearing on pleadings and proofs. The suit is for infringement of United States letters patent 524,254, August 7, 1894 (application filed April 1, 1893), to Paul Julius, assignor to complainant, for safranine azo naphthol lake. Patented in England, No. 4,543; issued January 2, 1892, on an application of March 13, 1891.

Gifford & Bull, for complainant.

Forbes & Haviland, for defendants.

LACOMBE, Circuit Judge. Defendants object to the maintenance of the suit on the ground that there is "no proof of the incorporation of the complainant, and therefore of its capacity to sue." Counsel for complainant contends that such objection can be raised only by a special plea in abatement or bar. This question of practice need not be passed upon, since upon the record the incorporation of complainant is proved. A corporation is an artificial person. Its birth is regulated by the laws of the sovereignty which permits it to be created. What acts of private and official persons, what documents and records, shall operate to create a corporation, are settled by the laws—usually by the statute laws—of the state which fathers it. No one can tell whether or not a corporation has been created unless he be familiar with the law of such state. One familiar with such law can easily determine the question. When the question of incorporation is raised, touching an alleged foreign corporation, the inquiry calls for proof of the law of a foreign country. The nature of such proof was discussed by the Court of Appeals in this Circuit in Herbst v. S. S. Asiatic Prince, 108 Fed. 289, 47 C. C. A. 328, from which the following excerpt is taken:

"The law of a foreign county [is] proved here by calling its lawyers * * * and interrogating them. That has been done in this case, with a result which certainly warrants the conclusion that the proof is overwhelmingly the one way. It is true that as to the law of Brazil the only witness called by the claimant was a young lawyer, but his statements are direct, positive, and reiterated, * * * and there is no reason apparent why his statements should not be accepted."

In the case of The Asiatic Prince, the law sought to be proved was contrary to that prevailing in all other maritime countries. The court proceeds:

"There was abundant opportunity to take the testimony of some other lawyer, * * * if the statements of claimant's witness were inaccurate; * * * but libelant has contented himself with printing copious excerpts from the statute law of Brazil, which he insists do not sustain the witness' statement. * * * Such a method of criticising the testimony of a foreign lawyer as to the law which prevails in his country is unpersuasive. There is much more than the text of a statutory enactment to be considered. Departmental regulations, administrative construction, judicial exposition, are often quite as important. The text of the act of Congress of February 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], might well convey to a jurist in some foreign country a different meaning from that which it conveys to a lawyer here, who is familiar with Holy Trinity Church v. U. S., 143 U. S. 457 [12 Sup. Ct. 511, 36 L. Ed. 226]."

In the case at bar the law for the introduction of the General German Commercial Code into the grand duchy of Baden, and a part of said Code, are set forth. Exemplified or sworn copies are also produced of the articles of association of the complainant company, of a certain request by such company for entry in the commercial register at Mannheim, and of two entries in such register—one relative to the organization of the company, and the other to an extension of its term. Two German lawyers, duly qualified as experts, were sworn on behalf of the complainant, and testified that such acts, documents, and records, under the German law, were competent to make of the associates a corporation for an unlimited period, with capacity to sue and to be sued. This is certainly prima facie evidence of incorporation, and, in the absence of any evidence to the contrary (no expert in German law was called by defendants), must be taken as conclusive. The brief submitted on behalf of defendants contains an elaborate and ingenious analysis of the German law, but it is not proof of what that law is, under the decision in The Asiatic Prince, supra.

The patent sued upon was before this court in Badische Anilin v. Kalle (C. C.) 94 Fed. 163. It was sustained in all particulars, and infringement found of claims 1, 2, and 4, the same involved here. The Kalle Case was appealed to the Court of Appeals in this circuit, and the decision below was affirmed. 104 Fed. 802, 44 C. C. A. 201. According to well-settled practice, the earlier decision in this court is to be followed here, and the decision of the Court of Appeals is, of course, controlling upon this court. The Kalle Case was vigorously contested by counsel of great ability and large experience. The record presented was elaborate and of great length; a large mass of documentary evidence, patents, and publications was put in; and 11 experts testified on behalf of the defendants. The briefs submitted were exhaustive and highly technical, the oral arguments in both courts were extended far beyond the usual time allowance, and the opinions of both courts are exceptionally long and elaborate. Decision under such circumstances means something, and the first question presented here is precisely what it does mean. Defendants advance the proposition, which no one will dispute, that, since the judgment of a court is founded on facts, it is authority only as to the facts upon which it is founded. But defendants' counsel go further, and insist that it must be taken that those facts are such only as are found stated in the opinion. If the important distinction between fundamental facts and facts which are merely probative be carefully observed, this proposition, also, might be conceded; but they seem to ignore all such distinction, and to contend that, as to every individual, specific fact of which the record affords proof, but which is not found restated as a fact in the opinion, the court before whom similar issues are again presented may treat it as new, in the sense that it has not been passed upon by the court which first tried the issue. To illustrate: If, in a suit upon a patent, 17 alleged anticipating patents are set up, and the court, in its opinion, discusses only 2 of them, which it thinks most nearly approach the invention of the plaintiff, another court dealing with the same patent is not to assume that the first court considered the other 15 alleged anticipating patents, nor that it held

that they neither anticipated nor narrowed the field of invention too much to leave room for plaintiff's device to stand. Such a practice would make patent litigation interminable, and would be intolerable alike to litigants, to the bar, and to the courts. The rule is well settled that, when a patent has once been sustained by an appellate court, a subordinate court, dealing with the same patent subsequently, inquires first whether the second record contains anything not before the appellate court (whether mentioned in its opinion or not), and, if it finds something new, inquires next whether the new matter is of such a character that it may fairly be supposed that the appellate court would have reached a different conclusion, had it been advised of its existence. It is unfortunate that defendants have failed to appreciate this rule. Counsel have given a great amount of time, thought, and labor to the preparation of an elaborate and highly technical brief and argument, the greater part of which might be most helpful on a motion for reargument of the Kalle Case, but which, to a court situated as this is, is necessarily unpersuasive and to be disregarded.

It is unnecessary here to set forth the patent, or to discuss the invention to which Julius made claim. The specifications have been most fully quoted from and the prior state of the art set forth in the opinions in the Kalle Case. It is to be assumed that no one will undertake to read this opinion who has not familiarized himself with the earlier ones. It will be sufficient, therefore, to take up the subject where the Kalle Case left it, and see whether there is any new evidence as to anticipation or the prior art, and what such evidence amounts to. In the Kalle Case it was held that Julius was the first to give to the public a safranine azo naphthol, which, although unsulphonated, was soluble in water. That record contained prior patents and publications which disclosed unsulphonated safranine azo naphthol, and set forth formulas for producing it. The literature of the art, however, whenever it made a statement as to such characteristic, referred to it as insoluble in water. Some of the earlier publications made no such statement (i. e., as to whether or not it was water-soluble), but their statements of formulas lacked definiteness. As to one or more ingredients, in the language of the court, they "left a blank," which the art, so far as set forth in literature, did not tell any one how to fill so as to get a soluble product. There was much testimony as to the theories, experiments, and practice of foreign chemists and dyemakers, all of which the court held, under section 4923, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3396], was not to be taken into account. It was shown as to some of these imperfect formulas, that, "if the blank be filled with a certain quantity of caustic soda, * * * the result will be water-soluble safranine azo naphthol; but, if the blank be filled with a certain larger quantity of caustic soda, the result will be water-insoluble safranine azo naphthol." The Court of Appeals held that to defeat the patent by reference to what had taken place in a foreign county—in other words, by showing that the art had information which would instruct the experimenter to "fill the blank" as Julius filled it—"reference must be made, not to the individual experiences of foreign dyestuff makers, nor to the un-

published theories of foreign chemists, but to the literature of the art —to the 'description in a printed publication' which the statute calls for." In view of this decision, such new testimony as deals with the unpublished theories, experiences, experiments, or practice of foreign experts should be disregarded. As to prior literature, not in evidence in the Kalle Case, each patent or publication may be separately examined.

Agenda 1890 Article.

This was in the Kalle Case. It was quoted in the opinion, and found inapplicable because it dealt with formation of color on the fiber. It now appears that the concluding part of the Agenda article was not in evidence in the Kalle Case. It reads as follows:

"Brick reds may be obtained by treating the reds obtained from paranitraniline and from beta naphthylamine with a boiling bath of sulphate of copper, 2 grammes to the liter. By printing the thickened diazo derivative on the tissue prepared with naphthol and caustic soda, grounds with whites may be obtained. Similarly one may make reserves by printing upon the tissue prepared with naphthol and caustic soda a gum color containing 600 to 800 grammes of tin salts, and then padding with the diazo solution; now wash and dry."

Certainly there is nothing here at all calculated to modify the decision of the Court of Appeals as to the nonapplicability of this publication.

Abel's British Patent of 1887.

This is too long to quote. All that is claimed for it in the testimony and briefs is that it showed the use of acetate of soda in forming azo colors in substance, and is an "instance of the common practice to try the solubility of azo colors in acid."

Allen, Commercial Organic Analysis (1889)

This is not at the page given in the manuscript index, nor have I been able to find it. It is unnecessary to give any further time to it, since it is not referred to in the briefs of any of the counsel, nor indexed under the head "Anticipation by Literature," in the printed index, presumably because of its unimportance.

Berichte, 15th Year (1882).

The part of this article which is deemed important is quoted in defendants' brief as follows:

"An acid solution of diazotized xylidine and aqueous solution of resorcine do not react upon each other even after standing for days. The reaction begins instantly, however, as soon as some caustic or carbonated alkali is added to the liquid," etc.

It is suggested that, according to this writer, caustic alkali and corbonated alkali are treated as known equivalents in the making of an azo phenol, to wit, xylidine azo resorcine, and a more advantageous result is obtained if sodium acetate be used instead of caustic alkali. Complainant contends that this publication has no relation to safranine azo naphthol, because resorcine is more analogous to the group of sulphonated naphthols. But conceding for this article what defendants claim, it does not change the situation. The Court of Ap-

peals, in the Kalle Case, held that it was known before Julius that "alkalinity might be produced by caustic soda or by carbonate of soda," but this 15th Berichte is as barren as was the literature before that court of any information as to the quantity of either which should be used to secure a water-soluble product. It fails to fill the blank, and, that being so, it cannot be assumed that its presentation to the Court of Appeals in the Kalle Case would have led to a different conclusion.

Berichte, 17th Year (1884).

This refers to the production of oxy-azo bodies from phenols and diazo compounds, and shows the equivalency of caustic and corbonated alkalies for the purpose of inducing the reaction. It refers to the improvement which was obtained by substituting sodium acetate for caustic or carbonated alkali. This is substantially like the Berichte 15th, just referred to, and may be similarly disposed of.

Benedikt and Knecht—Chemistry of Coal-Tar Colors (1889).

All that is claimed for the excerpt put in evidence by defendants is that it shows the use of tanno metallic mordant before 1891. It is not apparent that the Court of Appeals supposed it was not known before that date, and the bearing of this evidence upon the question now at issue is not apparent.

The Chemical News (1890).

No expert seems to have testified as to this, but, so far as the court can make out from its text, it refers solely to dyestuffs of the sulpho-acid group, and which the Kalle Case held to be outside the pale of Julius' invention. The article refers only to beta naphthol disulphonic acid, to beta naphthol monosulphonic acid, beta naphthylamine disulphonic acid, and beta naphthylamine monosulphonic acid.

Clark's British Patent of 1884.

The only proposition that it is claimed this reference tends to establish is that the use of acetate of soda in the formation of azo bodies in substance was then known. Such use, however, is mentioned only in connection with two sulpho-acid bodies.

Forel Patent of 1888.

This was introduced by complainant. The only reference to it in defendants' brief shows that no reliance is placed upon it as anticipating or circumscribing the art. The same remarks apply to Wolff patent of 1888, and Greville-Williams patent of 1889.

Faberwerke Two Circulars (1889).

These certainly would not have modified the opinion of the Court of Appeals, for they are expressly headed, "Production of Insoluble Azo Dyes Direct upon the Cotton Fiber"; and, as defendants' expert testifies, although they give a list of several shades, they make no mention of safranine azo naphthol. The same remarks apply to "Organische Farbstoffe," by Mohlan (1890), and to the Textile Colorist article of 1889.

Friedlander Article (1888).

All the pertinence defendants claim for this is that it shows that the cost of azo safranine bodies before 1891 was prohibitive. It relates, moreover, only to the sulpho acids.

German Patent 51,331.

Complainant's expert, on cross-examination, read some excerpts from this patent. After long search, I have been unable to find in the record any statement as to its date. As it is not included in the index to briefs, presumably it is not deemed of much importance.

The Hollidays' United States Patent 241,661 (1881).

This is for same invention as the English Holliday patent 2,757 of 1880, which was in evidence in the Kalle Case.

Hoffman's United States Patent 332,528 of 1885.

This seems to deal solely with the sulpho-acid group.

Kegel's English Provisional No. 13,408 of 1885.

It is not perceived that the excerpt from this which is introduced changed the situation from that made by the introduction of Kegel's French patent for the same invention, which was in the Kalle Case.

Lauber's Handbook (1885).

This is a "Practical Handbook of Cloth Printing." The article, as a whole, and even the excerpts put in by defendant, are too long to quote. It may be noted that the production of dyestuffs, in substance, is an operation quite distinct and separate from cloth printing; also that the heading of that part of the book in which all the passages in proof are contained reads: "Direct Development of Azo Colors on the Fiber." Defendants' contention with regard to this reference is that it is particularly important in the three following respects: First, it gives facts of general interest in the formation of azo dyes; second, it shows the difference between preparing an azo dye in substance, and the production of the same dye on the fiber; third, it describes the production of safranine azo naphthol. The only production of safranine azo naphthol which it describes is Kochlin and Galland's prescription for forming it on the fiber, which was disposed of in the Kalle Case. As to the second proposition, all that the article says is this:

"In the production of azo dyes in the color factory, it is customary to allow the diazo solution to run into the alkaline phenol solution. In the production of the same dyes on the fiber this method is reversed. The cloth, impregnated with the phenol, is run into the diazo solution."

As to the first proposition, it gives prescriptions and practical instructions as to the formation of azo dyes, but they all, so far as the article indicates, refer to formation on the fiber. Besides the caption above quoted, the article within the four pages quoted by defendants states in so many words that it refers to production "on the fiber" no less than 12 times. It seems entirely clear that, had this article been before the court in the Kalle Case, it would have been disposed

of as was the article from the Agenda, supra. Defendants' expert refers to a single sentence in this article as showing that before Julius the literature of the art had stated that unsulphonated safranine azo naphthol was soluble in water. The sentence reads: "The blue obtained according to Koechlin & Galland with safranine is absolutely not fast." This does not state whether it is "not fast" when tried with water, with soap, or with sunlight; and complainant calls attention to the circumstance that this very sentence was in an edition of Lauber's Handbook published in 1891, which was before the court in the Kalle Case.

Depierre's Treatise (1890).

The date on title page is 1891, but defendants proved publication in 1890. Defendants' brief concedes that "this work gives a description of the Koechlin & Galland prescription for forming safranine azo naphthol," although the book itself does not give these names. As we have already seen, the prescription of these gentlemen related solely to production of the color on the fiber, and there is nothing in the article to indicate a formation of dyestuff in substance. On the contrary, its prescription reads: "One pads first with naphthol and caustic soda bath, containing [certain ingredients]; one dries, then passes * * * through a mixture of the three solutions following," etc. This is the method of dyeing on the fiber, and the Depierre is to be disposed of as was the Agenda reference in the Kalle Case.

Nietzki Article (1883).

This is also referred to as "Berichte, 16th year." It is an article in a publication of the German Chemical Society entitled "On the Dyestuffs of the Safranine Series." Complainant's counsel, in both his briefs, asserts that it was before the court in the Kalle Case, but the manuscript list furnished after the case was submitted does not confirm this assertion, nor does it appear in the index of exhibits in the Kalle record. Complainant also contends that the article relates not to safranine azo naphthol, but merely to diazo safranine. Apparently this contention is not disputed. Defendants' brief admits that this article did not couple the diazotized safranine with naphthol. Be that as it may, what is claimed for the article is that it taught those skilled in the art (1) that the original chlorine atom of commercial safranine is not removed by caustic soda; and (2) that the said atom plays no part in the diazotization of safranine, for which purpose two additional molecules of hydrochloric acid are therefore theoretically necessary. Conceding that such is its teaching, the article certainly does not state that safranine azo naphthol is soluble in water, nor does it give such instructions for filling the blank in existing formulas for its production as would result in a water-soluble product.

Nietzki and Otto in 21st Berichte (1888).

Refers only to tests for safranine.

Poirrier & Rosenstiehl United States Patent 390,327 (1888).

This is for the production of azo colors in substance. Defendants call attention to the fact that it mentions carbonate of soda with both

the sulphonated and unsulphonated naphthols. It is difficult to see upon what theory it would have induced a different conclusion, had it been in the Kalle Case, in view of its statement:

"All the coloring matters described in this specification are soluble in water, with the exception of that from alpha naphthol and from beta naphthol; but, by treating these with sulphuric acid according to known processes, they are obtained in the state of soluble sulpho combinations."

This seems to be in complete accord with what the court in the Kalle Case understood to be the state of the art.

Roussin Patents (1878, 1879).

These are United States patents 210,054, 211,525, 211,671. I have not been able to find testimony of defendants' experts explaining these patents. The first seems to deal with the sulphonated group, for the specification states that the coloring matters sought to be patented are obtained "by the reaction of the diazoic derivative of sulphanilic acid upon the amines," etc. The second, as stated in defendants' brief, deals with "the formation of an azo body on the fiber." Of the third, it is stated that it "shows the coupling of alpha naphthol (but not of beta naphthol) in a nonalkaline bath." The bearing of this fact is not apparent.

Roscoe & Scharlemmer Treatise (1886).

All that is claimed for this is that it shows "that in safranine the chlorine atom is held even against alkalies by a strongly basic group, which can neither be diazotized nor acetylized."

Reissig Patent (1890).

A United States patent (No. 431,541), the relevant parts of which apparently deal only with fluorescence test, which is discussed infra, under the heading of "Infringement."

Stebbins United States Patent 221,114 (1879).

This shows the production of a yellow-brown dyestuff, of which it is stated, "It is not soluble in water, but by converting it into a soda salt or sulpho salt it is rendered soluble in water." Certainly the presence of this patent in the Kalle record would have made no change in the result.

Vancanceine Blue of Holliday (1891).

This is referred to subsequently under the heading of "Alleged Prior Uses."

The following references are apparently not discussed anywhere in the briefs, and, so far as the court has been able to ascertain, not in the expert testimony. They are not given in the index to briefs, and need not be here discussed; each has been examined and appears to be unimportant: Lieberman, Berichte, 16th year (1883); Berichte, 20th year (1887); Witt & Deslichen, Berichte, 21st year (1888); Fehling's Handwortenbuch (1890); Homolka United States patent 418,916 (1890); Richter Organic Chemistry (1885); Textile

Colorist (1884); Villon, Traite Pratique (1890); Weinbourg United States patent 426,345 (1890); Williams United States patent 11,016, reissue (1889).

Subsequently, under the discussion as to alleged prior uses, will be found the reasons for taking the de jure date of the patent as March 13, 1891. That disposes of the following references: Chemical News (1896); Dyer article (1893); Farbenfabriken German patent 95,483 of 1897; Faberzeitung of 1898; Janbert article (1895); Knecht, Rawson & Lowenthal's Manual (1893); Lehne's Faberzeitung (1891; the date is given only as 1891, and defendants have not shown it was published prior to March 13th of that year); Lefevre, Matiers Colorantes (1896); Shultz & Julius Tables of 1894, 1896, and 1897.

Alleged Prior Uses.

In the Kalle Case there was no evidence of any prior use in this country. In the case at bar testimony as to three such uses was taken. Of these the latest in point of time is referred to as the Read Holliday & Sons experiments at their laboratory in Williamsburg. The character and extent of this alleged "use" need not be discussed, since the testimony does not bring it back of June, 1891. The defendants' brief states it "as early as June, 1891, if not before," but there is nothing to show it was earlier than the date given. When the patent was before the Circuit Court, it was held that the de jure date of the invention was January 2, 1892, the date of the English patent. Upon appeal both sides acquiesced in this finding, so the Court of Appeals took that date as marking the boundary between Julius and the prior art. Since the decision of the Circuit Court in the Kalle Case, however, the question of de jure date of an invention previously patented in a foreign country was before the Court of Appeals in the Second Circuit, which held:

"As against an infringer, the patentee in a United States patent for an invention previously made by him and patented in a foreign country may, to avoid alleged use in this country by an infringer, before the date of the foreign patent, show the date of the application for the foreign patent, for the purpose of showing the actual date of his invention in a foreign country." Welsbach Light Co. v. American Incandescent Lamp Co., 98 Fed. 613, 39 C. C. A. 185.

The date of application for Julius' English patent is March 13, 1891, which eliminates this alleged Read Holliday & Sons' use of June, 1891.

The same concern, some time in 1890, had been using a dye which resembled the dyestuff of the patent in suit in some particulars, but there is no proof that it was safranine azo naphthol in any form. Apparently defendants do not rely on this alleged use, for with regard to it their brief contains this statement only:

"Defendants were unable to trace out the anticipation. Whether the evidence is or is not sufficient to show a direct anticipation, it shows that Julius was not the first to make a blue color soluble with hydrochloric acid in order that it might be used to dye on a tanno metallic mordant."

The last proposition, if conceded, would not defeat the patent, and the evidence is wholly insufficient to show an anticipation. One wit-

ness only testified to the transaction, from his unaided memory of 10 years before, and his statements were vague and unpersuasive.

Considerable testimony was taken as to an alleged prior use in 1889 at the Merrimac Printworks, in Lowell, Mass. The experiments testified to were unsatisfactory to those making them, and consequently were abandoned. The dyestuff, moreover, was produced on the fiber—a circumstance which in the Kalle Case was held sufficient to eliminate an alleged anticipating publication which was greatly relied on. But it seems unnecessary to discuss these experiments at any length, since the only reference to them in defendants' brief is that they "tend to show that it is impracticable to make safranine azo naphthol insoluble."

Sufficiency of Description.

It is further contended that the description given in the patent of the manner of carrying the invention into effect is insufficient. The specification calls for safranine T, 7 parts; sodium nitrite, 14 parts; and other ingredients. As shown by the testimony, this prescription, expressed in molecules, is as follows: Safranine T, 1 molecule; sodium nitrite, 10.14 molecules, etc. Nevertheless the specification states that the 14 parts of sodium nitrite amount to one molecular proportion. There is manifest error somewhere. Complainant's expert corrected it by reading 1.4 parts instead of 14 parts of the sodium nitrite; but defendants ask, and not without reason, why, in the state of knowledge of the art when the application was prepared, one should change the figures "14 parts" to "1.4 parts," instead of changing the words "one molecular proportion" to "10 molecular proportions." We need not go into any discussion of possible corrections. It appears by the testimony of both complainant's experts that "if one employs ten molecular proportions of nitrite of soda, instead of one molecular proportion, one still obtains the water-soluble safranine azo naphthol of the patent." There is, of course, more waste, and consequently greater expense; but it cannot be said that the specification, read either way, fails to show one skilled in the art how to make water-soluble safranine azo naphthol.

Julius' American Patents.

It is contended that the patent in suit is void by reason of certain other patents issued to Julius on the same day. These patents are United States Nos. 524,251, 524,252, 524,253; the patent in suit being 524,254, and all four of them issued on August 7, 1894. No. 524,251 contains a single specific claim for the specific indoin blue obtainable from safranine proper and alpha naphthol. No. 524,252 contains a single specific claim for the specific indoin blue obtainable from dimethyl safranine and beta naphthol. No. 524,253 contains a single specific claim for the specific indoin blue obtainable from dimethyl safranine and alpha naphthol. The fourth claim of the patent in suit is for the specific indoin blue obtainable from safranine proper and beta naphthol. The second claim, as already construed, is generic, and covers all these four varieties. As defendants' brief expresses it:

"The distinction between the four patents is based upon the division between safranines proper and substituted safranines, on the one hand, and

between alpha naphthol and beta naphthol, on the other. All four combinations are set out in [the specifications of] each of the four patents; but the first three [patents] are restricted in their several claims to the combinations of the safranines of the first of the two divisions with alpha naphthol, and of safranines of the second division with both alpha and beta naphthols, whereas, the patent in suit, in addition to claiming in claim 4, the combination of safranine proper with beta naphthol, claims in claim 2 the combination of any safranine of either division with naphthol in either of its forms."

Of course, the more logical way would have been to include the genus and its various species in a single patent, avoiding thus what seems to be an unnecessary multiplication of patents. But the rules of the Patent Office do not allow any such simplification, permitting in a single application only a generic claim and one specific claim, and requiring all other specific claims to be each the subject-matter of a different patent. It would be a failure of justice if the patentee of a meritorious invention should be deprived of the fruits of his labors because an arbitrary rule of the Patent Office has brought about complications not contemplated, if authority can be found for securing it to him. Such authority is not wanting in this circuit, where it has been held that an inventor has the right by contemporaneous applications to a generic and specific patents, and that when he has thus applied he shall not lose his generic patent because one of or more of the specific patents may happen to be issued first. Electrical Co. v. Brush Co., 52 Fed. 137, 2 C. C. A. 682; Thomson-Houston Co. v. Elmira Co., 71 Fed. 396, 18 C. C. A. 145; Thomson-Houston Co. v. Hoosick Railway Co., 82 Fed. 461, 27 C. C. A. 419. Julius was careful by cross-references in the documents themselves to indicate the relations of his generic and specific patents.

The defendants, however, contend that the applications for generic and specific patents were not contemporaneous. The facts are as follows: On April 21, 1892, four applications were filed. Of these, Nos. 430,111, 430,112, 430,113 are the ones on which the specific patents were subsequently granted. The history of the other application is this: As will be seen from the Kalle opinion and what has been written supra, the generic invention of Julius was an unsulphonated water-soluble safranine azo naphthol dyestuff—an article not known before to the art, and which was patentable, however it was produced. He also discovered two processes for producing it (both patentably novel), known as the "acid process" and the "washing-out process." Seemingly he first discovered the acid process, for we find it mentioned in his application for the English patent, but no mention of the washing-out process until a later period. Apparently he knew only of the acid process when he filed application No. 430,110, on April 21, 1892, for it says nothing of the other process. In other respects this application conformed substantially to the specification of the patent in suit. It contained a generic claim, and a specific claim for the product of safranine proper and beta naphthol, and a claim for the process. Subsequently becoming acquainted with the washing-out process, he sought to incorporate it, and on March 22, 1893, filed a communication by which the application was "amended by canceling the entire specification, with the exception of the caption and signatures, and substituting therefor" a new specification,

which sets forth both the processes, but still contains the generic claim and the "beta" specific claim. For reasons which are not testified to, but which may readily be conjectured, it was thought better to make a new application, setting forth both processes under the inventor's oath. This was done April 1, 1893. The new application, which is No. 468,691, and on which the patent in suit is issued, sets forth both processes, and contains the generic and the "beta" specific claims. The Supreme Court, in Godfrey v. Eames, 1 Wall. 324, 17 L. Ed. 684, says:

"A change in the specification as filed in the first instance, or the subsequent filing of a new one, whereby a patent is still sought for the substance of the invention as originally claimed, or a part of it, cannot in any wise affect the sufficiency of the original application, or the legal consequences flowing from it. To produce that result, the new or amended specification must be intended to serve as the basis for a distinct and different invention, and one not contemplated by the specification as submitted at the outset."

If the generic claim here is not for the process, but for the new article, however made, which is formed of designated components and responds to designated tests, the later and the earlier applications will be treated as continuous, for the purpose of saving the patent from the effect of an earlier issue of a specific patent. That such is the construction of the claim was held in the Kalle Case.

Infringement.

The proof as to infringement may be next considered. On December 31, 1895, on the employment of the agents in this country of complainant, one Pollman went to the regular place of business of A. Klipstein & Co., and asked for "one pound blue for cotton, the same color what Kalle & Co. sell here under the name Bengaline Navy Blue." He was given one pound cotton navy blue in a can, with instructions for use. On May 9, 1899, Pollman made another purchase, making the same request, and being supplied with another one-pound can of Klipstein's Cotton Navy Blue; a receipted bill being given with the same, but no instructions as to use. The contents of both cans were carefully traced to the hands of complainant's expert. Defendants suggest that long delay in prosecuting should induce the court to disregard the sale in 1895. But it appears that the delay was solely to await final decision in the Kalle Case, which was not only excusable, but commendable. It is objected that there is no proof connecting any of the defendants with this sale. A. Klipstein & Co. is a corporation, and proof of a sale made by a person found in its regular place of business, apparently engaged in his ordinary occupation, and who makes statements as to method of use which are appropriate to the sale of such material, is certainly prima facie evidence of a sale by the corporation. The defendants put in no evidence to controvert Pollman, or repudiate the employment of the persons who sold him the cotton navy blue. Proof of a sale by the corporation is therefore shown, but there is no proof connecting E. C. Klipstein personally with the transaction. He is an officer of the corporation, but, in the absence of specific proof of personal participation in infringement, should not be singled out for a separate decree.

Defendants contend that it is nowhere shown that the A. Klipstein

& Co. from whom the dye was purchased is the A. Klipstein & Co., defendant in the suit. This objection is wholly without merit. It appears from the pleadings that the defendant A. Klipstein & Co. is a corporation doing business in the city of New York, and that E. C. Klipstein is an officer thereof. Pollman bought dyestuff from A. Klipstein & Co., at 122 Pearl street, New York City. Defendants called one Van der Menlen, a clerk, who testified that he was in the employ of A. Klipstein & Co., at 122 Pearl street, New York City. He produced books of his employer, from which he read the market price of safranine for several years prior to 1893. E. C. Klipstein, a defendant, and an officer of defendant company, was shown the same books, and testified to the correctness of the figures given therefrom. To suggest, in the face of this testimony, that there are two corporations or firms named "A. Klipstein & Co." at 122 Pearl street, one of whom sold dyestuff to Pollman, while the other employed Van der Menlen, is absurd.

Defendants further contend that the sales were not infringements of which a court of equity should take notice, because, being made to its agents, it was as though Badische Anilin had bought the cans; that the dyestuff was not sold to a person who intended to dye with it; and that sales to a patentee are licensed sales. A similar objection was overruled by this court in Chicago Pneumatic Co. v. Phila. Tool Co. (C. C.) 118 Fed. 852, where it was held that, although a complainant might not be able to recover damages or profits for such a sale, it was nevertheless an infringement, entitling complainant to injunctive relief. Moreover, when two such sales on different dates are proved, the seller apparently supposing that the purchaser was buying in the regular course of business, and delivering the goods from a stock on hand, and no evidence whatever to contradict or explain is produced by defendant, the facts proved are broad enough to support an inference that other similar sales have been made—sufficiently so to warrant a decree (the evidence on other points being satisfactory) for an accounting as well.

There is no proof as to the process by which the dyestuff sold to Pollman was made. In the Kalle Case, however, both courts held that the patent was for a product, irrespective of the process by which it was made, and found infringement in an article which responded to the tests prescribed in the claims. The same construction should be followed here; but, even if this court were not controlled by the earlier decisions, and were persuaded that infringement could be predicated of a product which responded to those tests only when it was produced by the processes of the patent, the complainant's right to relief, upon the record in this case, would not be affected. The prior discussion in the Kalle Case and in this has resulted in the conclusion that Julius was the first to give to the art an unsulphonated water-soluble safranine azo naphthol, and was the first to point out two ways in which it might be produced. The washing process, only, was discussed at length in the Kalle Case, but the acid process, as well, was held to disclose invention. How a chemical product is made is a question which the maker alone can answer with absolute certainty. All the experts in the world, if they did not

see it made, could testify only to inferences based upon their acquaintance with the literature and practice of the profession. Two ways, and two ways only, to produce the product defined in the claims of the patent, are shown to be known to the art. Its literature has been ransacked. In the Kalle Case and this together nearly a score of experts, many of them men of the highest attainments, not only in the art generally, but also in this branch of it, have been examined and cross-examined, and no process other or different from the two described in the patent has been indicated. Were such other process known, it is unthinkable that in this enormous mass of testimony there should be no hint of its existence. If, then, complainant shows that the product is within the definition and responds to the tests of the claims, and nothing further appears, it is a legitimate, and, in the state of the record, an irresistible, inference that it was produced by one or other of the indicated processes. If defendants have discovered some new process, which they wish to keep as a business secret, a court might not compel them to divulge it, but they could at least show by affirmative proof that some one or more steps (or all the steps) of the processes set forth in the patent had not been followed in the manufacture of the product. In the absence of any such proof, complainant would establish a prima facie case of infringement, even if the process were read into the product claims.

The contents of the two cans purchased by Pollman were submitted to Dr. Henry Morton for chemical analysis. He testified on the direct that he had examined and tested the coloring matter taken from them, and that it substantially consisted of the coloring matter claimed in claims 2 and 4 of the Julius patent in suit; one of the cans, however, containing a mechanical admixture of the dyestuff known as methylene blue. No expert was called by defendants to show that their cotton navy blue dyestuff would not respond to the tests of the patent, or that it was not in fact a water-soluble safranine azo naphthol. They confined themselves to an exhaustive cross-examination of Dr. Morton, in the course of which he set forth in detail the tests by which he satisfied himself that defendants' dyestuff was substantially that of the patent. Briefly stated, these were the tests: (1) He placed a gramme of the dyestuff in 100 grammes of water, with the result of a solution without precipitate. (2) He stirred a few grains of the dyestuff in a little sulphuric acid, whereupon the sulphuric acid assumed a blackish-green color. (3) He took fiber mordanted with tannin and tartar emetic, and introduced it into a solution of the dyestuff. It is unnecessary to give the details. The fiber was first dyed, and then tested by washing in a soap solution, about such as would be used in a laundry. The same piece of fiber was hung up in a window, partly covered, and showed no fading after exposure for several days. (4) He treated another portion of the dyed fiber by zinc dust and acetic acid—a "well-recognized reducing agent"—whereupon the red color of safranine was developed. (5) He treated another portion with caustic soda, and obtained a brown color in solution, which, on addition of a salt of iron, turned black—a result known to chemists as the "tannin reaction." (6) He treated another portion with dilute hydrochloric acid and sulphureted hydro-

gen, securing "the characteristic orange precipitate of sulphide of antimony"—a metal. (7) He treated a portion of the dyestuff itself with zinc dust and acetic acid, thereby obtaining a red color, which, on pushing the reduction, disappeared, but quickly reappeared on exposure of the solution to air. (8) He mixed a small portion of the red liquor from the last test with alcohol, and observed the color by reflected light; the color exhibited being a delicate yellow tint, which he says is a fluorescence characteristic of safranine. (9) He reduced the dyestuff with stannous chloride and hydrochloric acid. The process is too long to quote, but it resulted in a precipitate of a perfectly white color. By observing the behavior of this substance during the operations, and by applying a test of perchloride of iron, he reached the conclusion that it was alpha amido beta naphthol, which is one variety of amido naphthol.

Now, if the three claims of the patent be referred to, it will be seen that the above enumeration includes every test which is set forth therein. The expert was a chemist of high attainments and large experience, fully competent to conduct the various technical processes of the laboratory by which such tests are made. He was cross-examined at great length, and gave the detail of those processes. The court is wholly without the professional knowledge which would enable it to decide whether those processes were conducted in conformity to scientific methods. Upon the borders of the vast wonderland of chemistry it must perforce wait till some one skilled in the intricacies of that science and art appears to lead the way through its labyrinth of terms and symbols. No expert was called by the defendants to show that, in this, that, or the other particular, Dr. Morton's tests were improperly conducted. No expert testified that he had himself applied the tests of the claims to defendants' dyestuff, with some other or different result from that obtained by Dr. Morton. No expert was called to show that the residuum which Dr. Morton satisfied himself was amido naphthol was really something else, or that the residuum which he satisfied himself was safranine was not safranine at all. An elaborate and highly technical argument is presented in the briefs, directed to prove this; but, beyond merely elementary propositions, the court cannot take its chemistry from counsel. The obscure actions and reactions of chemical processes require for their comprehension the study and investigation which qualify the expert, and the expert's statement should be given as other evidence is, with full opportunity for cross-examination. It is contended that, upon Dr. Morton's own showing, he did not sufficiently establish that the red color (see test 7, supra) was safranine. It is insisted that safranine is not the only substance with a disappearing and reappearing red color. The witness, it is true, admitted that there are many coloring matters of various shades which lose color on reduction and regain it on oxidation; but he added that, so far as he knew, "safranine is the only color which can be obtained from a blue dyestuff, which on gradual reduction first becomes red, then colorless, recovering its color on exposure to the air." It may be admitted that probably there were dyestuffs or colors in the world which the witness had never seen or heard of, but, when a competent expert witness has given such testi-

mony as is above quoted, the identity of the red color of the test with safranine is made out prima facie. If there are other colors which will give the same results, it is for the other side to show some reference to them in the literature, the experiments, or the practice of the art. The complainant is not required to eliminate by affirmative proof every other substance in the universe. Moreover, the witness applied an independent test (the fluorescence test, No. 8, supra) which indicated that the red color was safranine, as to which test there was no cross-examination. The only criticism which the brief makes on this test is found in a dozen lines. It is asserted that Dr. Morton did not lay any stress on it, and that it is not recited in the patent. Dr. Morton did assert that the delicate yellow tint displayed was characteristic of safranine, and the fact that the patent does not mention it is immaterial. What the patent says is that upon a certain reduction "a safranine is produced." How the experimenter shall establish the fact that the residuum produced by such reduction is a safranine, the patent does not undertake to provide, and any test approved by skilled experts may therefore be employed. Two other facts are mentioned in the brief: That naphthalene red dissolves very readily in alcohol, with a bluish-red coloration, the dilute solution exhibiting a magnificent cinnabar red fluorescence, and that the ethereal solution of Reissig's red-colored bases exhibits a yellow fluorescence. It is not perceived in what way these facts affect the conclusions which Dr. Morton drew from his fluorescence test. If he had never made the disappearing color test at all, it would seem that the identity of safranine was sufficiently established by this fluorescence test. There is no controverting evidence whatsoever in the record. The court feels entirely confident that defendants' dyestuff is the dyestuff of the patent. If it were not, complainant's prima facie case as to infringement might have been utterly demolished in a dozen pages of affirmative proof. The circumstance that defendants have chosen instead to devote their energies, at great cost of time and labor, to elaborate and refined criticisms of complainant's proof, is persuasive to the conclusion that it was the only thing they could do.

Under the authority of the Kalle Case, the sale of the dyestuff of claims 2 and 4, with instructions such as were furnished to Pollman on the occasion of his first purchase, constitutes an infringement of claim 1.

Complainant may take the usual decree for injunction and accounting as to claims 1, 2, and 4.

THE HARTFORD.
THE MANHATTAN.

(District Court, S. D. New York. October 30, 1903.)

1. COLLISION—STATE RULES FOR EAST RIVER NOT AFFECTED BY NATIONAL PILOT RULES.

The state statute requiring vessels navigating the East river to keep near the middle of the river is not changed or superseded by the pilot rules established by Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2876].

2. SAME—STEAMSHIP AND TOW—FAILURE OF TUG TO KEEP IN MIDDLE OF EAST RIVER.

A tug with a tow held in fault for a collision between her tow and a steamship in East river on the ground that she was near the side of the river without necessity, and in violation of the statutory rule requiring all vessels to keep near the middle, and also for her failure to have a lookout.

3. SAME—LIGHTS—EVIDENCE CONSIDERED.

Conflicting testimony examined, and *held* to clear a steamship from the charge of fault in not observing a meeting tug with a tow in East river, in the night, in time to avoid collision with her tow, on the ground that the tug's side lights were not burning.

In Admiralty. Suit for collision.

Carpenter & Park, for libelants and the claimant of the Manhattan.
Wilcox & Green, for claimant of the Hartford.

ADAMS, District Judge. This action arose out of a collision between the libellants' barge American Eagle and the steamboat Hartford, which happened on the 17th of May, 1902, a little after 8 o'clock p. m. in the vicinity of the Brooklyn Bridge. The barge, in tow, on a hawser of about 20 fathoms, of the steam lighter Manhattan, in company with another vessel alongside of her, was proceeding to the westward and the Hartford was going, under her own steam, from old pier 24, East River, to Hartford, Connecticut. The night was dark but clear and the tide the strength of the ebb. The effect of the collision was to overturn the barge, causing the loss of her deck load of iron and the effects of the crew. The action was brought against the Hartford and the Manhattan was brought in by petition.

The collision occurred on the Brooklyn side of the river, where, on account of the ebb tide, it was necessary for the Hartford to go to get a heading up the river, but there was no necessity for the tow being there. The Manhattan was out of her proper place in the river and this was a fault on her part for which she must be held. The A. Demarest (D. C.) 25 Fed. 921; Brooklyn Ferry Co. v. United States (D. C.) 122 Fed. 696, 703.

The rule requiring vessels to keep in the middle of the East River established by state statute has not been changed by the pilot rules by Act Cong. approved June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2876], the object of the local rule being to keep vessels away from the vicinity of the piers, in order that vessels properly using the wharves, shall not be imperiled by vessels going up or down the river. The Breakwater v. New York, L. E. & W. R. Co., 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139. And the United States statutory regulations for the prevention of collisions, especially provide (Article 30) that:

"Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters." Act Aug. 19, 1890, c. 802, 26 Stat. 328 [U. S. Comp. St. 1901, p. 2871].

¶ 3. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

The Manhattan was also in fault for not having a lookout.

The determination of the controversy with respect to the alleged fault of the Hartford for not observing the Manhattan and for that reason participating in the collision, turns principally upon the question whether the Manhattan, owned by the libellants, had her side lights set and burning. It was alleged on the part of the Hartford that there were no colored lights visible on the Manhattan, and that those navigating the Hartford were not aware, at first, that the tow was coming down the river but supposed, until the collision was imminent, that it was bound up the river, in the same direction as the Hartford. On the part of the Manhattan, it is alleged that her side lights were properly set and burning.

Of the many witnesses examined on behalf of the Manhattan, but few testify to the lights being set and burning before the collision, viz.: the master of the Manhattan, her deck hand, a boy on board, named Becker, and, possibly, a deck hand of the tug Annan, which was in the neighborhood and took the men off the barge after the collision. All these witnesses testified in court excepting Becker, who was not present but was examined subsequently out of court. Their general testimony is met by the testimony of five witnesses on the Hartford to the effect that they were looking carefully for lights and, while they saw the white lights of the tug and tow, no colored lights were visible. This was not an after thought, because those on the Hartford charged the Manhattan with fault in this respect within five or ten minutes after the collision, when the Manhattan, having gone down the river to pick up the barge, returned alongside the Hartford with her lights then burning. And the answer, filed shortly after the collision, specifically sets forth this alleged fault.

A careful examination of Becker's testimony, particularly the cross-examination, leads me to the conclusion that the witness should not in any respect be relied upon. It has also led me to a careful examination of the minutes of the testimony taken on the trial. When arrangements were made for the examination of the additional witness, it was upon the theory that he was a recently discovered deck hand, who was missing when the trial took place. The witness who was examined out of court, was a boy, who had been described by the master of the Manhattan as a passenger, some friend of the owners, who had just happened to come into the pilot house. Pearson, deck hand of the Manhattan, said that he saw the other deck hand put up the colored lights. The absence of this other deck hand is not sufficiently accounted for. The witness Becker testified that he put them up. He said that he was 16 years old at the time of the collision and getting $25 per month, deck hands' wages, which is, at least, doubtful. He also said he had within about a week of the trial been re-employed by the libellants at that rate of wages. These facts, with some other discordant testimony, discredit all these witnesses, and no testimony remains in support of the lights being set and burning at the time of the collision, excepting, possibly, that of the witness Gabriel, the deck hand of the Annan mentioned. His testimony was not particularly impressive. He appeared to be the only one on the Annan, who was willing to convey the impression

that he saw the lights burning at the time of the collision. He testified, on cross-examination, that he saw the lights when the Annan crossed the Manhattan's bow, which was after the collision, and it is likely that if he actually saw the lights, it was after they were lighted subsequent to the collision.

I am inclined to believe from the circumstances and the straightforward testimony from the Hartford, including that of a lookout, that the Manhattan's colored lights were not burning until after the collision, and it follows that the allegation of fault on the part of the Hartford for not seeing the Manhattan fails. The Westfield (D. C.) 38 Fed. 366; The Monmouthshire (D. C.) 44 Fed. 697; The Viola (D. C.) 59 Fed. 632; The Livingstone (D. C.) 87 Fed. 769, 775; The Lansdowne (D. C.) 105 Fed. 436.

Another allegation of fault on the part of the Hartford was, that she exchanged a signal of two whistles with the Manhattan. This she denied and her witnesses say that the only signal of such character that she gave was to a tug, towing two car floats, bound down the river on the Brooklyn side. The finding on the credibility of witnesses with respect to lights is decisive of this question also.

Libel dismissed as to the Hartford.

In re J. S. PATTERSON & CO.

(District Court, N. D. Texas. April 17, 1903.)

No. 457.

1. BANKRUPTCY—FRAUDULENT PURCHASE OF GOODS—RIGHT TO RECLAIM.

Bankrupts, who were retail merchants, made a financial statement to a wholesale house as a basis for credit, which was signed, and stated that it was "a true and accurate statement of our assets and liabilities," and should stand as to all subsequent purchases unless notice was given of change, and they bound themselves to give such notice in case of any material change. In the itemized statement of liabilities was a question asking for the amount "due relatives," which was unanswered, although they at the time owed $3,500 to a relative. *Held* that, under the general representation that it was a true and accurate statement, the omission to answer such question was a concealment which was equivalent to a fraudulent representation, and entitled the creditor to reclaim goods which were shipped on credit in reliance on such statement.

2. SAME.

The shipment of goods three months after such statement was made, and in reliance thereon, without further inquiries, no notification of change having been given, was not such negligence on the part of the seller as to debar it from the right to rescind the sale.

In Bankruptcy. On certificate from referee.

Sam A. Leake, for petitioners.

Sidney L. Samuels, for trustee.

MEEK, District Judge. J. S. Patterson & Co., the bankrupts, were merchants doing business at Frost, Navarro county, Tex. Early in the year 1902, Feder, Silberberg & Co., a large mercantile firm doing business in Cincinnati, Ohio, received through one of their traveling

salesmen an order for goods from J. S. Patterson & Co. This order amounted to $1,133.10, and was sought on a credit. Feder, Silberberg & Co. immediately, and before extending the credit, instituted investigation, through the usual channels, to ascertain the financial standing and rating of J. S. Patterson & Co. Not being satisfied with the information secured through these channels, Feder, Silberberg & Co. called on J. S. Patterson & Co. for a financial statement of their affairs, and sent to them a blank form to be filled out. The letter accompanying the blank form requested that all questions in same should be answered "either in dollars and cents, or by the words 'No, None, Yes, or Nothing.'" J. S. Patterson & Co. complied with the request, and forwarded the following financial statement:

Credit Department.

Statement made this 14 day of Feb. 1902, Feder, Silberberg & Co. Cincinnati, O., by J. S. Patterson of the firm of J. S. Patterson & Co. City of Frost, State of Texas, which firm is composed of the following persons (giving names in full), J. S. Patterson, and J. H. Patterson .....
(Co-partnership) and engaged in the business of Dry Goods.
(unlimited)

Resources:

Cash on hand or in bank	.....
Cash value of merchandise on hand	$7,000
Cash value of book accounts and notes that are good and collectible....	7,000
Cash value lands, houses and other real estate.....	3,000
Cash value of personal and all other property not specified above.....	2,000
Are all the above assets in your name? If any parts are owned jointly by husband and wife, so state here.....	.....

Liabilities:

Amount of indebtedness on merchandise due	1,500
" " " " not due	500
" "notes or other obligations both due and not due.....	.....
Number and amount of mortgages or deeds of trust held against real estate or personal property.....	.....
Due relatives	.....
Amount of security paper my name is on, due or not due.....	.....
Amount of any other liability that I may be liable for.....	.....

Resources Over Liabilities:

How long have you been in business? Four years in Frost.
Do you own storehouse and dwellings? Yes.
Amount of insurance on stock 5000. On storehouse 1500.
The above is a true and accurate statement of our assets and liabilities, and upon which we desire credit based, in our purchases from Feder, Silberberg & Co. and the same shall stand as to all subsequent purchases, unless at the time of such subsequent purchase or purchases we shall notify them of any change in our assets or liabilities, and hereby bind ourselves to give such notice in case of any material change in our pecuniary condition; otherwise all subsequent purchases to be made on the faith of the above statement.
Sign here full name of firm: J. S. Patterson & Company.
By whom signed: J. S. Patterson, a member of the firm.

Henry Hermann, credit man for Feder, Silberberg & Co., testified that on the strength of this statement his house shipped the bill of goods on February 20, 1902. Some time in May, 1902, another order for goods was received by the house, through its traveling salesman, for September delivery. This order amounted to $793.50, and the goods under it were duly shipped and delivered. J. S. Patterson

& Co. were adjudicated bankrupts on the 9th day of December, 1902. At the first meeting of creditors it developed from the testimony of J. S. Patterson that at the time of the making of the financial statement to Feder, Silberberg & Co. his firm was indebted to his cousin, L. E. Patterson, in the sum of $3,500; that the consideration for this indebtedness was borrowed money. The financial statement of J. S. Patterson & Co. was shown to be untrue and inaccurate in several respects, but it is not considered necessary to state or analyze such untruthful and inaccurate portions of the statement. Feder, Silberberg & Co. did not know of the indebtedness of J. S. Patterson & Co. to L. E. Patterson until the examination of the bankrupt at the first creditors' meeting. They at once filed their application before the referee to have the goods shipped to J. S. Patterson & Co. under the May order, that were on hand, segregated from the stock in the possession of the trustee of the bankrupt estate and returned to them, on the ground that the title thereto had not passed, by reason of the fraud perpetrated on them by J. S. Patterson & Co. This application was resisted by the trustee, and a hearing had on the issue thus made before the referee. Henry Hermann testified that in extending credit on the February and September shipments he relied on the truthfulness of the financial statement made in February; that he relied solely on that statement in extending credit on the September shipment; that, if he had known or discovered the statement to be false, he would not have relied upon it, nor would he have extended the credit; that he would not have given J. S. Patterson & Co. the line of credit he did, had he known they were indebted to a relative in the sum of $3,500. The correspondence in evidence tends to prove the February order had been accepted by Feder, Silberberg & Co. before the receipt of the statement, and that the sellers were only awaiting the arrival of certain goods to complete the order before making the shipment. However, the insistence of Feder, Silberberg & Co. upon a financial statement before any shipment of goods, and the entire course of dealing between the parties, stripped of the polite phrasing of commercial correspondence, clearly establishes the truthfulness of Henry Hermann's evidence, and that the Cincinnati house placed its main reliance and extended credit on the financial statement. J. S. Patterson testified that he knew of the indebtedness of $3,500 to his cousin at the time of making the statement, but "just kept it private." After hearing, the referee refused and dismissed the application, and the applicants complain and appeal from this ruling.

In order that the rights of all parties might be preserved pending this appeal, the referee ordered the property claimed by Feder, Silberberg & Co. to be appraised, but refused to separate and segregate it, because such segregation would involve loss and expense to the estate. In event the property of the estate is sold by order of the referee, funds arising from the sale of the goods claimed by Feder, Silberberg & Co. will be subject to the action of the court on this appeal.

It is well settled that representations as to the financial status of a buyer made as a basis of credit, and known by the party making

them to be false, and but for which the sale would not have been made, are fraudulent, and entitle the seller to reclaim the goods so obtained by fraud. Turner v. Ward, 154 U. S. 618, 14 Sup. Ct. 1179, 23 L. Ed. 391; In re Weil (D. C.) 111 Fed. 897; In re Epstein (D. C.) 109 Fed. 878; Gainesville National Bank v. Bamberger, Bloom & Co., 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; Lowdon et al. v. Fisk et al. (Tex. Civ. App.) 27 S. W. 180; Schwartz et al. v. Mittenthal et al. (Tex. Civ. App.) 50 S. W. 182; Schram et al. v. Strouse et al. (Tex. Civ. App.) 28 S. W. 262. Counsel for the trustee contends that the bankrupts, in failing to set opposite the words "due relatives" the amount owing L. E. Patterson, were not guilty of making a false statement or misrepresentation; that the bankrupts had been requested to answer the various interrogatories in a blank form by placing opposite thereto the figures in dollars and cents, or by answering "No, None, Yes, or Nothing," as the query and their financial condition might indicate; that their failure to place anything opposite the words "due relatives" gave notice to the parties seeking the statement that the bankrupts refused to answer the question, and that therefore the statement could not be relied upon as accurate and correct in that particular.

The financial statement of Patterson & Co. must be construed as a whole, and the general statement appended thereto must be considered in connection with the itemized statement under the heads of "Resources" and "Liabilities." They assert, over their signature, that they have set forth a true and accurate statement of their assets and liabilities, that they desire a line of credit based thereon, and that the statement shall stand as to all subsequent purchases unless at the time of such subsequent purchase or purchases they shall notify the sellers of any change in their assets or liabilities, and they bind themselves to give such notice in case of any material change in their pecuniary condition, and, in event no such notice is given, then all subsequent purchases are to be made on the faith of the statement given. In view of these representations and stipulations, it is my opinion Feder, Silberberg & Co. were justified in indulging the conclusion that J. S. Patterson & Co. owed nothing to relatives. They alone were in possession of the necessary information to make a true and accurate statement of the financial condition of their firm. They were invited to make such statement by distant merchants, in order that the latter might determine whether or not they would be willing to accept their orders and ship valuable merchandise to them on a credit. J. S. Patterson & Co. accepted the invitation, made a statement and represented it was true and accurate, and yet, owing a cousin a large sum of money, they placed no figures opposite the words "due relatives." It will be noticed that the words "true and accurate," as used, do not qualify the particular items of the statement, but qualify the "statement of our assets and liabilities," so that they vouch for the truthfulness and accuracy of the statement as a whole. Even though the failure to set forth the amount "due relatives" in the statement were not considered a positive misrepresentation on the part of J. S. Patterson & Co., yet under the circumstances it is such a suppression of the truth as amounts

to a suggestion of falsehood. In the case of Stuart v. Wyoming Ranch Company, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439, Mr. Justice Gray, in delivering the opinion of the court, says:

"In an action of deceit it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere, aliud celare. A suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of plaintiff."

The failure of Patterson & Co. to set forth the amount due relatives, together with the general representations made at the end of the statement, clearly brings this case within the above rule.

It is also contended by counsel for the trustee that Feder, Silberberg & Co. were guilty of negligence in accepting the May order for goods to be shipped in September, without making additional investigation as to the financial condition of J. S. Patterson & Co.; that they should not have relied on the statement made in February as a basis of credit for goods ordered in May. The bankrupts had stipulated to notify them of any material change in their pecuniary condition. Even though this were not sufficient to relieve Silberberg & Co. from the exercise of care and diligence, yet the time intervening between the date of the statement and the date of the second order and the delivery of the goods under it was not sufficient to deprive them of the right to rely on it. Such statements are made as the basis for continuing credit, and it is not necessary that they should be made exactly at the time of the sale. Such a requirement would be unreasonable. The length of time that has elapsed since making the statement, within reasonable limits, is for the consideration of the court in passing upon the extent that the sale was actually influenced thereby. Lowdon et al. v. Fisk et al. (Tex. Civ. App.) 27 S. W. 180; Schram et al. v. Strouse et al. (Tex. Civ. App.) 28 S. W. 262.

I am of the opinion that the order heretofore entered by the referee overruling and dismissing the application of Feder, Silberberg & Co. is error, and should be set aside, and that an order should be entered allowing the application and directing the goods identified as belonging to Feder, Silberberg & Co. to be turned over to them, or, in lieu thereof, the amount of such goods upon sale by the trustee. The costs of this appeal will be taxed against the trustee.

THE NEW BRUNSWICK.

(District Court, D. Massachusetts. October 30, 1903.)

No. 1,394.

1. MARITIME LIENS—HOME PORT OF VESSEL—PLACE OF ENROLLMENT.
Allegations that a Maine corporation, the owner of a vessel, had its principal place of business in Boston, and that the vessel was there enrolled, are not sufficient to show that Boston was the home port of the vessel.

2. RES JUDICATA—SUBSTANTIAL IDENTITY OF CAUSES OF ACTION—ALLEGING DIFFERENT GROUNDS FOR RELIEF.
A decree on the merits dismissing an intervening petition to establish a general maritime lien on a Maine vessel for supplies furnished in Boston is a bar to a second petition to establish a lien for the same supplies, under the statute of Massachusetts, on the ground that she was a domestic vessel because enrolled in Boston, since the subject-matter of the two petitions is the same and the causes of action substantially identical, and under the liberal rules of practice in admiralty both grounds for relief might have been alleged in the first petition in the alternative.

3. SAME—MATTERS CONCLUDED BY JUDGMENT.
Under the American rule the identity of the causes of action in two suits cannot be tested by inquiring whether the same matters might have been proved under the pleadings, but the second suit will be barred if the parties and relief sought are the same and the matters essential to sustain the cause of action alleged might have been proved in the former action under appropriate pleadings.

In Admiralty. On motion to dismiss intervening petition.

Carver & Blodgett, for petitioner.
Arthur J. Selfridge and Wm. Lewis O'Brion, for claimant.

LOWELL, District Judge. Morrison filed an intervening petition against the proceeds of the steamer New Brunswick, alleging that the steamer was of Portland, in the District of Maine, owned by a Maine corporation; that he had supplied her with coal and labor while she was lying at Boston; that she was in need of supplies, and that they were furnished on her credit; that he had duly filed with the city clerk of Boston the statement required by Mass. Rev. Laws, c. 198, § 15. The petition thus appeared to assert a lien of two sorts: First, a general maritime lien; and, second, a statutory lien upon a foreign vessel. The libel was filed before the case of The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770, had appeared in a bound volume of reports. That case decided that the statutory lien does not affect foreign vessels, and so Morrison became limited under his pleadings to the general maritime lien. Near the end of the trial his counsel suggested that the steamer was enrolled in the port of Boston, and might therefore be deemed a domestic vessel. He moved to amend his petition by alleging this, but the motion was denied upon the ground that it came too late, inasmuch as the case had been tried nearly to a conclusion upon the undisputed allegation in his petition that the steamer was a Maine vessel. The court held, on the evidence, that there was no general maritime lien upon the vessel, and dismissed the petition. Thereafter Morrison filed a second petition, which alleged that the New

Brunswick was owned by a Maine corporation which had its usual place of business in Boston, and that the steamer was enrolled in the Boston customhouse; that the coal was needed for the vessel's use, and was supplied to her by the petitioner, who duly filed the statutory statement above referred to, and became entitled to a statutory lien upon the steamer. The claimant has moved to dismiss the second intervening petition upon two grounds: First, that the matter is res judicata; and, second, that the intervener, by filing the first petition, elected to establish his claim as a general maritime lien, and by that election is precluded from claiming a statutory lien.

Is the matter of the second petition res judicata? The time for taking an appeal from the decree upon the first petition has been extended, but no question has been made that the decree is final, nor has objection been made to the form of the claimant's motion to dismiss. The question of the sufficiency of the second petition is squarely presented. Upon precisely what grounds Morrison seeks to maintain this petition is not easy to determine. Its allegations differ from those of the first petition only by the omission of the explicit allegation that the steamer was a Maine vessel, and by the addition of allegations that her owner had its usual place of business in Boston, and that she was enrolled in the Boston customhouse. In the first petition the coal is said to have been ordered by "her master and agent"; in the second by "the agent for the owner," probably the same person. The place of enrollment does not ordinarily determine the home port of the vessel as against the place of the owner's incorporation. The Havana, 64 Fed. 496, 12 C. C. A. 361. There all the business of the corporation, except the transfer of its stock, was done in New York or on the high seas (see The Havana (D. C.) 54 Fed. 201), yet the vessel's home was deemed to be in New Jersey. If the intervener desired to set up that, for the purposes of this case, by reason of estoppel or otherwise, the New Brunswick was to be deemed a Massachusetts vessel, he should have done so directly. He has alleged a statutory lien, but the facts he has set out do not support the allegation. It is doubtful if the allegation just mentioned, unsupported as it is by the facts set out, would bar the petitioner from asserting under his second petition that he has a general maritime lien—the very matter decided upon his first petition. The petition cannot be sustained as for a general maritime lien, for that matter is admitted to be res judicata; nor as for a statutory lien against a Massachusetts vessel, for it contains no sufficient allegation that the vessel's home port was in this state.

Even if the second petition be deemed to allege specifically, as probably was intended—otherwise it must undoubtedly fail—that the New Brunswick was a Massachusetts vessel, the result is the same. The doctrine of res judicata has two applications. In Werlein v. New Orleans, 177 U. S. 390, 397, 20 Sup. Ct. 682, 44 L. Ed. 817, it was said that:

"A former judgment between the parties (or their privies) upon the same cause of action as that stated in the second case constitutes an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for

that purpose. Where the second between the same parties is upon a different claim or demand, the judgment in the former action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered."

See, also, Columb v. Webster Co., 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195; Foye v. Patch, 132 Mass. 105, 110. Does the case at bar fall within the first category? Is the cause of action the same? The same supplies were furnished by the same petitioner to the same vessel of the same owner, at the same time and place, in the same manner and with the same need. Nothing has happened or has been discovered since the first petition was filed to affect the rights or relations of the parties. The only difference between the two petitions concerns the home port of the vessel. There is ambiguity, indeed, in the expression just quoted from the decision of the Supreme Court that a former judgment constitutes a bar as to every admissible matter which might have been offered to sustain the demand. The phrase is a common one, and has been substantially repeated in many considered cases. Did the court mean to bar only those matters which might have been offered to sustain a plaintiff's demand under the existing pleadings, or all those matters which might have been offered under appropriate pleadings? If only those matters are barred which might have been offered under the existing pleadings, then the cause of action stated in the second petition here before the court is not the same as that stated in the first. Under the first petition, Morrison was not allowed to show that the New Brunswick was a Massachusetts vessel.

In Hunter v. Stewart, 4 D. F. & J. 168, a bill in equity for the transfer of certain shares of stock was dismissed on the merits. Later the original plaintiff brought a bill for the same relief upon different grounds, known to exist when the first bill was brought. Lord Chancellor Westbury held the former judgment no bar, and said:

"The validity of the defense depends on the inquiry whether the case made by the plaintiff in his present bill be the same with that stated in the former bill, or could have been given in evidence under the allegations which such former bill contained. The conditions necessary for the validity of a defense of this nature are, in my opinion, best collected in a well-known passage from the commentary of Vinnius on the 4th book of the Institutes, and which is in these words: 'Exceptio rei judicatæ non aliter agenti obstat quam si eadem quæstio inter easdem personas revocetur, itaque ita demum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.'"

See Paton v. Sterling, Morr. Dic. 12,229. In Herman on Res Judicata, 96, in Chand on Res Judicata, 53, and in Freeman on Judgments, 259, identity of cause of action is tested by the identity of admissible testimony. See Horton v. Bassett, 17 R. I. 129, 20 Atl. 234. Indeed, the English courts have not clearly recognized that the bar of a former judgment is differently limited where the cause of action is the same in the two suits, and where the matter in issue is the same, but the cause of action is different. See Barrs v. Jackson, 1 Phil. 582; Flitters v. Allfrey, L. R. 10 C. P. 29.

Respectable as is the authority in support of the test by identity of evidence, the law has been settled otherwise by the decisions of

the Supreme Court. In Werlein v. New Orleans, above cited, a bill in equity had been brought to enjoin a sale alleged to be illegal because of certain irregularities. The bill was dismissed. Thereafter another bill was brought, with the same parties, to recover the estate in question, on the ground that the land was dedicated to a public use, and so could not be sold. The court held that the matter was res judicata, and said:

"The threatened sale might have been illegal for a number of reasons, based upon widely divergent facts; but whatever those reasons were, the facts upon which they rested were open to proof in the chancery action, and if the city desired the benefit of them they should have been alleged and proved. It would seem to be quite clear that the plaintiff could not be permitted to prove each independent fact in a separate suit. Suppose the city had only set up the fact of the registry of the judgment as a ground for enjoining the sale, and after a trial on that issue it had been beaten and judgment had gone against it; could the city after that have commenced another suit for the same purpose, and set up as a ground for the alleged illegality of the sale the assignment of the judgment by Klein? In such second action would not the judgment in the prior action conclude the city? If not, then on being beaten on a trial of that issue the city could commence still another action based on the allegation that the judgment had been paid. Thus, as many different actions as the city might allege grounds for claiming the sale would be illegal could be maintained seriatim, and no one judgment would conclude the city, except as to the particular ground upon which the city proceeded in each particular case. And yet all these different grounds would simply form evidence upon which the original cause of action was based, namely, the alleged illegality of the apprehended sale. They would form simply facts upon which the cause of action might rest. There is no difference in the nature of the ground now urged in this case from the other grounds actually set up in the chancery suit." 177 U. S. 399, 400, 20 Sup. Ct. 686, 44 L. Ed. 817.

Like decisions have been reached in the highest courts of many states: Lamb v. McConkey, 76 Iowa, 47, 40 N. W. 77; Sayers v. Auditor General, 124 Mich. 259, 82 N. W. 1045; State v. Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172. In Columb v. Webster Mfg. Co., above cited, the acts of negligence alleged in the second declaration could not have been given in evidence under the first. See So. Minn. Ry. Extension Co. v. St. Paul, etc., R. R., 55 Fed. 690, 694, 5 C. C. A. 249. In Clare v. N. Y. & N. E. R. R., 172 Mass. 211, 51 N. E. 1083, the plaintiff had brought suit under the employers' liability act, and the court held in substance that, by a judgment in that suit, he was barred of his common-law remedy, though he might not have been able to obtain that remedy under his original declaration. In Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1, the plaintiff brought suit for the delivery up of deeds alleged not to have been executed or delivered. There was judgment for the defendant, and the judgment was held to bar a second suit for the same relief, based upon an alleged cancellation of the deeds after delivery. The court said:

"If the plaintiff's complaint in the former action was so framed that he could not avail himself of all the evidence which he had to prove his right to recover, and so suffered defeat, it may be his misfortune. By that judgment the plaintiff is bound. He sought an amendment to enlarge the issue, but at so late a stage of the trial that the judge for that reason disallowed the motion. His cause of action had been adjudicated. He cannot now have another trial to enable him to use such other evidence to obtain the same remedy."

Even the English courts have hesitated to allow a plaintiff to bring a second suit for the same relief sought in the first, merely by alleging additional grounds for relief, similar to those alleged in the first suit, yet not strictly admissible under the pleadings therein. Phosphate Sewage Co. v. Molleson, 4 A. C. 801. But in order to bar a second suit in England or Scotland, as it seems, the identity in the cause of action must be more complete than is required for the same result by most courts in the United States.

In his first petition, Morrison alleged that the New Brunswick was a Maine vessel. This was not disputed, and was material to his case, as he understood it. There is here no question of mere variance in the proof of a fact not material to the maintenance of the suit. To permit a plaintiff to seek the same relief regarding the same subject-matter by several actions, each setting up a different ground for relief, is to give a plaintiff an advantage over a defendant. A. sues B. for breach of contract under seal. B. has three defenses—invalidity, performance, and satisfaction. If he sets up only one defense and fails, he cannot, in general, avail himself thereafter of the others in defense to the action. Why should B. be able to bring three successive bills in equity for a cancellation of the contract, each upon one of the grounds mentioned? That the same rule should be applied to those matters which sustain and to those which defeat a demand is implied in the first extract from the opinion in Werlein v. New Orleans, above quoted. That there is an essential difference in this respect between the situation of plaintiff and that of defendant was asserted, indeed, by Lord Campbell in McDonald v. McDonald, 1 Bell, App. 819, 829, but the Supreme Court must be taken to have disapproved the doctrine of the House of Lords in the last-named case.

While rejecting the test of identity of testimony, it must be admitted that the courts of this country have proposed no applicable test to take its place. Identity of relief is not an adequate test. In suits upon several coupons, for example, the relief sought is identical, but the causes of action are not the same. A prior judgment does not bar all demands which might have been prosecuted in the first suit without misjoinder. As was said in Werlein v. New Orleans, the "proper application" of "the law in relation to the effect of a judgment between the same parties" "to particular cases is sometimes difficult to determine." The substantial identity of two causes of action differently expressed is deemed within the direct knowledge of the court from the circumstances of the case, without need of canons of distinction. This is not altogether satisfactory, but is perhaps unavoidable. Here it is sufficient to say that the causes of action stated in Morrison's two petitions are nearer identity than causes of action hitherto deemed to be identical by courts of authority.

It was argued that the second petition can be maintained because otherwise there might be a failure of justice. A petitioner may be in real doubt about a vessel's home, and may conceive that he has a valid lien upon her in either case—a general maritime lien if she be a foreign vessel, a statutory lien if she be domestic. But both these contentions can be joined in one libel or petition. The forms of

pleading in admiralty are unusually liberal and free from technicality. If the libelant has a good cause of action upon one or other of two theories practically inconsistent, and he is doubtful which theory is correct, he may, with proper allegations, plead in the alternative. The cause of action in the second petition, so far as one is set out, was heard and determined upon the first petition, and cannot be litigated again.

Petition dismissed, with costs.

In re WALSHE.

(Circuit Court, D. Indiana. November 2, 1903.)

No. 10,250.

1 EXTRADITION — TREATY WITH GREAT BRITAIN — PLACE OF PRELIMINARY HEARING.

The extradition treaty between Great Britain and the United States, and Rev. St. § 5270 [U. S. Comp. St. 1901, p. 3591], enacted to carry into effect the provisions of extradition treaties, do not vest a commissioner with power to issue a warrant upon which the accused may lawfully be arrested in another state and returned for examination before such commissioner. To authorize the extradition of a person under such treaty the charge must be one which would constitute an offense under the laws of the place where he is found, and the evidence such as would justify his apprehension and commitment for trial if the offense had been there committed; and, since the treaty recognizes the dual nature of our government, and the laws governing the offense may be either national or local, it is clearly contemplated that the hearing shall be within the state, district, or territory where the accused is found.

Habeas Corpus. On exceptions to marshal's return to writ.

Winter & Winter, A. C. Harris, Henry N. Spaan, and A. W. Wishard, for petitioner.

Jesse J. M. LaFollette, for respondent.

BAKER, Circuit Judge (orally). On the petition of Thomas Walshe a writ of habeas corpus was issued in this case, and the return of the marshal justifies the detention of the petitioner by virtue of a writ issued by United States Commissioner Shields in the Southern District of New York, addressed to any marshal of the United States, and commanding him to arrest and bring before the commissioner for hearing one James Lynchehaun, as a person who had been convicted in Ireland of the offense of assault with intent to kill, and who had escaped with the sentence unexecuted.

The exceptions of the petitioner challenge the legality of this writ, which was the only justification set up in the return.

Passing over those objections that go to the formality of the writ, and the questions presented as to the scope that this hearing on habeas corpus might take, I come to the one question that seems to me controlling, and that is the power of the commissioner in the Southern District of New York to issue a warrant upon which the marshal of this district may lawfully arrest the accused and return him

to the court of the commissioner in New York. The solution of that question depends upon the terms of the existing treaties between this country and Great Britain and the statute of the United States enacted to carry the provisions of such treaties into effect. If a construction of the statute and treaties had been given by the Supreme Court of the United States to the effect that a commissioner of one district may lawfully cause the arrest of an accused person at any place he may be found within the sovereignty of the United States, I would be constrained to follow such an interpretation. No decision of the Supreme Court to that effect has been cited, and my own examination of the authorities has failed to disclose one. Certain decisions in courts of the United States have been referred to. In the Henrich Case, in 5 Blatchf. 414, 11 Fed. Cas. p. 1143, arising under the treaty of June 16, 1852, with Prussia, the language of article 1 thereof being identical with article 10 of the treaty of 1842 with Great Britain, it was expressly decided that a warrant issued and returnable in New York was legally served in the state of Wisconsin, and that the return of the accused person from Wisconsin to New York for the purpose of the extradition hearing was warranted by the treaty and statutes.

In the case of Re Fergus (C. C.) 30 Fed. 607, the Henrich Case is referred to, but the question was not in any way involved in the case, and it does not appear that the court in that instance made an independent examination of the treaties and statutes for the purpose of forming and announcing a judgment of his own. The citation of the Henrich Case in the Fergus Case is simply a passing allusion.

The case of In re Baruch (C. C.) 41 Fed. 472, is also referred to, but in that case the question was not raised and decided, nor was the matter contained in the dictum in the view of the decision of the Henrich Case. The Baruch Case simply shows that the prisoner was brought forcibly from New Jersey to New York, and was discharged in New York because the showing against him was not sufficient. The case exhibits circumstances under which the question now presented might have been raised, but it was not.

In Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130, the Henrich Case is referred to on page 187, 187 U. S., and page 101, 23 Sup. Ct. The observation is made that the Henrich Case was vigorously contested because the warrant was executed without the limits of the District of New York and within the state of Wisconsin. There is no expression of opinion on the question whether the execution of the warrant in Wisconsin was lawful.

So that, as a matter of authority, the only case that has been presented, or that I can find, in which the question now presented is decided, is the Henrich Case. It is my duty to give to the decisions of the federal courts in other circuits the weight and consideration to which they are entitled in view of the ability and learning of the judges who decided them; but they are not binding in this circuit as authorities and precedents, and finally are entitled to only such consideration as the reasoning of the case justifies. In the Henrich Case I do not find any consideration given to some features of the treaty and statute that are controlling with me at this hearing, and

therefore, as a matter of authority and precedent, I find myself compelled to be actuated solely by my own judgment as to the scope of the treaties and statute.

In article 10 of the treaty of 1842 it was provided that the United States and the king of Great Britain, upon mutual requisitions, should deliver up to justice all persons who, being charged with certain specified crimes, should seek an asylum or should be found within the territories of the other, provided that this shall be done only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. The petitioner in this case is charged with being an escaped convict. So far as the issues to be tried before the examining magistrate that may arise upon the sufficiency of the record of conviction to be presented by the demanding government are concerned, and so far as the determination of the issue made by the petitioner's denial that he is the person who was convicted is concerned, it is very clear to me that those issues would be controlled by article 10 of the treaty of 1842, in connection with section 5270 of the statutes relating to extradition.

In the recent case of Wright v. Henker, 23 S. C. 781, 47 L. Ed. 948, it is very clearly determined that the representatives of the two governments in making the treaties of 1842 and 1889 had respect to the dual form of the government of the United States. Of course, the treaty-making power is with the national end of our duality, but it was competent for the national government to make the test of the existence of extraditable crimes, and to make the test of the definition of the crime depend upon the state law; and in the treaty, as the words of the treaty themselves clearly indicate, the test of the right of the British government to demand the return of an accused person was made to rest upon the law of the place where he was found, that place being determinable by the lines of the states, districts, and territories that make up the United States; and I have no doubt that such is the situation with respect to the provinces and colonies of Great Britain, because the contracting parties referred to an accused person "who shall seek an asylum or who shall be found within the territories of the other," and that the return could only be had upon evidence sufficient, according to the laws of the place where the person shall be found, to justify his commitment if the offense had been committed there. And in section 5270, Rev. St. [U. S. Comp. St. 1901, p. 3591], enacted to carry the provisions of extradition treaties into effect, the magistrate referred to may, upon complaint made under oath charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of the foreign government an extraditable crime, issue his warrant, etc. So that it is absolutely clear to my mind that the one nation was not dealing with the other merely as a national entity. It was in that capacity only that they could execute the treaty, but each had regard to the situation of the other, and on the part of the British government the dual character of our institutions was very clearly recognized. We have no common-law crimes in this

country. The penal code enacted by Congress is very limited. The great bulk of the crimes that are defined by the statutes are found in the penal codes of the states alone; and so, if an accused person is found in Indiana, and his return to Great Britain is demanded, the right of extradition stands upon whether or not the offense with which he is charged is an offense under the laws of Indiana. That is the substance of it, for it is made a condition upon which the return may be had that the evidence of criminality shall be determined according to the law of the place where the person is found, and shall be such as would justify his commitment for trial if the crime or offense had there been committed. Article 10 of treaty of 1842.

If an offense is committed in Indiana, of course it is contemplated by the law of Indiana that the preliminary hearing and the commitment for trial shall be in Indiana. Neither of the treaties nor the statute says in so many words that the hearing shall be had in the place where the accused party is found, but, inasmuch as the laws of the place where he is found, not only with respect to the substantial definition of the crime, but also with respect to the competency of witnesses and the admissibility of evidence, are made controlling, it was also intended that the hearing should be had at the place where he was found, particularly in view of the reference to the fact that the return is only justified under those circumstances that would warrant his commitment if the offense was committed in the jurisdiction where he was found. Of course, if an offense is committed there, his preliminary hearing must be had in that jurisdiction.

Now, returning to the Henrich Case, I observe that the court thought it sufficient ground upon which to decide that the warrant was one that runs throughout the United States to note the fact that the extradition is arranged for by treaty between the two countries in their national capacities. Of course, that is necessarily so. The treaty-making power is lodged in the national part of our institutions. But because the United States, as a national entity, alone has authority to make the treaty, it does not follow that the basis of returning people who are demanded under an extradition treaty is to be the national law, or under the national definition of crime. No attention was paid in the Henrich Case to the fact, which has been thoroughly established by the courts, that the operative basis of extradition treaties is the law of the place where the accused person is found.

Now, while it is true that the court in New York may decide the questions according to the law of Indiana—and therefore the decision of Wright v. Henkel is not conclusive upon the question now before the court—yet, inasmuch as it would be necessary to have a person committed in Indiana for an offense in Indiana, before a magistrate of Indiana, I shall hold, until controlled by explicit legislation, or until the Supreme Court shall by definite construction declare that the makers of the treaty intended that an accused person presumably innocent could be taken from Alaska to New York for the purposes of a preliminary hearing, or that an American citizen presumably innocent could be taken from Australia to London for the purpose of a hearing, that no such intention was within the view of the makers

of this treaty, and that they intended that, when the basis of the extraditability of the crime was made the law of the place where he was found, the hearing would be had there, similarly to the hearing where he would be committed for trial if the offense had been committed in the place where he was found.

So I will sustain the exceptions of the petitioner to the return of the marshal, and, as counsel for the British government have indicated that they do not desire to amend, the petitioner may be discharged.

In re FREDERIC L. GRANT SHOE CO.

(District Court, W. D. New York. September 2, 1903.)

No. 1,502.

1. BANKRUPTCY—INVOLUNTARY PETITIONERS—CREDITOR HAVING UNLIQUIDATED CLAIM.

A creditor having a provable debt, although the amount is unliquidated, may file a petition in bankruptcy against his debtor, and, where a jury trial on the petition is demanded, the amount of petitioner's claim may be liquidated and determined on the same trial.

In Bankruptcy. On motion to dismiss petition.

McGuire & Wood, for petitioning creditors.
Satterlee, Bissell, Taylor & French, for defendant.

HAZEL, District Judge. Motion to dismiss petition in bankruptcy. The question presented on this motion to dismiss the petition in involuntary bankruptcy is whether a creditor having an unliquidated claim may file a petition in bankruptcy against a debtor, and how such a claim may be liquidated in accordance with the provision of section 59b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]). The debt which is unliquidated and disputed by the bankrupt is for damages arising out of a breach of warranty upon the sale of personal property. This precise question has been decided by Judge Brown and by Judge Thomas in Re Manhattan Ice Co. (D. C.) 7 Am. Bankr. R. 408, 114 Fed. 399, affirmed 8 Am. Bankr. R. 569, 116 Fed. 604, 54 C. C. A. 60. It was there held that a creditor having an unliquidated debt may file a petition in bankruptcy to have the debtor adjudged bankrupt, provided the debt is provable. As the petitioning creditor here has a provable debt, though the amount thereof is undetermined, the rule announced by Judge Brown will be followed. As a jury trial has been demanded, the amount of petitioner's claim may be established upon the trial in connection with petitioner's other proof.

Motion to dismiss denied.

BROWN et al. v. PEGRAM.

(Circuit Court of Appeals, Third Circuit. October 30, 1903.)

No. 46.

1. NEGOTIABLE INSTRUMENTS—NOTES GIVEN FOR PATENT RIGHTS INDICATING CONSIDERATION.

Act Pa. April 2, 1872 (P. L. 60) § 1, providing that, when a negotiable instrument is given in consideration of patent rights, the words "given for a patent right" shall be put on the face thereof, and the instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder; and section 2, providing that if any person shall take or transfer a negotiable instrument not having such words on its face, knowing that the consideration was patent rights, every such person shall be guilty of a misdemeanor—does not make void a negotiable instrument given for such a consideration without such words on its face, or affect the right of recovery thereon of a bona fide purchaser without notice of its consideration.

2. SAME—ACTION BY PLEDGEE—CREDITING MONEY RECEIVED FROM THIRD PERSON.

The pledgee of a note in an action against the maker need not credit money received by him from a person who was only secondarily liable on a guaranty of payment of the pledgor's debt.

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

For opinion below, see 122 Fed. 1000.

Reynolds D. Brown, for plaintiffs in error.

Richard C. Dale, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. This case was tried without a jury, and the following facts were found by the court:

"The plaintiff adduced in evidence a promissory note dated December 12, 1901, for $20,000, payable June 10, 1902, at 817 Drexel Building, Philadelphia, signed, 'American Alkali Company. A. K. Brown, President. Clayton E. Pratt, Treasurer.' This note was payable to the order of the American Alkali Company, and was indorsed by the same officers of that company who had signed it. It was protested upon June 10, 1902. The plaintiff also adduced in evidence a like note for $30,000, bearing the same date and payable at the same time as the note above mentioned, and in like manner executed, indorsed and protested. By this proof the plaintiff established a prima facie right to recover the amount of said notes, with interest and costs of protests. This is not questioned, and, as respects the defense it is said in the defendant's brief, that 'the plaintiff's requests for findings of fact cover the material facts in the case, and defendants concede them all,' with two 'qualifications,' which, as they do not challenge the correctness of the statements of fact to which they relate, but merely present the claims of the defendants as to their effect, need not be at this point considered. I accordingly find the following facts:

"(1) The American Alkali Company is a corporation organized under the laws of the state of New Jersey, and has its principal office in the city of Camden, N. J. It also maintains an office in the Drexel Building, in the city of Philadelphia.

"(2) By agreement in writing dated May 6, 1899, the American Alkali Company agreed to purchase from the Commercial Development Corporation, Lim-

ited, organized under the laws of Great Britain, letters patent of the United States Nos. 608,300 and 591,783, dated respectively August 2, 1898, and July 18, 1893, and also letters patent of Canada No. 61,368, and to pay in consideration for the assignment therefor four hundred and seventy-nine thousand nine hundred and sixty shares of the common stock of the American Alkali Company, full paid and nonassessable, and $1,000,000, payable as follows: One accepted bill at not to exceed one hundred and eighty days for $100,000, a note or notes made by the company to its own order and indorsed by the company, and at not later than June 1st, and for $500,000, and four accepted drafts at not to exceed twelve months for $100,000 each.

"(3) Among the accepted drafts thus given was one for $100,000, dated May 18, 1899, payable twelve months after date. When this matured, $50,000 in cash was paid on account and two new drafts were given, one for $32,000 and another for $20,000. These matured in May, 1901, and were renewed by two drafts of like amount, which were the drafts hypothecated by the Commercial Development Company to the plaintiff on November 5, 1901. These were not paid at maturity, but were renewed by the drafts in suit, which bear date December 12, 1901, and matured June 10, 1902.

"(4) The contract of May 6, 1899, was executed at the office of the American Alkali Company in Philadelphia, and the drafts and notes were there executed. In the negotiations the Commercial Development Corporation, Limited, was represented by A. R. Harvey, its attorney in fact, and a managing director specially authorized to act in the premises. Authority for the execution of the contract and the issue of the drafts referred to therein was given at a meeting of the stockholders of the American Alkali Company held May 5, 1899, at its office in Camden, N. J.

"(5) About the 1st of November, 1901, Thomas Pegram, residing in Liverpool, England, was requested to make a loan to the Commercial Development Corporation, Limited, of £10,000. The application was made through a solicitor, Mr. Alderman Fred Smith, senior partner of the firm of Grace, Smith & Hood, and a magistrate of Liverpool. The statement was made that the loan of £10,000, was but for a short time, and that as collateral Mr. Pegram should receive the rights of the Commercial Development Company under a contract with a firm named Perrins, Limited, any funds coming to the Commercial Development Company from the flotation of certain Spanish tin mines, and the American Alkali bills for $52,000. After a negotiation lasting a few days, on November 5, 1901, the plaintiff loaned the Commercial Development Corporation Company, Limited, £10,000, giving them his check for that amount on Lloyd's Bank, Limited, of Liverpool, which check was forthwith presented and paid in due course. To secure the loan the Commercial Development Company, Limited, executed a writing under date of November 5, 1901, reciting that in consideration of the sum of £10,000 paid them they hypothecated in favor of Pegram, first, the sum of $52,000, payable in respect of the two bills of exchange dated the 15th April, 1901, for $32,000 and $20,000, respectively, payable to the order of the American Alkali Company and endorsed by it, and, second, the moneys payable to us in respect of the flotation of the Spanish Tin Mining Company, and undertaking to pay the said sum of $52,000, and the said moneys payable in respect of the flotation of the said Spanish Tin Mining Company immediately upon receipt of the same to the extent of £10,500.

"At the date of this transaction the Alkali bills of exchange above mentioned were in the possession of Messrs. Chapman & Co., bankers of New York, for the account of the Commercial Development Company. On December 10, 1901, $2,000 was paid on account thereof by the American Alkali Company to Messrs. Chapman & Co., and the notes in suit were given for the balance of $50,000. Mr. Pegram received no part of the $2,000 which was paid by Chapman & Co. to the Commercial Development Company. Subsequently, upon hearing of these facts, the plaintiff took the notes in suit out of the hands of Chapman & Co., and placed them in the hands of the Canadian Bank of Commerce, to be held for his own account.

"In making the loan to the Commercial Development Company the plaintiff had no notice or information that the consideration for the American

Alkali bills was the assignment of the letters patent above mentioned. The loan was made in good faith, and with nothing to impair the plaintiff's rights as a purchaser for value without notice.

"(6) Under date of December 5, 1901, A. R. Harvey executed a writing in favor of the plaintiff, in words following:

" 'In consideration of your not requiring payment forthwith of the sum of £10,500 due to you from the Commercial Development Corporation, Limited, I hereby guarantee the payment by them to you of the said sum of £10,500 on the fifth day of January, 1902.'

"On January 9, 1902, a further writing as follows:

" 'In consideration of your not requiring payment forthwith of the sum of £10,500 due from the Commercial Development Corporation, Limited, to you, I hereby consent to your extending the time for payment of the said sum and to the corporation giving you further security for the same.'

"And on April 29, 1902, a further writing as follows:

" 'In consideration of your extending the time for payment by the Commercial Development Corporation, Limited, of the sum of £11,000 to the 7th proximo I hereby guarantee the payment by them to you of the said sum of £11,000 on the 7th proximo, but this guarantee is not to be enforced before the 12th day of June next.'

"And on April 30, 1902, Ruth L. Harvey, the wife of A. R. Harvey, executed writings in words following:

" 'In consideration of your extending the time for payment by the Commercial Development Corporation, Limited, of the sum of £11,000 to the 7th proximo I hereby charge all my interest in "Ramleh" (exclusive of the charge of £4,500 already upon it), and also the furniture and fixtures upon which there is no charge. I also undertake that no charge will be made upon "Ramleh," or upon the said furniture and fixtures, and that I will not remove or disturb anything at Ramleh between the present date and the 12th day of June next.'

" 'In consideration of your extending the time for payment by the Commercial Development Corporation, Limited, of the sum of £11,000 on the 7th May, 1902, I hereby guarantee the payment by them to you of the said sum of £10,750 on the 7th May, 1902, but this guarantee is not to be enforced before the 12th day of June, 1902.'

"(7) In June, 1902, the Commercial Development Company was placed in the hands of a receiver and liquidator, and out of that receivership the plaintiff realized ninety pounds on account of the indebtedness. As against the amount thus realized he paid out in sundry expenses connected with the receivership and keeping the corporation in life £400.

"In September, 1902, the plaintiff received the check of Mrs. Ruth L. Harvey for £6,000 on account of her guaranty. In part, at least, this represented the proceeds of the sale of certain chloride shares which the plaintiff had obtained from W. W. Gibbs on account of an obligation of W. W. Gibbs to A. R. Harvey which had come into the plaintiff's possession in the course of the dealings. To what extent this check for £6,000 in fact represents moneys of Ruth L. Harvey and to what extent moneys of A. R. Harvey, the plaintiff was unable to state.

"Other than the moneys herein stated, the plaintiff has received nothing on account of the loan made by him to the Commercial Development Company on November 5, 1901, either by way of payment or in realization of any of the collaterals.

"The defendant admits that the plaintiff is entitled to recover the balance now due to him by the Commercial Development Company, Limited, on account of his loan of ten thousand pounds to that company, made November 5, 1901; but insists that the plaintiff's claim to recover the full amount of the notes sued on cannot be sustained, because neither they nor any of the preceding drafts of which they constitute renewals had the words 'Given for a patent right' written or printed on their face, although the original draft of the series was in fact part of the consideration for a purchase of patent rights. This insistence rests upon a statute of Pennsylvania, as follows:

"'An act to regulate the execution and transfer of notes given for patent rights.

"'Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that whenever any promissory note or other negotiable instrument shall be given, consideration for which shall consist in whole or in part of the right to make, use, or vend any patent invention or inventions, claimed to be patented, the words, "Given for a patent right," shall be prominently and legibly written or printed on the face of such note or instrument, above the signature thereto; and such note or instrument, in the hands of any purchaser or holder shall be subject to the same defences as in the hands of the original owner or holder.

"'Sec. 2. If any person shall take, sell, or transfer any promissory note or other negotiable instrument, not having the words "Given for a patent right," written or printed legibly and prominently on the face of such note or instrument above the signature thereto, knowing the consideration of such note or instrument to consist in whole or in part of the right to make, use, or vend any patent invention or inventions claimed to be patented, every such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding $500, or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the court.'"

P. L. 1872, p. 60.

The decision of the case was put upon the point that the act of 1872 violated the Constitution of the United States, because (to use the language of the circuit judge) "the monopoly which a patent grants is a property right created under the Constitution and laws of the United States, and by those laws made assignable; and therefore a state law which prescribes that negotiable instruments in the ordinary form shall not be given or accepted for an assignment of the patent itself is as plainly obstructive of the exercise of a right vested by the federal law as would be the inhibition of payment in the current funds upon the sale of a patent for cash." We express no opinion concerning the correctness of this ruling, believing that the case may be properly decided upon another ground, namely, upon the true construction of the Pennsylvania statute.

The attack made by the plaintiffs in error upon the notes in suit depends wholly upon the effect that should be given to the second section of the statute. The argument may be stated in these words: The second section declares it to be a misdemeanor, punishable by fine or imprisonment, or both, if any person, with knowledge that a negotiable instrument has been given in whole or in part for a patent right, shall take, sell, or transfer such instrument, unless the words "Given for a patent right" appear upon its face. Therefore, upon familiar principles, since it is a crime to make such an instrument, the instrument itself is void in the hands of the original payee; and, even in the hands of a bona fide pledgee, who is therefore a purchaser for value, it is so far invalid that it may only be enforced to recover whatever balance may be still unpaid. We are unable to assent to the soundness of this argument, and believe that further consideration of the statute and of the Pennsylvania decisions thereon will show satisfactorily that a different conclusion should be reached. The act was first considered by the Supreme Court of Pennsylvania in Haskell v. Jones, 86 Pa. 173. The opinion of the court was delivered by Mr. Justice Sharswood, and is as follows:

"If the act entitled 'An act to regulate the execution and transfer of notes given for patent rights,' passed April 12, 1872 (P. L. 60), makes absolutely void all such notes in which the words 'Given for a patent right' are not prominently and legibly written or printed on the face of such note above the signature thereto, there would be great reason for the contention that the act is unconstitutional and void. No state can so interfere with the right of a patentee, secured to him by the acts of Congress, to sell and assign his patent. But such is not the operation of the act, according to its letter and spirit. By the express provision of the statute the only effect of the insertion of such words is that 'such note or instrument in the hands of the purchaser or holder shall be subject to the same defenses as if in the hands of the original owner or holder.' By necessary implication, notes without such words inserted in them remain on the same footing as before the act. The sole object of the Legislature was to secure, so far as could be done consistently with the rights of innocent third persons, that notice of the consideration should be given to all who should take the paper. Nothing is better settled than that between the original parties to a note given for a patent right it is a good defense to show that the alleged patent is void; in other words, that it is no patent right at all, and that the consideration has therefore entirely failed. Bellas v. Hays, 5 Serg. & R. 427, 9 Am. Dec. 385; Geiger v. Cook, 3 Watts & S. 266; Holliday v. Rheem, 6 Harris, 465, 57 Am. Dec. 628. All who take with notice of the consideration, take necessarily subject to the same defense. There is nothing in all this which interferes with any just right of the holder of a valid patent under the acts of Congress, nor that the maker of the note shall be permitted to show against a holder with such notice that it was obtained by fraudulent misrepresentation. This very plainly distinguishes our act from the statutes of other states which have been held unconstitutional.

"To secure the insertion of these words, the second section of the act makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person 'knowing the consideration of a note' to be the sale of a patent right to take, sell, or transfer it without the words 'Given for a patent right' inserted, as provided by the act. It is too plain for argument that this section in no way affects the right or title of the holder of such a note who takes it, not knowing that the consideration was the sale of a patent. He commits no illegal or indictable offense. The negotiability of a note in which the required words are not inserted is in no way affected by the act. The innocent holder, who takes it before maturity for value, without knowledge or notice of the consideration, takes it as heretofore, clear of all equities between the original parties."

In Hunter v. Henninger, 93 Pa. 373, the court again said:

"The act of 12th April, 1872, was intended to destroy the negotiable character of notes given in whole or part for 'the right to make, use, or vend any patent invention,' in order that the makers thereof might have the right to defend as well when said notes were passed to third parties as when in the hands of the original payees. In furtherance of this intent, the act requires the indorsement, 'Given for a patent right,' to be made across the face of such notes; and this in order that no one may ignorantly purchase paper of this kind. Without this, of course, the innocent purchaser for value would not be affected. He would hold as the indorsee of any other negotiable paper. Not so, however, as to one knowing the consideration of a note given for a patent right, for such a one is, by the act, guilty of a misdemeanor, if he receives this kind of paper without having the words above stated written upon its face."

The only other decision upon the subject is Shires v. Commonwealth, 120 Pa. 368, 14 Atl. 251, which adds nothing of present value to the previous cases. The brief per curiam opinion is as follows:

"There is nothing in the act of April 12, 1872, which infringes the Constitution of this commonwealth, nor do we think it conflicts with the federal Constitution. As a police regulation the statute has proved itself to be valuable in that it has been the means of preventing gross frauds upon our

citizens, to which, before its enactment, they were subjected. Under these circumstances we are not disposed to pronounce this law invalid."

As we understand these decisions, the result is that a note made in violation of the statute is not void in the hands of any holder whatever, whether he be the original payee or a subsequent innocent indorsee or pledgee. To take the position that the note is made wholly void by the statute is, we think, to overlook the necessary effect of the first section. This declares in plain language that whenever a negotiable instrument shall be given for a patent right the words "Given for a patent right" shall be put upon the face of the instrument, and that a negotiable instrument thus marked shall, in the hands of any purchaser or holder, be subject to the same defenses as in the hands of the original owner or holder. The object of the statute is thus declared, namely, to destroy the negotiable character of the instrument, and there is nothing expressed to warrant the conclusion that the Legislature intended to make the instrument void altogether. Neither should such a conclusion be readily implied, for the mischief at which the act was aimed was fully remedied by preserving whatever defenses the maker might have against the original payee. If the maker had been tricked or defrauded into making the note, or if a spurious or worthless patent had been foisted upon him by a clever knave, he was fully protected (if the act was obeyed, and the paper was marked) by permitting him to prove the fraud or failure of consideration against the title of any holder whatever. But, to deal fairly with subsequent purchasers, it was necessary to put them upon notice. Clearly, if the paper were unmarked in ordinary negotiable form, an innocent purchaser would take an indefeasible title, and therefore it was required that the paper should carry with it a plain notification to the world that unknown defenses might exist. With both reasons in mind—the protection of the maker, and notice to subsequent purchasers—the second section was added, in order that the command of the first section might have the sanction of the criminal law, and therefore be less frequently disobeyed. To suppose that the legislature intended to make void a negotiable instrument given for a valid patent in a perfectly fair transaction, an instrument to which no defense whatever could be interposed, simply because by mistake or ignorance or carelessness the words "Given for a patent right" do not appear upon the instrument, is a supposition not easily to be entertained. We should only be willing to accept such a construction of the statute because we could find no other, and were left no alternative by the plain direction and positive language of the Legislature. As it seems to us, no such situation is presented. The two sections of the act are to be taken together, and when they are thus considered and are read in the light of the construction adopted by the Supreme Court of the state they lead naturally and without difficulty to the conclusion already stated—that the act does not make the unmarked negotiable instrument void, and goes no further than to save the defenses of the maker in two instances: First, where the note is marked as required by the first section; and, second, where it is sued upon by any person who takes it subsequently, with knowledge that the consideration was in whole or in part the right to make,

use, or vend any patented invention, or invention claimed to be patented.

If this conclusion is correct, the foundation of the defense is destroyed. No defense against the original drafts is suggested other than the argument, already considered, that the second section of the act made them void, and no other defense is suggested against the renewal notes in suit. It follows that the defendant in error was entitled to the full amount of his claim, for upon a valid obligation of the maker, who was also the primary debtor, the pledgee was certainly not bound to credit the money that he had already received from another person, who was only secondarily liable, upon a separate and collateral undertaking. Whether, even if the drafts had been void in the hands of the original payee, the defendant in error would have been obliged to give credit for this money, is a question upon which we are not called upon to express an opinion.

The judgment of the court below was right, and is now affirmed, with costs to the defendant in error.

PEACOCK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1903.)

No. 945.

1. PLEADING—MOTION TO STRIKE OUT.
   Portions of a pleading which are objectionable as being evasive, ambiguous, or uncertain may appropriately be attacked by a motion to strike out.
2. SAME—DENIALS IN ANSWER.
   A denial, in an answer, on information and belief, of allegations of fact made in the complaint which are clearly within defendant's knowledge, or are matters of public record within his reach, is insufficient, and will be treated as an evasion.
3. SAME—SUFFICIENCY OF ANSWER.
   In an action by the United States to recover the penalty imposed by Rev. St. § 4143 [U. S. Comp. St. 1901, p. 2809], for making a false oath to secure the registry of a vessel, averments in an answer setting up that defendant was ignorant of the law, and, regarding the proceedings for the registry as purely formal, did not read the papers he signed, constitute no defense, and were properly stricken out on motion as immaterial and impertinent.
4. UNITED STATES—ACTION TO RECOVER PENALTY—PETITION FOR REMISSION.
   The provisions of Rev. St. § 5292 [U. S. Comp. St. 1901, p. 3004], giving any person who has incurred a penalty or forfeiture under the laws relating to the collection of duties or taxes or to the registration of vessels the right to prefer a petition through the judge of the district for a remission of such penalty or forfeiture by the Secretary of the Treasury, does not require the court to postpone the trial of an action brought to recover the penalty on the presenting of such a petition, the secretary having the same power to remit the penalty after as before judgment thereon.
5. EVIDENCE—WEIGHT AND SUFFICIENCY—PROOF OF ALIENAGE.
   Proof that a defendant was naturalized as a citizen of the United States on a certain date, and took the usual oath, is sufficient, prima facie, to establish the fact that he was an alien prior to that time.

Appeal from the District Court of the United States for the District of Hawaii.

The petition in this case presents the nature and character of this proceeding. It reads as follows:

"The United States of America, plaintiff, complains of Walter C. Peacock, defendant, for cause of action against the said Walter C. Peacock, alleges as follows, to wit: That heretofore, and on, to wit, the 2d day of July, A. D. 1902, in order to secure the registry, under the laws of the United States, of a certain vessel known as the 'Julia E. Whalen,' the said Walter C. Peacock did take an oath at the port of Honolulu, in the district and territory of Hawaii, before one R. C. Stackable, special deputy collector of customs in and for the district and territory of Hawaii, the said R. C. Stackable being then and there an officer authorized to make such registry. That in said oath so taken as aforesaid the said Walter C. Peacock, under and by the name of W. C. Peacock, did swear, according to the best of his knowledge and belief, amongst other things, that he, the said Walter C. Peacock, was a citizen of the United States of America, and that he, the said Walter C. Peacock, was at the time of the making of the said oath the sole owner of the vessel Julia E. Whalen, and did further make oath, to the best of his knowledge and belief, that no such subject or citizen of any foreign power, either directly or indirectly, by way of trust or confidence or otherwise, was interested in the said vessel, or in the profits or issues thereof. That at the time of the taking of the oath aforesaid the said Walter C. Peacock in truth and in fact was not a citizen of the United States of America, but was a subject and citizen of a foreign power, which said fact was within the knowledge of the said Walter C. Peacock. That at the time of the taking of the oath as aforesaid, a subject and citizen of a foreign power, to wit, the said Walter C. Peacock, was interested in the said vessel Julia E. Whalen, and was the sole owner thereof; and in truth and in fact, within the knowledge of the said Walter C. Peacock, the statement made by the said Walter C. Peacock in said oath so taken as aforesaid that no subject or citizen of said foreign power was interested in said vessel was not true. That the value of the said vessel Julia E. Whalen is the sum of twenty-five hundred (2,500) dollars. That by reason of the facts aforesaid, and by force of the statutes of the United States of America, to wit, sections 4142 and 4143 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2809], the said defendant, Walter C. Peacock, forfeited and became liable to pay to the United States of America the value of said vessel, to wit, the sum of twenty-five hundred (2,500) dollars, and an action has accrued to the said United States of America, to demand and have of the said defendant the sum of twenty-five hundred (2,500) dollars. Yet the said defendant, though requested, has not paid to the United States of America the said sum of money, or any part thereof, but refuses so to do; to the damage of the said United States of America in the sum of twenty-five hundred dollars. And therefore the said United States of America brings this suit, and prays judgment against the said defendant in the sum of twenty-five hundred (2,500) dollars, together with its costs herein expended."

This petition was duly verified by the United States Attorney for the District of Hawaii, and filed in the United States District Court October 27, 1902. The defendant interposed a demurrer to the petition, which was overruled, and in due time filed his answer, which, among other things: "(1) Denies that at the time of taking the oath in said petition averred, if in fact taken by him, it was within the knowledge of the said defendant, although it was within his supposition, that in truth and in fact he was not a citizen of the United States of America, or that he was a subject or a citizen of a foreign power; and as to whether in fact or in law he took the oath in said petition mentioned this defendant has no information or belief upon the subject sufficient to enable him to answer the averment of said petition of that behalf; and therefore, placing his denial on that ground, he denies that he took the oath in said petition averred. (2) As to whether this defendant, at the time averred in said petition, was not a citizen of the United States, but a subject and citizen of a foreign power, this defendant has no informa-

tion or belief sufficient to enable him to answer the averments of said petition of that behalf. Therefore, placing his denials on that ground, he denies the said averments, and each of them. (3) Denies that at the time of the taking of the oath aforesaid, if in fact he took the said oath, he, the said defendant, knew, although he supposed himself to be, a subject or a citizen of a foreign power, and denies that within the knowledge of this defendant, in truth or in fact, the statement of this defendant in the said oath, if there contained, that no subject or citizen of a foreign power was interested in said vessel, was not true. * * * And the defendant, as a separate and distinct answer to the said petition, * * * further avers: (1) That at the times, or any of them, in the said petition averred, this defendant individually had no interest whatever in the said vessel, the Julia E. Whalen, except that the legal title to the said vessel stood temporarily in his name, while the beneficial interest therein was in the Marcus Island Guano Company, a corporation duly organized, existing, and doing business under and by virtue of the laws of the territory of Arizona, United States of America. That the said Julia E. Whalen was purchased by this defendant for said corporation at San Francisco, state of California; and that, at the city of Honolulu, Island of Oahu, territory of Hawaii, aforesaid, and on or about July 2, 1902, this defendant was informed and instructed that it was expedient to take out a register for the said vessel under the laws of the United States. That he applied for said register on or about the date aforesaid, and, being then and there under the belief that the proceedings in reference thereto were purely formal, and having no knowledge of the laws of the United States in that behalf, and having no interest in the said vessel, except as aforesaid, signed a paper submitted to him for that purpose, at the office of R. C. Stackable, special deputy collector of customs for the district and territory of Hawaii, but then and there did not read and had no knowledge of the contents of said paper, but supposed and believed the said paper to be purely formal, and then and there had no knowledge or belief, if such be the facts, that the said paper represented this defendant to be a citizen of the United States, or that no subject or citizen of any foreign power, either directly or indirectly, by way of trust or confidence or otherwise, was interested in the said vessel or in the profits or issues thereof; and that the said paper may be the oath mentioned and averred in said petition, but as to whether it is or no, or of the actual contents of said paper, this defendant has no knowledge, although he is informed and believes that the said paper and the oath so averred in said petition are identical. Wherefore this defendant prays that he may be hence dismissed, with his costs."

The court, upon motion of the United States attorney, struck out the averments 1, 2, and 3 on the ground that each thereof was sham, evasive, ambiguous, and uncertain, and constitutes no denial; and also struck out the averment above quoted as a separate and distinct answer to said petition on the ground that all of the allegations therein contained were sham, irrelevant, and immaterial, and not a denial of any probative fact in the case. The defendant thereafter, by leave of the court, filed an amended answer to the petition, which quotes the different paragraphs of the petition, "and as to each and every clause of said quoted paragraphs this defendant neither admits nor denies the same, and leaves the plaintiff to make such proof as it may be advised."

The amended answer, as well as the first answer, denied that the value of the vessel Julia E. Whalen exceeded $2,000, and denied that by reason of any of the facts stated the defendant forfeited or became liable to pay the value of the vessel.

The case thereafter regularly came up for trial. A stipulation was filed waiving a jury, and the case was tried before the court. At the time of trial counsel for defendant called the attention of the court to the fact that a petition for a remission of the penalty incurred by defendant had been prepared, under the provisions of section 5292, Rev. St. [U. S. Comp. St. 1901, p. 3004], on the ground that defendant herein had not been guilty of any moral turpitude whatever, and that no benefit had accrued to him, and no injury resulted to others, and praying that the judge should in a summary manner inquire into the circumstances presented by this petition, and

cause the same to be transmitted to the Secretary of the Treasury; and thereupon the defendant moved the court "that the trial of said cause be postponed until after the hearing and other proceedings upon the petition aforesaid." This motion was denied. The trial was then had, and resulted in a decree in favor of the plaintiff against defendant in the sum of $2,000 and costs. From this decree the appeal was taken.

Henry E. Highton and Thomas Fitch, for appellant.

Marshall B. Woodworth, U. S. Atty., N. D. Cal., and Robert W. Breckons, U. S. Atty., D. Hawaii.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after stating the facts, delivered the opinion of the court.

1. It is claimed that the motion to strike out portions of the answer was an inappropriate remedy; that the points should have been reached by demurrer, by motion to render the answer more definite or certain, or by motion for judgment on the pleadings. Conceding that the objections to the averments might have been presented by either of the methods suggested, it does not follow that the course pursued in this case was either inappropriate or erroneous. The remedy to strike out portions of a pleading which are objectionable upon any of the grounds stated in the motion has been frequently recognized and enforced by the courts. Denver R. L. Co. v. Union Pacific (C. C.) 34 Fed. 386, 390; Buller v. Sidell (C. C.) 43 Fed. 116; Gilchrist v. Helena S. & S. R. Co. (C. C.) 47 Fed. 593; Tabor v. Commercial Nat. Bank, 62 Fed. 383, 387, 10 C. C. A. 429; Wallace v. Bacon (C. C.) 86 Fed. 553; McDonough v. Evans Marble Co., 112 Fed. 634, 50 C. C. A. 403; 14 Ency. Pl. & Pr. 80, and authorities there cited.

2. It is next urged that the denials in the answer which were stricken out were sufficient. A bare reading of the statement of facts will carry conviction to the mind that this contention cannot be sustained. The averments in the answer were clearly evasive, and in several respects were ambiguous and uncertain. It is true that, where the facts alleged in a complaint are not within the knowledge of the defendant, and which, from their nature and character, are such as might not readily be ascertained by him, the defendant may so state in his answer, and place his denial on that ground, and in such a case the defendant ought at least to show how it happened that he was without knowledge as to such facts. As was said by Justice Field in Curtis v. Richards, 9 Cal. 33, 38:

"If the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion."

See, also, Gas M. Co. v. Neuse M. Co., 91 N. C. 74.

In the present case it clearly and affirmatively appears upon the face of the petition that the matters therein alleged were matters of public record within the reach of the defendant, and by an examination thereof he could readily have ascertained the truth or falsity of the

averments which he was called upon to answer. It further appears that he was directly connected with the transactions set forth in the petition, and must have known what did occur in relation thereto. Or, if the matters referred to had escaped his memory and recollection, he could and should have gone to the records and ascertained the facts before making his answer. In Bliss on Code Pl. § 326, the author said:

"If the fact charged is evidently within the defendant's knowledge—as an act done by himself, and within the period of recollection, or where he has the means of information—a denial of information in the language of the statute would be clearly false or evasive, and such an answer should be disregarded."

Dixon, C. J., speaking for the court in State v. McGarry, 21 Wis. 496, 500, where the facts were similar to the case in hand, said:

"I do not think, in cases of this description, that a defendant should be allowed to close his eyes and ears, and set up a want of knowledge or information."

The rule is universal that matters of public record within the reach of the defendant cannot be denied on the ground that he had no sufficient information or belief concerning them. Wallace v. Bacon, supra; Elmore v. Hill, 46 Wis. 618, 624, 1 N. W. 235; Union L. Co. v. Board of Supervisors, 47 Wis. 245, 248, 2 N. W. 281; Carpenter v. Momsen, 92 Wis. 449, 456, 65 N. W. 1027, 66 N. W. 692; Brown v. Scott, 25 Cal. 189, 195, 196; Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. 844; Gribble v. Columbus B. Co., 100 Cal. 68, 75, 34 Pac. 527; Mulcahy v. Buckley, 100 Cal. 484, 488, 35 Pac. 144; 1 Ency. Pl. & Pr. 813, and authorities there cited. In Union L. Co. v. Board of Supervisors, supra, where certain alleged irregularities were specified in the complaint, which affected the legality of the taxes, the defendants answered that they had no sufficient knowledge or information to form a belief. The court said:

"This answer is manifestly evasive and bad, because the public records within the reach of the defendants would enable them to positively and distinctly deny these defects in the tax proceedings if they did not exist. Mills v. The Town of Jefferson, 20 Wis. 50. This is really all the answer contains which professes to meet the case made by the complaint; and it is very evident that it shows no defense whatever, for the answer does not traverse and deny nor confess and avoid any of the material allegations of the complaint."

3. It is apparent that the separate and distinct answer to the petition was properly stricken out, because it does not deny any of the material facts alleged in the petition. It only seeks to set up the excuse that he did not know what the law was, and believed that all of the proceedings in relation to the registry of the vessel under the laws of the United States were "purely formal," and that he did not read the same, or know the contents of the papers filed by him. These averments were immaterial and impertinent, and could not be received as a defense to the recovery of the penalty imposed by the law. As was said by the court below, to allow such averments to remain "would be trifling with public justice, and would create false issues to be tried in said cause." They certainly are not consistent

with the solemnity of sworn pleadings before any legally authorized tribunal.

4. The court did not err to the prejudice of appellant in declining to postpone the trial of the cause until the Secretary of the Treasury should act upon the petition of defendant for a remission of the penalty. Section 5292, Rev. St. [U. S. Comp. St. 1901, p. 3004], implies that such steps may be taken before the proceedings which have been instituted for a recovery of the penalty are tried. But it does not declare that upon the presentation of such a petition the proceedings in court shall be stayed until action is taken by the judge and by the secretary upon the petition, or that the petition cannot be acted upon after the judgment and decree are entered in the court. The action of the court in refusing to postpone the trial does not prevent action being taken upon the petition for a remission of the penalties. The petition can be acted upon after the decree is entered as well as before. The trial by the court in this case was no invasion of the right of the Secretary of the Treasury to grant the remission of the penalty after the judgment was rendered, if, in his judgment and discretion, the case, as made in the petition, would warrant it. United States v. Morris, 10 Wheat. 246, 291, 295, 304, 305, 6 L. Ed. 314; The Laura, 114 U. S. 411, 415, 5 Sup. Ct. 881, 29 L. Ed. 147; Brown v. Walker, 161 U. S. 591, 601, 16 Sup. Ct. 644, 40 L. Ed. 819.

5. It is contended that the evidence admitted on the trial was insufficient to justify the decree rendered by the court, in this: "That there is no evidence in the record to show that on July 2, 1902, the appellant was not an American citizen. The only attempted proof was that on September 9, 1902, he was naturalized in the court below, and abjured allegiance to the British crown." The record in the office of the Collector of Customs containing the oath taken by Mr. Peacock to secure the registry of the vessel called the "Julia E. Whalen" was produced in evidence, and the oath read therefrom by E. R. Stackable, the collector. The oath, as shown by the record, was administered by "R. C. Stackable, special deputy collector." The signature to the oath was proven to be in the handwriting of W. C. Peacock, appellant herein, and the testimony shows that on this oath the Julia E. Whalen was registered under the navigation laws of the United States. The collector was not present when this oath was administered. When this fact appeared, the court said: "Does the defendant deny that the oath was administered by some one? Mr. Breckons: He admits it. The Court: If that is so, we will not hear any testimony about it." No objection was made or exception taken to this ruling. Frank L. Hatch, deputy clerk of the United States District Court, testified that he administered the oath of naturalization to W. C. Peacock on September 9, 1902. Certain objections were made to questions asked as leading, and then "the defense admits that the defendant was naturalized on the 9th day of September, and took the usual oath." This was substantially all of the evidence in the case upon the part of the government. W. C. Peacock was then called, and testified in his own behalf as follows: "Q. You have heard read the oath admitted in

evidence purporting to have been taken by you on the 2d of July, 1902? A. Yes, sir. Q. I will ask you whether you did on that occasion, on the date fixed by that oath, you remember being sworn. A. I have no recollection of it." It is suggested by counsel for appellant that the naturalization oath may have been procured by appellant "to settle a doubt or to record a certainty," but there was no evidence whatever tending to show that such was the purpose.

The pleadings and the evidence establish a prima facie case, and fully sustain the order, judgment, and decree of the court, which are hereby affirmed, with costs.

CONTINENTAL INS. CO. v. GARRETT.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1903.)

No. 1,198.

1. INSURANCE—AWARD—CONFORMITY TO SUBMISSION—FAILURE TO FIND SOUND VALUE.
   Where both an insurance policy and a submission to appraisal thereunder require the finding of both sound value and damage, a failure of the appraisers to find the sound value is a fatal variance, which cannot be helped by assuming that the blank left in the award where the sound value should have been inserted was intended as a finding that there was no sound value, nor by a contention that the finding of sound value was immaterial.

2. SAME—NOTICE OF HEARING—FAILURE TO GIVE—EFFECT.
   Where appraisers appointed to estimate a loss under an insurance policy on a brick building, the woodwork of which had been completely destroyed, and the walls partially broken down, failed to give notice to the parties of the time and place of the appraisal, so as to permit the production of evidence, the award was void.

3. SAME—WAIVER.
   The fact that an insured, after a submission to appraisal of a loss under his policy, saw the appraisers on the street, but failed to ask to be heard, or to object to their proceeding without notice, he did not thereby waive notice of the time and place of the appraisement.

4. SAME—SUIT SETTING ASIDE AWARD—DAMAGES—JURISDICTION OF EQUITY.
   Equity, having obtained jurisdiction for the purpose of setting aside an award of insurance arbitrators, may properly retain the case to determine the amount of damages, and render decree therefor.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

This is a bill to set aside an award made by appraisers appointed under the usual clause to that effect in a policy of fire insurance. The subject of insurance was a dwelling house situated in Carthage, Tenn. The contract insured against loss and damage to the extent of $5,000. The loss was appraised at $3,409.72. The insured, claiming that his loss and damage was $5,000, filed this bill, attacking the award upon several grounds. Upon the pleadings and evidence, the court below held the award void, and entered a decree appraising the complainants' damage at $5,000, for which sum, with interest, a decree was directed. From this decree the insurance company has appealed.

¶ 1. Conditions of insurance policies as to arbitration, see notes to Insurance Co. v. Alvord, 9 C. C. A. 628; Assurance Co. v. Decker, 39 C. C. A. 389.

¶ 2. See Insurance, vol. 28, Cent. Dig. § 1429.

J. C. Bradford, for appellant.
G. N. Tillman and A. E. Garrett, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. 1. The policy provided that in default of an agreement the loss should be ascertained by "two competent and disinterested appraisers," one to be selected by each party, and an umpire selected by the two thus chosen, to whom any differences should be submitted. It also provided that the appraisers should together "estimate and appraise the loss, stating separately sound value and damage." A disagreement as to amount of loss having occurred, appraisers were chosen; the insurers selecting one, and the insured another, and these two selecting a third as umpire. The submission was duly signed, and provided, among other things, that the appraisers "should ascertain the sound value of and the loss upon the property damaged and destroyed," etc. For their government in making the appraisement, it was also provided, that, "it is further expressly understood and agreed that, in determining the sound value and the loss or damages upon the property hereinbefore mentioned, the said appraisers are to make an estimate of the actual cost of replacing or repairing the same or the actual cash value thereof, at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location or otherwise, a proper reduction shall be made therefor." It was further provided that the award of any two of the appraisers thus chosen, "made in writing in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss." The award made was signed by the appraiser chosen by the insurer, and by the umpire. The appraiser selected by the insured refused to sign.

The award is in these words:

"To the Parties Interested: We have carefully examined the premises and remains of the property hereinbefore specified in accordance with the foregoing appointment, and have determined the sound value to be ——— dollars, and the loss and damage to be thirty-four hundred and nine and $^{72}/_{100}$ dollars ($3,409.72).

"Witness our hands this the 28th day of January, 1901.

"W. H. Robinson, Umpire.
"H. Griffin, Appraiser."

Is this award in accordance with the submission? The agreement under which the appraisers were selected was at once the source and limit of their authority, and the award, to be binding, must, in substance and form, conform to the submission. 33 Ency. of Law & Proced. 674; Toomey v. Nichols, 6 Heisk. 159; Palmer v. Van Wyck, 92 Tenn. 397, 21 S. W. 761. The submission required the appraisers to determine two things, and two things only, for the submission was only for the purpose of determining the amount of loss, and no other defense open to the insurer was submitted. The policy itself required that the appraisers should state "separately sound value and damage," and the submission, in no less than four

distinct paragraphs, required that both the sound value and loss or damage should be estimated or appraised. Sound value is the cash value, making an allowance for depreciation due to use, etc., at and immediately preceding the time of the fire. This definition is plainly implied by the paragraph from the submission set out above. The award is therefore not in accordance with the submission, because the sound value has not been estimated or appraised.

The able attorney who represented the insurance company in this court has attempted to meet this departure from the submission by two suggestions: First, that the award should be construed as a finding that the "sound value" was nothing; second, that the failure to estimate and appraise the sound value is immaterial, and therefore not fatal. But if "sound value" be the cash value of the insured premises before the damage by fire, the award would be absurd, for it would be equivalent to saying the cash value of the premises before the fire was nothing, but that by the fire a loss and damage has been sustained of $3,409.72. Upon the other hand, a more reasonable implication from the loss and damage appraised is that the cash value immediately before the fire was at least not less than the amount of loss and damages sustained. But was the cash value of the premises immediately before the fire greater than the loss and damage resulting from the fire? If any, the difference must be the value of the remains. If the appraisers had been governed by the agreement of submission, we should not be guessing as to whether the appraisers regarded the loss or damages greater or less than the cash value of the premises just before the damage occurred. The arbitrators have failed to decide a matter which they were required to decide. The cash value before the fire, less depreciations, is all that the insurer was obliged to pay. If the loss and damage was less than this sound value, it could not be required to pay more than the least of the two sums, and the loss and damage could not be greater than the cash value. Hence it was material to the insurer to have both appraised. The award would not conclude the company, therefore, if this sound value was not found, and it might refuse to abide by it. An award ought not to be valid or void at the option of one only of the parties. The award should have pursued the submission, so as to have been obligatory upon both parties. Smith v. Sweeny, 35 N. Y. 291, 293 (opinion of Peckham, J.); Cyclopedia of Law & Procedure, vol. 3, p. 713; Brown v. Warnock, 5 Dana, 492; Harrington v. Brown, 9 Allen, 579. But the direction to assess both the sound value and the loss and damage cannot be said to have been immaterial to either party. If followed, the appraisers would have been compelled to have exercised much care in their estimate, inasmuch as the appraisement of the sound value and the loss and damage to that would necessarily involve an assessment of the value of the remains. Thus some security was provided against inconsistent appraisements. Neither is this such an award as should be upheld by any strained interpretation that the appraisers meant by the unfilled blank in their written award to find that the sound value was identical with the loss and damage reported. This would be an inference in the teeth of an overwhelming weight of evidence show-

ing that the sound value was not less than $5,000, after allowance for depreciation. It is therefore inferable that if the appraisers had obeyed the submission, and appraised the sound value as they were directed to do, they would have appraised it at $5,000. Such a result as this would have checked the possibility of assessing the loss and damage at any less figure, except as a result of an estimate of the cash value of the ruins as equal to such difference. But here, again, the evidence forbids any such intendments for the purpose of upholding a defective award, for the almost conclusive evidence is that the remains of the burned building were not worth more than the cost of removal from the site. We cannot, therefore, assume that the determination of the sound value was for the sole benefit of the insurer, or that the failure of the award to find and report that value has not been of detriment to the assured.

2. Objection is made to the validity of the award for want of notice to the insured. The submission does not, in terms, require notice, or that the appraisers should follow the law. In such circumstances, if appraisers act in good faith, the award is not invalidated because they have erred as to the facts or respecting the law, unless the award shows a purpose to follow the law, and a plain mistake. 3 Cyclopedia of Law & Procedure, 740, and cases cited; Tenn. v. Ward & Briggs, 9 Heisk. 100, 116; Nance v. Thompson, 1 Sneed, 325. Section 5198, Shannon's Code of Tennessee, requiring notice, seems to apply to statutory arbitrations conducted under that chapter, and not to abrogate the common law in respect of arbitrators and awards. Halliburton v. Flowers, 12 Heisk. 25. That notice shall be given to the parties of the time and place of the hearing is ordinarily required, from the commonest principles of justice. Lutz v. Linthicum, 8 Pet. 165, 8 L. Ed. 904; Elmendorf v. Harris, 23 Wend. 628, 35 Am. Dec. 587; Vessel Owners Co. v. Taylor, 126 Ill. 250, 18 N. E. 663; Warren v. Tinsley, 53 Fed. 689, 3 C. C. A. 613. But if the character of the matter submitted and of the arbitrators chosen is such as to justify an inference that the appraisers were selected to act as experts, and adjudge the matter from their own knowledge, it is not essential that notice shall be given or evidence heard unless the submission so provides. 3 Encyclopedia of Law & Procedure, 638, 640; Warren v. Tinsley, 53 Fed. 689, 3 C. C. A. 613, 616; Liverpool Ins. Co. v. Goehring, 99 Pa. 13; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356; Straw v. Truesdale, 59 N. H. 109, 112. In the present case the arbitrators were to ascertain and appraise the sound value of a brick dwelling which had been so completely destroyed by fire as that substantially nothing remained of the woodwork, inside or out. The walls themselves were in part fallen. Thus a mere examination of the premises could not, on the evidence in this record, have informed them as to the character of the finishing of the interior work, and its condition before the fire. The appraisers were experienced contracting builders, but, without some evidence, how was it possible for them to know the sound value or the loss and damage. Under such circumstances, appraisers should give notice to both parties of the time and place of hearing, and require evidence in respect of facts which they could

not otherwise know. The mere fact that the assured saw the appraisers on the street, and that he did not ask to be heard, or object to their proceeding without notice, is not a waiver. The appraisers were not in session when complainant saw them, and he was not present when they examined the ruins or acted in any way in the discharge of their duty, and he had no notice of either the time or place of their session. In favor of an apparently just award, many presumptions may be indulged, but in this case the result reached is so apparently unjust as not to justify any indulgent view of the conduct of the arbitrators. If the appraisers heard evidence as to the character and finish of the interior of this house without notice, they were guilty of misconduct. On the other hand, if they undertook to appraise the loss and damage resulting to the assured without other information as to the character of the interior work than that to be derived from such a ruin as this was, they were equally neglectful of their duty, and exhibited an indifference to justice most culpable.

3. A question has been made upon the partiality of the appraiser selected by the company, but we think it unnecessary to go into this question, in view of the fact that the award must be set aside without regard to this matter.

4. There was no error in the rendition of a decree for the loss and damage as shown by the evidence in the cause. The court, having obtained jurisdiction for the purpose of setting aside the award, which had been pleaded as a bar to the pending suit at law upon the policy, might retain the case for the purpose of determining the loss and damage, or, in its sound discretion, remit that subject to a court of law. Peck v. Ayers & Lord Tie Co., 116 Fed. 273, 275, 53 C. C. A. 551; Ward v. Todd, 103 U. S. 327, 26 L. Ed. 339; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829.

The decree is accordingly affirmed.

PHILLIPS v. IOLA PORTLAND CEMENT CO.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1903.)

No. 1,888.

1. ANTI-TRUST ACT—TEST OF VALIDITY OF CONTRACT OR COMBINATION UNDER.
   The test of the violation of the anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), by a contract or combination, is its effect upon competition in commerce among the states. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law.

2. SAME—CONTRACT RESTRICTING TERRITORY WITHIN WHICH PURCHASERS MAY SELL.
   A contract of sale by a manufacturer to jobbers of some of its product, to be shipped across state lines to the latter, whereby the parties agree that the purchasers shall not sell, ship, or allow any of the product thus purchased to be shipped, outside of a certain state, is not in restraint of trade or illegal under the act of July 2, 1890.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

John Charles Harris (Edward F. Harris, on the brief), for plaintiff in error.

James C. Williams, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge. This is a writ of error to review a judgment for the plaintiff below, the Iola Portland Cement Company, a corporation, against Thomas H. Phillips, in an action for damages for the breach of a contract of sale of cement. The company was a manufacturer of cement in the state of Kansas. The defendant below, Phillips, was a member of the copartnership of William Parr & Co., who were merchants engaged in business at Galveston, in the state of Texas. On January 24, 1901, Parr & Co. made a contract with the cement company whereby they agreed to purchase of it, during the year 1901, 50,000 barrels of Iola portland cement to be delivered free on board the cars at Iola, in the state of Kansas, and to pay therefor $1.20 per barrel. They further agreed "not to sell said cement, ship same, or allow same to be shipped," outside of the state of Texas. Under this contract they accepted and paid for 24,580 barrels of the cement, and refused to accept 25,420 barrels thereof. The cement company brought an action against them to recover the damages which it sustained by the failure of the purchasers to accept and pay for these 25,420 barrels, and Phillips, the only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the state of Texas.

It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. Hopkins v. U. S., 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v.

U. S., 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Northern Securities Co. (C. C.) 120 Fed. 721, 725. The application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the state of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the states, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the act of July 2, 1890.

For a more extended consideration of the principles upon which this decision is based, for a citation, review, and analysis of the authorities which sustain them and which compel the ultimate conclusion which we have reached in this case, reference is made to the opinion of this court in Whitwell v. Continental Tobacco Co. (which is filed herewith) 125 Fed. 454. A repetition of the citation and review of authorities, and of the more exhaustive discussion of principles there indulged in, would be useless here, and it is omitted.

The evidence disclosed the fact that shortly after the expiration of the year within which the defendants had agreed to receive and pay for the cement the plaintiff sold the 25,420 barrels, which the defendants refused to take, for $1.10 per barrel. The president of the plaintiff testified that the cost of selling this cement was about 10 cents per barrel, that it did not cost any more to sell the cement which had been previously sold to Parr & Co. than it did to sell any other cement, but that the cost of selling any cement was about 10 cents per barrel. The court below instructed the jury that, if they believed that the cost of selling this cement was 10 cents per barrel, they might allow that amount as a part of the damages which the plaintiff was entitled to recover. This instruction is assigned as error. But it was manifestly right. The plaintiff had once incurred and paid the cost of selling the cement in question to Parr & Co., and had obtained a valid contract for its purchase price. Their failure to comply with this agreement imposed upon the plaintiff the necessary expense of making a second sale of that portion of the cement already sold which the defendants refused to accept.

It is assigned as error that the court below refused to admit in evidence a telegram from the president of the Iola company to Parr & Co., dated January 24, 1901, the day of the date of the contract, to the effect that the plaintiff would guaranty a rate of freight of five cents per hundred less than Kansas City rates to all Texas points. But there was no error in this ruling. The telegram was not admissible to establish any agreement to guaranty this rate of freight, and a breach of that agreement as a defense to the action, because no such defense was pleaded. It was not admissible to modify or change the written contract of January 24, 1901, because if it was sent before or at the time that the contract was executed it was merged in that contract and became ineffective, and if it was sent after that contract was made it was not pleaded and had no place in the trial of this case.

Another alleged error specified is that the court below refused to admit in evidence a letter from the plaintiff to the defendants, dated February 10, 1902, in which they wrote that they had not done an agency business and requested a proposition. It is contended that this letter was competent to establish the fact that the relation between the plaintiff and the defendants under the contract in suit was that of vendor and vendee, and not that of principal and agent. Conceding that this letter had a tendency to establish that fact, its rejection did not prejudice, and could not have prejudiced, the defendants, because the relation of vendor and vendee was proved by the contract, because the case was tried, and the court charged the jury, and this court has determined the case, upon that theory, and error without prejudice is no ground for reversal.

The judgment below is affirmed.

H. HACKFELD & CO., Limited. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1903.)

No. 940.

1. ALIENS — DEPORTATION — ESCAPE FROM VESSEL—LIABILITY OF OWNERS—ERROR IN LOWER COURT.

   Act Cong. March 3, 1891, c. 551, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], makes guilty of a misdemeanor the owner of a vessel who, having received back on board aliens ordered to be deported, neglects to detain them thereon, or refuses or neglects to return them to the port from which they came. In a prosecution under this act, it was stipulated that in returning Japanese immigrants defendant's steamship arrived at Honolulu; that the immigrants were locked in a room, and between midnight and 5 o'clock effected their escape through a porthole nearly 25 feet from the water; that this method of escape could not have been reasonably anticipated by the master or officers; and that the escape did not occur by reason of any negligence or lack of proper care on their part. The court below made no finding of fact further than that defendant was guilty as charged. *Held*, that as, notwithstanding the stipulation as to absence of negligence, the court might have found that defendant's agents were negligent, the question of liability in the absence of negligence was not presented for review.

In Error to the District Court of the United States for the District of Hawaii.

An information was filed against H. Hackfeld & Co., Limited, a corporation, charging it with violating the provisions of section 10 of the act of Congress entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891, c. 551, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], which provides as follows: "That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid." The information alleged, in substance, that the appellant did refuse and neglect to return to the port of Yokohama two Japanese immigrants, Terujiro Yamoto and Hachiero Irie, whom it had brought from that port to the port of San Francisco, and who had been denied admission to the United States at the latter port. The case was tried before the court without a jury on an agreed stipulation of the facts. The stipulation of facts contains the following: "That on the 12th day of November, A. D. 1902, the said steamship Korea did arrive at the port of Honolulu, in the district and territory of Hawaii; that at the time of the arrival of said steamship Korea at said port of Honolulu the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel, and locked up by the steerage steward of said vessel; at 12 o'clock midnight, of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and 5 o'clock on the morning of the 13th day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly twenty-five feet above the water; that this method of escape could not have been reasonably anticipated by the master or officers or agents of said steamship Korea; that said escape did not occur by vis major or inevitable accident, and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant; that the said defendant made search for said escaped immigrants, but up to the present time have not apprehended the said immigrants, and said immigrants have not been returned to Japan." On this stipulation of facts the plaintiff in error was found guilty of the misdemeanor charged, and was adjudged to pay a fine of $600. To review that judgment the writ of error is taken.

J. E. Foulds and Kinney, Ballou & McClanahan, for plaintiff in error.

Marshall B. Woodworth, Robert W. Breckons, and Benjamin L. McKinley, Asst. U. S. Atty., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff in error invokes the rule that a penal law must be strictly construed, and contends that within the meaning of section 10 of the act of 1891 there can be no neglect to comply with the obligation thereby imposed, if a reasonable attempt be made to perform the same. The case of Warren v. United States, 58 Fed. 559, 7 C. C.

A. 368, decided by the Circuit Court of Appeals for the First Circuit, is an authority adverse to this contention; but the plaintiff in error earnestly urges that the doctrine of that case involves a misconception of the true meaning of the statute, and it cites the case of United States v. Spruth (D. C.) 71 Fed. 679, in which the District Court of the Eastern District of Pennsylvania doubted the wisdom of such a construction of language in a criminal statute. In the view which we take of the record which is before us, it becomes unnecessary to enter into a discussion of this question. The case was tried before the court without a jury upon an agreed stipulation of the facts. In the stipulation appears the fact that the two Japanese who were ordered to be deported, and who had been taken by the plaintiff in error on its steamer from San Francisco to Honolulu en route to Japan, escaped from the vessel while she was lying at anchor at the port of Honolulu, and that they made their escape through portholes, from which they dropped or descended into the sea. The record contains no finding of fact by the court further than that the plaintiff in error was found guilty as charged, nor does it state the ground on which the trial judge found the plaintiff in error guilty of the misdemeanor charged. For aught that we know, the court found that by placing the men in the room, as it did, without taking precautions against their escape through the portholes, the plaintiff in error neglected to perform the obligation imposed upon it by the statute. It is true that the stipulation of the facts recites that the escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or of the plaintiff in error, and that the method of the escape could not have been reasonably anticipated. But the court was not bound by these recitals, nor was it prevented thereby from placing upon the stipulated facts the construction which in its judgment they should properly bear. Haight v. Green, 19 Cal. 113. The assignment of error is that the court erred in rendering judgment upon the pleadings and the facts therein stated. If the trial court entertained the opinion, as may well have been the case, that the plaintiff in error was guilty of negligence in placing the deported persons in a room on board the vessel from which portholes, visible and open, afforded means of escape to any one who could swim a short distance to the shore, we, in our own view of the facts, could find no ground to question the correctness of that conclusion. The rule is that the burden is on the plaintiff in error to show error in the trial court. In this case we think it has failed to meet the requirement of the rule.

The judgment will therefore be affirmed.

BOAK et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1903.)

No. 943.

1. CUSTOMS DUTIES—CLASSIFICATION—FOX BERRIES.

Held, that the expression, "berries, edible, in their natural condition," in paragraph 262, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], means berries which are in their natural condition as imported, and are edible either in that state or after cooking, and that fox berries imported in barrels filled with water are in their natural condition, and are included within said provision in paragraph 262, and not within paragraph 559 of said act, section 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1679], relating to "berries, green, ripe, or dried, * * * not specially provided for."

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The facts are stated in the opinion of the court.

William Brace, for appellants.

Albert H. Washburn, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

GROSSCUP, Circuit Judge, delivered the opinion of the court.

This is an appeal, by the importers of merchandise known as fox berries, from the decree of the Circuit Court sustaining a decision of the Board of United States General Appraisers (Ga. 5142).

Fox berries grow on small bushes in mountainous regions in Norway, Sweden, Nova Scotia, and the Canadian provinces; and are utilized for sauce, tarts and pies, so resembling, both in appearance and uses, the cranberry, that they are sometimes called the hanging cranberry.

The fox berry is imported in casks filled with water. There is some contention in the record that the water carries a salt, thus making it a brine, but this is not satisfactorily shown. The function of the water is not to chemically change the berry, or to act as a preservative, but to furnish a cushion against the injuries incident to transportation, similar to that furnished by sawdust in the transportation of grapes. We are of the opinion that fox berries thus imported, are, within the meaning of the tariff act, imported "in their natural condition."

The importations in dispute were between November 17th, 1900, and November 18th, 1901, and were assessed for duty at one cent per quart under paragraph 262 (Act July 24, 1897, c. 11, § 1, Schedule G., 30 Stat. 171 [U. S. Comp. St. 1901, 1651]), which reads as follows:

"Apples, peaches, quinces, cherries, plums, and pears, green or ripe, twenty-five cents per bushel; apples, when dried, desiccated, evaporated or prepared in any manner, not especially provided for in this act, two cents per pound; berries, edible, in their natural condition, one cent per quart; cranberries, twenty-five per centum ad valorem."

The contention of the government is that the third clause of section 262 includes all edible berries, as distinguished from berries used for drugs, dyeing, &c.; and all berries imported in their natural condition, as distinguished from berries imported in a dried, evaporated, or other prepared, condition. If this interpretation of the clause is maintainable, the duty was correctly assessed by the Board of General Appraisers.

The contention of the importers is, that the third clause of section 262 embraces berries edible in their natural condition, as distinguished from berries edible only after cooking; but if this be rejected, and the clause interpreted to cover berries imported in their natural condition whether edible before cooking or not, the importations in question are not included, because, before being imported, they underwent a water treatment.

The use of water, as already indicated, was not in the nature of a chemical process to change the natural condition of the berries, but was a mechanical medium only, to secure the berries against crushing in transportation. The condition of the berries, as imported, was their natural condition. This disposes of the second contention.

Nor do we think that the third clause of section 262 was meant to be confined to berries edible only in their natural condition. The adjective is meant, in our opinion, to qualify the noun, so as to distinguish, generally, berries edible, from berries non-edible. The tariff act of 1897 opens with the general clause, that there shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in schedules therein contained, the rates of duties therein named; and then proceeds directly to the schedules, in each paragraph of which, for the sake of ready reference, the noun stands first with the qualifying words following. Thus, the first paragraph reads "Acids, acetic or pyroligneous * * *; boracic * * *; citric * * *"; &c., Coming to paragraph 262, the transposed form of expression continues: "Apples, peaches, * * * green or ripe * * *; apples, peaches * * * dried, desiccated, evaporated * * *; berries, edible, in their natural condition." In view of this studied transposition of nouns and adjectives in the tariff act, and reading the opening language of the act into paragraph 262, it would stand as if the language used were "edible berries imported in their natural condition." This disposes of the first contention.

Nor do we think that these importations are governed by paragraph 559 (section 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1679]), providing that fruits or berries, green, ripe, or dried, and fruits in brine, not specifically provided for, shall be put on the free list. Assuming that edible berries imported in their natural condition—the conclusion just stated—are within the meaning of paragraph 262, the importations in question are, by its express terms, excluded from paragraph 559.

The decree of the Circuit Court, sustaining the decision of the Board of General Appraisers, is affirmed.

UNION BISCUIT CO. et al. v. PETERS.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1903.)

No. 1,904.

1. PATENTS—PATENTABLE NOVELTY—PACKAGE FOR BISCUITS.
The Peters patent, No. 621,974, for a method of and means for packing biscuit, crackers, or the like, which consists of placing upon a carton blank of any suitable shape a sheet of waxed or paraffined paper and folding the two together in completing the carton, so that the ends of the two sheets are interfolded, the purpose being to more effectually exclude dust or moisture, is void for lack of patentable novelty, in view of the prior art, which disclosed both the cartons and the paraffined linings.

2. SAME—EVIDENCE OF INVENTION—UTILITY.
The utility of a device is not in itself evidence of patentable invention, although it is entitled to weight when that question is doubtful.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For opinion below, see 120 Fed. 679.

This action was brought by Frank M. Peters, the appellee, against the Union Biscuit Company, Adolph E. Winkelmeyer, and Hartwell B. Grubbs, the appellants, to restrain an alleged violation of letters patent No. 621,974, issued March 28, 1899, to Frank M. Peters, the complainant below and the appellee in this court.

The nature of the invention is fully disclosed by the following excerpts from the specifications. Relative to the general objects of the invention, the patentee says:

"This invention relates to an improved method of and means for packing biscuits, crackers, and other articles, and has for its object to provide an inexpensive package whereby bakery goods of this description may be kept fresh and in proper condition for consumption by effectually excluding moisture therefrom, and whereby the goods will be firmly packed and held and thereby prevented from rattling and breaking in the package.

"Heretofore substantially air-tight and moisture-proof metallic cases or boxes have been employed for the purpose of preserving the freshness of biscuit or the like; but the use of these cases involves considerable expense, and they have only been employed in conjunction with the highest priced goods, their cost being too great to permit their use with less expensive goods. It has been customary heretofore to pack these less expensive goods in cartons or paper boxes, and in some cases these cartons or boxes have been provided with a lining of what is known as 'waxed' or 'paraffined paper'; but in such packages as heretofore constructed this lining has not been so disposed as to close the openings or folds of the box, and has itself presented openings through which the moisture has had direct access to the contents of the package. By reason of these facts such comparatively inexpensive packages have failed to protect the goods from moisture, and they have quickly lost their freshness.

"It is the primary object of my invention to obviate these difficulties, and to provide a package which, at an expense practically no greater than that of the ordinary lined carton package, will effectually protect the goods and preserve their freshness.

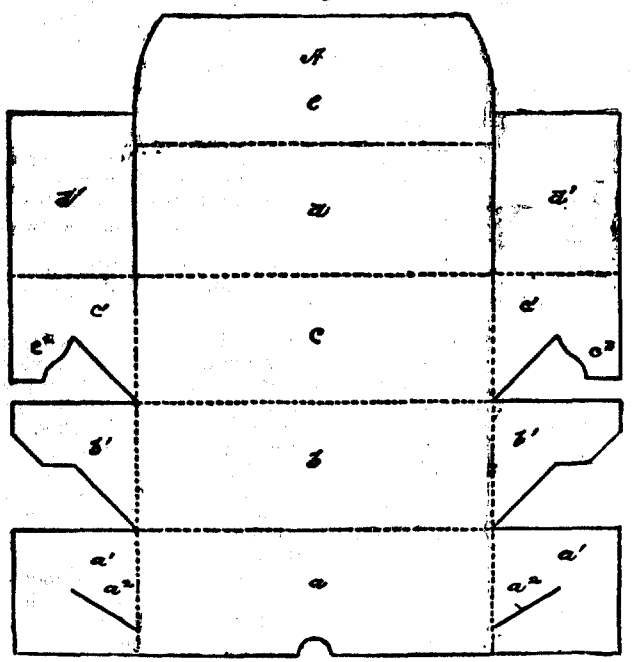
"A further object is to provide a package of this character which in its assembling or making up will be tightly drawn around the goods, and will therefore firmly hold the same, and prevent looseness and consequent breakage."

¶ 2. See Patents, vol. 38, Cent. Dig. § 39.

Relative to the method of constructing the patented device or box, the patentee says:

"In carrying out my invention I provide a blank of pasteboard, strawboard, or other sheet material of sufficient thickness and strength to properly protect the contents of the box or carton made from such blank. (See figure 1.) This blank may be of any suitable form which is adapted for the purpose of being folded up into a box or carton, and is provided with overlapping ends, which are folded over and interlocked with each other to form the ends of the box. In connection with such a blank I employ a sheet of thin flexible paper, preferably a moisture and grease proof paper, such as what is known as 'waxed' or 'paraffined' paper, and which is thin and flexible, yet strong. (See figure 2.) This sheet is of a width equal to the width of the blank and of a length at least equal to the length of the body of the blank plus the width of the top of the completed box or carton, and, since the tuck-flap of the blank is usually about equal to this surplus width, the sheet may be said

Fig. 1.



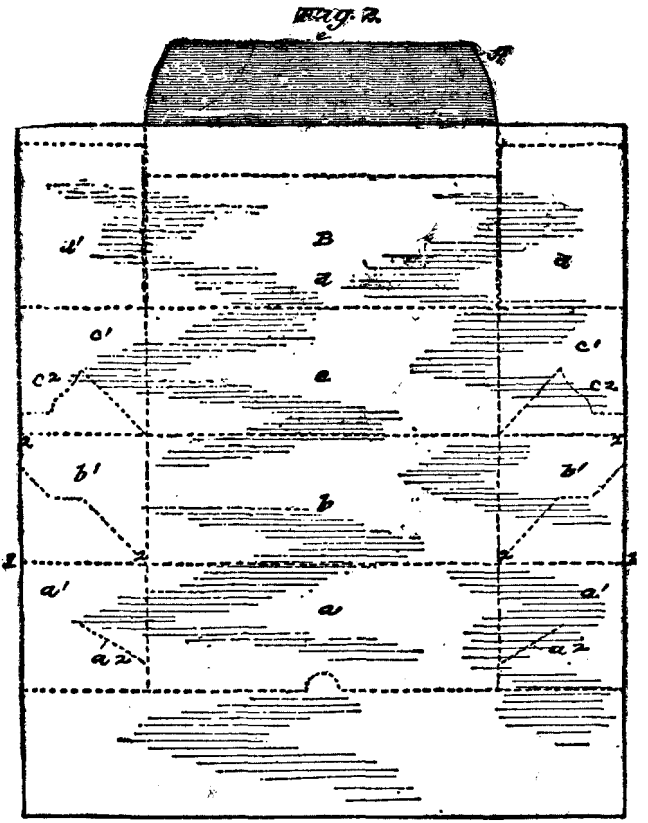
to be substantially equal both in width and length to the extreme corresponding dimensions of the blank. The sheet is laid upon the blank, and the two, both sheet and blank, are then folded around the crackers, the lining sheet being next to the crackers and being folded along with the blank, its lateral edges being thereby interfolded into the spaces between the end flaps of the box, while its front and back edges are folded over the crackers and over each other, and firmly held in place by the top and tuck flaps of the box. By this method of production a package is formed in which the crackers or biscuit are inclosed in a complete protective envelope of paper without any direct openings through which air or moisture may have access to the contents of the package, and are further inclosed in a paper box or carton, with the ends of which the protective envelope is so interfolded as to effectually close these ends and at the same time prevent any movement of the lining relatively to the box or carton. Moreover, in this folding of the two parts, to wit, the blank and the sheet of lining, around the crackers, the lining is

drawn tightly around these latter and held in that position, so as to firmly hold the crackers together and prevent relative movement and consequent breakage of these latter.

"I will now proceed to describe a package embodying my invention in one form and the method of making the same, it being understood that the particular form of blank set forth is employed merely for purposes of illustration, and that any other well-known form of blank adapted to be folded to form a box or carton by the overlapping and interlocking of its parts may be employed."

After describing the method of folding the carton and superimposed sheet of paraffined paper so as to form the box, the patentee says:

"The resulting package is one in which the crackers are completely enveloped and inclosed in a protective envelope of paper, preferably waxed or paraffined paper, which is moisture-proof and grease-proof, without any open-



ings which may gap and admit moist air to the contents; and this envelope is interfolded with the various flaps and sections of the paper box or carton, within which it and the crackers are inclosed in such a manner that the interfolded portions of the lining sheet close the spaces between the flaps of the box or carton and more effectually protect the contents thereof, while at the same time both the lining sheet and box or carton are so interfolded as to form, in effect, a unitary structure, it being impossible for the lining to move relatively to the box or carton, and the two holding the crackers firmly in place and preventing movement and consequent breakage of these latter."

For the purpose of indicating clearly that the patentee does not desire to confine his claims to the particular kind of box described in his specifications, he says:

"As already stated, the particular form of box-blank shown is chosen merely for purposes of illustration, and other well-known forms of folding box-blanks may be employed in its stead. Moreover, even with the particular form of blank shown, the precise order of folding in the several parts may be varied, it being only essential for the purposes of my invention that the lining sheet shall be folded along with the blank and interfolded with the parts of this latter. If it be deemed desirable, the lining sheet may be secured to the box-blank before folding by means of a suitable paste applied between the two along such lines or at such places as may be deemed necessary.

"While I have described my improved package and method of making same as applied more particularly to the packing of biscuit, crackers, or the like, it is obvious that the same package and method may be employed for other articles—as, for instance, lard and similar compounds—and in such a case the character of the protective lining of paper will vary according to the character of the article to be protected, being either moisture-proof or moisture and grease proof, or having other characteristics, such as the circumstances may require. In the case where the package is used for crackers or other similar bakery goods, a moisture and grease proof lining is desirable, and for this purpose, as well as for general use, I prefer to employ what is known as 'waxed' or 'paraffined' paper, which is both moisture and grease proof, although any equivalent paper adapted to be folded in the manner set forth may be substituted therefor."

The patentee claims as his invention:

"(1) The herein-described method of packing biscuit, crackers or the like, which consists in completely enveloping the same in an uncut or continuous lining or protective sheet and an outer sheet or blank of heavier but flexible material provided with marginal flaps, by superposing the lining or protective sheet upon the blank and then simultaneously folding both said sheet and said blank by the aid of a suitable former into the form of a box or carton, overlapping and tucking said flaps during said folding and thereby interfolding the marginal portions of the lining or protective sheet with the flaps of the blank and securing the flaps to hold the package closed, substantially as described.

"(2) The herein-described box or carton for crackers, biscuit or the like, comprising an internal lining composed of a sheet of protective paper completely enveloping the contents, and an outer sheet of heavier but flexible material having overlapping and interlocking flaps with which the marginal portions of the lining sheet are interfolded, substantially as described.

"(3) The herein-described box or carton for biscuit, crackers or the like, comprising an internal protective lining composed of a single continuous or unbroken sheet of material such as waxed paper and an external covering of heavier but flexible material suitably cut and scored to provide overlapping and tucking flaps, said sheets being adapted to be simultaneously folded while one is superposed upon the other and said flaps being overlapped and tucked and the marginal portions of the lining interfolded therewith and the package thereby secured without extraneous fastening means or perforating the lining, substantially as described.

"(4) The herein-described box or carton comprising an internal protective lining composed of a single continuous or unbroken sheet of material, such as waxed paper, and an external covering of heavier material suitably cut and scored to provide overlapping and tucking flaps, and said lining sheet being of such dimensions as to provide a top fold adapted when folded to afford a triangular flap of greater length than the width of the box, and to be engaged by the top flap of the external covering and pass therewith into the space between the edges of the front of the covering and the lining sheet, said flaps being overlapped and tucked and the marginal portions of the lining interfolded therewith, and the package thereby secured without extraneous fastening means or perforating the lining, substantially as described."

The trial below resulted in a decree in favor of the complainant, and the defendants have brought the case to this court on appeal.

Paul Bakewell (Frederick R. Cornwall, Dorsey A. Jamison, and Nelson Thomas, on the brief), for appellants.

C. K. Offield and Edmund Wetmore (Charles C. Linthicum, F. W. Lehmann, and Earl D. Babst, on the brief), for appellee.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal question that arises in this case, and the only one which we have found it necessary to consider, is whether the inventive faculty was exercised in the construction of the paper box or carton which is described in the Peters patent, and is claimed as a product in the second, third, and fourth claims of that patent, and as a method of packing crackers in the first claim. This question, as a matter of course, must be determined upon a full consideration of the state of the art to which the patent in suit appertains and in the light of the well-established doctrine that the patent itself creates a presumption of patentable novelty, which must be fully overcome by the appellant before it can be adjudged invalid.

The specification of the Peters patent contains a general admission that prior to its issuance paper boxes or cartons, as they are sometimes termed, had been used to pack crackers and biscuits and other like articles; also the admission that in some instances such cartons had been provided with a lining of waxed or paraffined paper to pretect the inclosed article from dampness. It is said in the specification, however, in substance, that heretofore the lining of such cartons had not been so disposed as to fully exclude moisture, and the chief object of the patentee seems to have been to so construct a paper box with a lining of wax paper that it would more effectually exclude dampness and dust. A merely cursory examination of the art shows that this was a necessary admission on the part of the patentee. Paper boxes had been made and were in use for the purpose of holding and carrying crackers, berries, candy, ice cream, lard, butter, and a great variety of other articles long before the date of the Peters invention, and many patents describing a method of constructing such boxes had been granted. Indeed, so common has the use of paper boxes become that, without resorting to patents or other printed documents, this court would be justified, by its everyday experience, in taking judicial notice of the fact that paper boxes, both lined and unlined, were in common use for at least 10 or 15 years prior to the date of the patent in suit. As a general rule, such boxes were made in substantially the same way; that is to say, by taking thick heavy paper, either pasteboard or strawboard, and cutting it into such a shape that when folded along certain lines a box of a certain desired shape would be formed. The boxes were either left open at the top, or were provided with an overlapping cover, or were entirely closed. Very frequently the paper which was used to construct such boxes was cut so as to have angular or curved flaps which, in the

process of folding, were inserted in slits cut in the side or top of the box so as to hold it together. On the trial of this case in the lower court a large number of patents were offered in evidence for the purpose of showing the state of the art in question and establishing the fact that very many persons had described methods of making paper boxes long before the date of the Peters patent, and that, as a rule, the processes so described were very much alike, and substantially as last above described; the only differences in the processes being that the paper out of which the boxes were made was cut at times in a different form, so as to produce boxes of a different shape, which would be best adapted to the uses to which they were to be put. For the purpose of showing that the art of making paper boxes was old and well understood when the Peters patent was issued, it is only necessary, we think, to refer to the following patents by name and number, without describing them in detail: United States letters patent No. 164,099, dated June 8, 1875, issued to James L. Moore; United States letters patent No. 183,950, dated October 31, 1876, issued to Charles L. Lockwood; United States letters patent No. 268,311, dated November 28, 1882, issued to Hugh R. Stewart; United States letters patent No. 285,456, dated September 25, 1883, issued to August Brehmer; United States letters patent No. 556,675, dated March 17, 1896, issued to W. B. Howe; and United States letters patent No. 511,080, dated December 19, 1893, issued to W. B. Howe and F. B. Davidson. An examination of these patents has satisfied us that when Peters entered the field as an inventor it was well known to those familiar with the art of making paper boxes that they could be produced in any desired form by simply cutting the paper out of which the box was to be made in a certain way and with the necessary flaps and slits, before it was folded.

Other patents, which the record contains, show with equal certainty that Peters was not the first person to suggest the idea of lining paper boxes with waxed or paraffined paper, or with any other kind of paper, for the purpose of more effectually excluding moisture. This idea was suggested by Smith as early as May 9, 1882. Vide United States letters patent No. 257,522; by Albert, United States letters patent No. 355,496, issued January 4, 1887; by Bower, United States letters patent No. 232,930, issued October 5, 1880; by Munson, United States letters patent No. 288,255, issued November 13, 1883; and by some others. The conclusion, therefore, is inevitable that when the patent in suit was applied for the art to which it appertained had reached a high state of development, and that, because it was a very simple art, little, if anything, remained to be done to perfect it. Paper cartons in many forms had already been made and applied to a great variety of uses. They had been made with a lining and without a lining, depending generally upon the use to which they were to be applied; and, when lined, the lining had sometimes been stuffed in after the box was formed, as shown by the Smith patent, No. 257,522, while in other instances the lining had been pasted in places to the outer covering, so as to be folded with it integrally in the process of making the box, as shown in the Albert patent, No. 355,496.

In view of what has been said, it is difficult to understand in what respect the Peters specification discloses patentable novelty, whether we consider the described method of making paper boxes claimed in the first claim or the product of the process. Novelty does not reside in the manner of cutting the pasteboard or strawboard blank out of which the box is formed, because the patentee himself says that the blank so cut "may be of any suitable form which is adapted for the purpose of being folded up into a box or carton and is provided with overlapping ends." Besides, it was a well-known fact, when the patent in suit was issued, that cartons of any desired shape could be made if a little attention was given to cutting the blank before folding. Nor does the novelty of the device consist in providing cartons with a lining of any sort, because cartons with linings were in common use long prior to the date of the application for the patent. If we correctly understood learned counsel for the appellee, it was frankly conceded on the oral argument that, if what Peters accomplished rises to the dignity of an invention, it is because he was the first to suggest the idea of laying a sheet of waxed or paraffined paper on top of the blank carton and folding them together so as to form a unitary structure. This method of making a carton, it was said, was of great importance, because it had the effect of interfolding the ends of the two protective envelopes in such a way as to more "effectually close these ends, and at the same time prevent any movement of the lining relatively to the box," and because more dampness and dirt was thereby excluded from the inclosed article. Did this suggestion involve the exercise of the faculty of invention? We think not. In the first place, the idea of placing the lining sheet on top of the blank carton, and folding the two together was not new, but was disclosed by United States letters patent No. 355,496, issued to Albert on January 4, 1887. That patent covers a paper box for carrying fruit, oysters, and other like articles. The box was made water-tight by pasting a sheet of thin manilla paper on top of the blank carton and folding the two at the same time so as to form the walls of the box integrally out of the two sheets. The patentee of this box pointed out as one of its chief merits that when a box was thus constructed the lining could not be torn out or displaced. Again, in a patent granted to Cooke on December 3, 1895 (United States letters patent No. 550,870), a paper box for shipping currency is fully described, which was constructed by placing the blank carton on top of a sheet of wrapping paper and pasting the two sheets together at the place where they united to form the bottom of the box. The patentee of that box also suggested that the two sheets might be pasted together where they united to form one side of the box. The carton was then folded in the ordinary way, to form the box, and after it was formed by inserting the flaps in the appropriate slits, the wrapping paper at the sides and ends was folded around it in the ordinary way to serve as an outer covering. One of the appellants' experts on the trial expressed the opinion, in which we fully concur, that, if the process of constructing a box which Cooke described was reversed by placing the wrapper on top of the blank carton, and then folding the two together to form a box, the result would be a carton for packing crackers that would

exclude moisture and dirt as effectually as the Peters box. The examiner of the Patent office to whom Peters' application for a patent was first submitted also called attention to the Cooke patent, and in rejecting the application made the following statement in which we fully concur: "It would not involve invention to place the wrapper on the inside of the box instead of the outside."

But, aside from the foregoing view of the case, the sole object which Peters seems to have had in view in folding the lining and the blank carton together was to more effectually close the ends of the box so as to exclude more dirt and moisture. Let it be assumed that this object was attained, or was attained to some extent, and yet it does not appear, we think, that the method of folding thus suggested was new, or was so far new as to amount to invention. It was substantially the same method of folding two sheets of paper which grocers have employed from time immemorial when they have had occasion to wrap up sugar, salt, flour, rice, and a hundred other like articles, using for that purpose two sheets of paper, one laid on top of the other. When two sheets are thus used instead of one, for the purpose of wrapping up an article, the ends of the two sheets are necessarily interfolded practically in the same manner which Peters describes; and the effect of such interfolding is to more "effectually close the ends," and prevent the inner sheet from moving relatively to the outer sheet.

It is urged, however, at great length, and with considerable force, that the demonstrated utility of the Peters carton as a means of packing crackers and preserving them from moisture in damp climates entitles him to favorable consideration and a monopoly of the use of the carton which he has constructed. It is said, in effect, that the great utility of the carton is sufficient evidence of invention. In view of this line of argument we have considered the evidence of utility with some care, and, while it is sufficient to show that the cartons in question do operate to exclude the outer air and moisture to a considerable extent, yet we are by no means satisfied that this result is due to the carton, or to the manner in which the ends of the lining and carton blank are interfolded. The testimony shows that when the carton is fully made up in the manner described in the patent, and filled with crackers, it is then carefully covered with an outer wrapper, which is closely sealed along the edges so as to entirely exclude the outer air. It admits of very little doubt, we think, that this outer cover, which is not mentioned or described in the patent, has as much, if not more, to do with protecting the contents of the box from dampness and dirt as the carton itself. But, even if this were not so, and if the carton possesses all the merit that is claimed for it, its mere utility would not suffice to render it patentable. It sometimes happens that an improvement in a machine or device, which is the result of ordinary mechanical skill, adds much to the utility of the device or machine, but this fact does not render it patentable. If a doubt arises in the consideration of a patented article or device whether the inventive faculty has been exercised, the fact that the article in question has gone into general use, that there is a large demand for it, and that it seems to possess great utility, is entitled to great weight; but when

it is apparent that the inventive faculty has not been exercised, and that nothing more has been accomplished by the alleged inventor than might have been done by an ordinary workman or mechanic acquainted with the art, if his attention had been directed to the subject, a patent, if granted, cannot and ought not to be sustained. The law to this effect is well settled. McClain v. Ortmayer, 141 U. S. 419, 427, 428, 12 Sup. Ct. 76, 35 L. Ed. 800; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707; Fox v. Perkins, 3 C. C. A. 32, 52 Fed. 205, 213; Dueber Watch Case Mfg. Co. v. Robbins, 21 C. C. A. 198, 75 Fed. 17; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 635, 13 Sup. Ct. 472, 37 L. Ed. 307; Falk Mfg. Co. v. Missouri Railroad Co., 43 C. C. A. 240, 103 Fed. 295, 302, and cases there cited. In the case in hand it is plain, we think, upon a fair consideration of the state of the art at the time the patent in suit was applied for, that Peters' patent is lacking in patentable novelty, and that he is not entitled to a monopoly of the manufacture, use, and sale of the article in question. Indeed, we think it would be a perversion of the patent law to hold that one who has made no greater advance in the art of manufacturing paper boxes than he appears to have done, is entitled to a patent. Considering the fact that Peters merely suggested the idea of folding the carton blank and superimposed lining sheet together, or at the same time, so that the two sheets, at the ends, would be interfolded, as always must be the case when any package is wrapped up in two sheets of paper instead of one, we may, with great propriety, apply to the alleged invention the oft-quoted remark of Mr. Justice Bradley in Atlantic Works v. Brady, 107 U. S. 192, 200, 2 Sup. Ct. 225, 231, 27 L. Ed. 438, that:

"The design of the patent law is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. * * * It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts."

We are of opinion, for the reasons heretofore expressed, that the Peters carton or paper box fails to disclose patentable novelty, and that the decree below ought to be reversed, and the bill dismissed. It is so ordered.

EQUITABLE LOAN & SECURITY CO. v. R. L. MOSS & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 17, 1903.)

No. 1,299.

1. BANKRUPTCY—MORTGAGED PROPERTY—SURRENDER TO MORTGAGEE.
Where it appears that the entire assets of a bankrupt corporation consist of a manufacturing plant incumbered by a mortgage for more than its value, that the trustee, after diligent effort, has been unable to sell the same, either at public or private sale, for any sum near its value,

and that the property is a source of expense, the court of bankruptcy should permit it to be turned over to the mortgagee, subject to the right of the trustee or general creditors to contest the validity of the mortgage, if desired, in any court having jurisdiction.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Georgia, in Bankruptcy.

H. E. W. Palmer, for petitioner.

Geo. S. Jones and Thos. F. Green, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. It appearing from the record that the Quintette Manufacturing Company, a manufacturing corporation, was adjudged an involuntary bankrupt on the 24th of October, 1902, and that all of its assets consisted of a cotton milling plant, and that the same was incumbered by a mortgage to the Equitable Loan & Security Company, executed more than four months before the filing of the petition in bankruptcy, for a sum which, with interest, amounts to about $28,000, and that the entire value of the plant does not exceed $20,000, and that the trustee, T. G. Greene, being placed in possession of the plant, has diligently endeavored, under orders of the District Court, for the past six months or longer, to sell the same, and has not been able to do so either at public or private sale, and has had no bid or offer made to him nearly equaling the amount of the incumbrance, and that it is necessary to insure the property and to employ a night watchman to guard it, and that, therefore, the property is burdensome, and without a value to the trustee for the benefit of the general creditors; and, it appearing that the interest of both parties requires a speedy disposition of this case, the court, reserving the right to file a more elaborate opinion herein, if deemed advisable, now orders, adjudges, and decrees that the petitioner is entitled to relief; that the order of the district court, of date August 10, 1903, be revised; and that the trustee is directed to release and surrender the possession of the mortgaged property, and that he no longer hold or seek to hold and control the same. Inasmuch as the attorney for the petitioner in the court below and in this court offered to pay "the taxes and the insurance premiums on the property and the hire of the night watchman," this order is made on condition that it reimburse the trustee so far as he has heretofore paid such taxes, premiums, or hire, less any amount which the trustee has received, if any, for rent of the mortgaged property; the amounts of such expenditures and receipts, if not agreed on, to be ascertained under the direction of the District Court. This decree is without prejudice to the right of the trustee or the creditors of the bankrupt to contest the validity of the mortgage by suit or otherwise in any court having jurisdiction.

The respondents R. L. Moss & Co. are taxed with the costs of this proceeding in this court and in the court below.

CORRIGAN TRANSP. CO. v. SANITARY DISTRICT.

(District Court, N. D. Illinois, N. D. October 13, 1903.)

No. 9,457.

1. NAVIGABLE STREAMS—OBSTRUCTION OF NAVIGATION BY CREATING CURRENT IN CHICAGO RIVER—LIABILITY OF SANITARY DISTRICT.

The sanitary district of Chicago, having been authorized by the state, and by the United States government through the Secretary of War, to construct the drainage canal and connect the same with the Chicago river, its use of the river for that purpose is lawful, and it cannot be held liable for damages resulting therefrom so long as such use is reasonable and within the authority conferred. The provision in the permit granted by the Secretary of War that the district must assume all responsibility for damages to property and navigation interests by reason of the introduction of a current in the river does not create a liability, but merely undertakes to impose on the district such liability as may legally arise; and the creation of a mean current throughout the length of the river of 1¼ miles an hour, which at congested points, such as bridge draws, is augmented, and operates to obstruct or retard the passage of vessels, especially those of large displacement, is not an unreasonable or unauthorized use of the river, which renders the district liable to a vessel for the additional expense and delay resulting, in the absence of any exercise by the secretary of the power reserved by him to regulate the current should it prove unreasonably obstructive.

In Admiralty. Suit to recover damages for obstructing navigation of the Chicago river.

Harvey D. Gaulder and C. W. Greenfield, for libelant.
Seymour Jones, for respondent.

KOHLSAAT, District Judge. Libelant seeks to hold the respondent for damages alleged to have been incurred in towing the barge Algeria from Elevator C, on the Chicago river, west of Halsted street, to a point near the mouth of the river, by reason of the current created by respondent's canal or drainage channel. The barge is 288 feet long, has 44.6 feet beam, and draws, when loaded, 16½ feet of water. Libelant claims: (1) The barge was delayed about 12 hours; (2) that she incurred an extra expense of tug hire of $328; and (3) that she sustained damage by the straining of lines and timber heads.

The above items, it is insisted, were all caused by the greatly increased rapidity of the current. Owing to this cause the tugs were unwilling to start with the barge until daylight on October 5, 1900. She started down the river about 5 o'clock in the morning in charge of two tugs—one forward and the other at her stern. These, it is claimed, would have been adequate in a current not exceeding 1¼ miles per hour. In passing through the Halsted street draw a third tug was engaged—two forward and one astern. She was half an hour in clearing the bridge draw. The same trouble was repeated at each draw from Twenty-Second street to Washington street. There a fourth tug was procured, and the trip down the river was finally concluded. While the current offered considerable resistance all the way down, the greatest current was encountered at the bridges by reason of the conjested channel at such point and the obstruction caused by the barge herself.

Libelant insists that respondent is liable for any damage caused by its acts in increasing the current, claiming incidentally that the increase was largely in excess of the 1¼ miles per hour alleged to be contemplated by the Secretary of War. Respondent, on the other hand, claims that its acts in respect to an increase of the current were under the control of the government of the United States, that it was acting under the permit of the Secretary of War, and that it committed no illegal act in accelerating the river current.

By Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541], it was provided that it should be unlawful to modify the condition or capacity of the channel of any navigable water of the United States, "unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to the beginning the same." This act covers the Chicago river. The respondent was organized in 1890, under the act of July 1, 1889 (Laws 1889, p. 125), in reference thereto, passed by the Legislature of Illinois, in which state the Chicago river is wholly situated. The district was by said act authorized to construct a drainage channel of sufficient size and capacity to produce and maintain a flow of water of 300,000 cubic feet per minute, and a current of not exceeding three miles per hour. Provision was also made for the increase of flowage, in the event of a greater population, without an increase of speed of current.

In pursuance of and conformity to the above act, respondent proceeded to and did construct a drainage channel from Robey street, in the city of Chicago, in said state, to Lockport, Ill., a distance of about 28 miles; it being the intention to use the Chicago river from Robey street to Lake Michigan as a connection between said channel and the lake. On June 16, 1896, the respondent, by its president, made application to the Secretary of War for permission to make such improvements and changes in the Chicago river as would meet the requirements of the said channel and the law under which it was constructed, and submitted therewith a map of the proposed changes. On the recommendation of the government engineer, the Secretary of War granted a qualified permission on certain conditions. Clause 2 of this permission provided that the authority granted should "not be interpreted as an approval of the plans of the sanitary district of Chicago to introduce a current into Chicago river. This latter proposition must hereafter be submitted for consideration." Clause 4 provided "that the United States will not be put to expense by reason of this work." The other clauses are not pertinent here. Afterwards more complete plans were furnished by respondent, whereupon, on November 16, 1897, upon the recommendation of the government engineer, the Secretary of War approved the same, and granted a permit, subject to the same conditions as above set out.

Some time prior to April 24, 1899, application was duly made to the Secretary of War for leave to connect the said drainage channel with the Chicago river at the south branch thereof at said Robey street. This was referred to the chief government engineer. On May 8, 1899, the Secretary of War granted permission to respondent to make such connection, subject to certain reservations, to wit:

(1) That the matter should be submitted to Congress, and the permit should abide its action there; (2) that, if at any time the current should be found to be unreasonably obstructive to navigation or injurious to property, the right was reserved to close or modify the discharge through said channel to such an extent as may be demanded by navigation and property interests along said Chicago river and its South branch; (3) that respondent must assume all responsibility for damages to property and navigation interests by reason of the introduction of a current in Chicago river. In January, 1900, the connection was made, since which time the water from the river and lake have flowed into the drainage channel. The current resulting from this flow is alleged by libelant to be the primary cause of the damage complained of.

It is evident that, should the theory of libelant prevail, it would make respondent liable for any and all damages arising from the increased current, no matter how slight the increase. Not only navigation interests, but abutting property interests, would be in position to make claims for damages growing out of any increase in current. The matters involved herein are therefore of very grave importance. The evidence as to the rate of speed of the current is uncertain. It would seem to be fairly established by respondent's witnesses that the average or mean rate of speed along the whole line of the river does not exceed 1¼ miles per hour, as a result of a flow of 300,000 cubic feet per minute. But at all congested points, such as bridge draws and other narrow points, it is much greater, and when augmented by the displacement and resistance of vessels this speed is further increased.

It would seem from the evidence that an average speed of even one-half a mile per hour would in such circumstances exceed 1¼ miles per hour. The only theory upon which this rate of speed, i. e., 1¼ miles per hour, is involved in this case, is that respondent in its application for leave to make changes in the river says: "It is desired to so correct and regularize the cross-section of the river as to secure a flowage capacity of 300,000 cubic feet per minute, with a velocity of one and one-quarter miles per hour;" and the recital in the engineer's recommendation to the Secretary of War, that the respondent's engineer estimates the mean current, with 300,000 gallons per minute, to be 1¼ miles per hour, which estimate he declares to be simply an assumption based on an unobstructed flow, together with the recital in the preamble to the final permit of the Secretary of War, granting authority to connect the river and the channel, to the effect that the Secretary of War has heretofore granted respondent permission to make improvements in the river "for the purpose of connecting and regulating the cross-section of the river so as to secure a flowage of 300,000 cubic feet per minute, with a velocity of 1¼ miles an hour." It will be seen from above that the Secretary of War does not in any manner undertake to fix the rate of speed of the current, or the amount of flowage, but simply reserves the right to regulate the same as experience may make desirable. The clause of the final permit above quoted requiring the respondent to assume all responsibility for damages in the premises

cannot be construed as meaning more than that, that whatever damages may legally arise are to be assumed by respondent. It does not create any liability, but would seem to have been inserted as an extra precaution. The Secretary of War could neither create nor wipe out a legal cause of action. The liability referred to is a "legal liability," springing out of the acts of respondent, existing, if at all, entirely independent of said clause. The issue, then, must be narrowed down to the single proposition: "Is the sanitary district of Chicago liable for damages growing out of its manipulation of the Chicago river, such acts being done with the consent of the federal government and the state of Illinois?"

A number of cases have been cited holding that a party obstructing navigable waters is liable for damages resulting therefrom, but in each of such cases the obstruction was an illegal one; that is, not done under authority of the government. In the case at bar there was no illegal act on the part of respondent. The improvement was lawfully made. Had Congress not legislated with regard to the Chicago river, the state would have the power to direct and control it to the extent of closing it. Congress has, however, so legislated, but has, through its proper officer, released to a degree something of its control. To the extent of such release may it not be said that the state is reinvested with control. The act creating respondent (Laws 1889, p. 125) by section 7 provides that the trustees of a sanitary district shall have power to provide for the drainage of such district by laying out, etc., one or more channels, etc., for carrying off and disposing of the drainage, etc., "together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed." It provides for the drawing of water from lake Michigan, and in section 27 enacts that, if any such channel "receives its supply of water from any river or channel connecting with lake Michigan, it shall be construed as receiving its supply of water from Lake Michigan." It would seem then that so far as the state had the power it authorized the respondent to use the Chicago river. Can it be claimed that the government had not the power to permit such a use of the river as to it should seem reasonable, reserving the right to regulate that use as it deemed consistent with the rights of navigation and property owners? Has the general government not the power to so reconstruct or change navigable streams as it may deem best for the public use? Certainly, if it has, it can permit others to do so. The drainage channel is a vast public improvement. The government has recognized it as such, and permitted a reasonable use of the Chicago river in connection with it. It has reserved the power to control the flow of water. This power it may exercise at any time.

Whether or not it is within the power of the government to arbitrarily permit the increase of the current in a navigable river to such an extent as to make navigation thereon more tedious and expensive, it must be conceded that the welfare of several millions of its citizens is a consideration which might well be pleaded as a sufficient ground for a reasonable modification of the existing current. Were it either necessary or desirable to find other consideration, it

may be found in the act of incorporation itself, wherein it is provided that when the channel is completed, and 300,000 cubic feet of water per minute turned therein, the same is declared to be a navigable stream, and that, whenever the general government improves the Des Plaines river for navigation to connect with this channel, said general government shall have full control over the channel, subject to the right of the district for drainage purposes. It may well be assumed that the government, through its proper officers, had this in mind.

My conclusion upon the matter is this: By permission of the general government the respondent connected the channel with the South branch of Chicago river. Such permission was withheld until certain requirements were complied with. Respondent took all necessary legal steps, and acted within the permit. Whatever damage accrued to libelant grew out of the congestion of the channel by reason of the bridge piers or abutments which were not under its contract. There is no undertaking with navigators, express or implied, that the current of the river shall not exceed a certain rate of speed, except the three-mile provision of the act creating the district. The damage complained of would not have accrued to a smaller vessel. It was the resistance of the current as augmented by the narrow draw and the great bulk of the vessel, the latter being such as to practically fill the draw and stop the flow beyond the bow. These three causes combined brought about the damage claimed. Was the additional current an unreasonable use of the permission given by the government? I think not. It was also a reasonable exercise of the power vested in the Secretary of War. I find no adjudicated case dealing with the rights of navigators with reference to difficulties of navigation caused by increased speed of currents resulting from acts approved by the proper government officers.

In the case of Cummings v. Chicago, 188 U. S. 410–431, 23 Sup. Ct. 472, 47 L. Ed. 525, Justice Harlan lays down certain general principles affecting the relative powers of the United States and of the state with reference to navigable waters, which, while not bearing directly upon the facts of this case, would seem to indicate that it was not the purpose of the act of 1890 to deprive the state within whose limits the navigable water is wholly situated of all reasonable control for local purposes.

On general principles, however, the rights of navigators must be held to be subject to the exercise of such power by the government. The most that can be said for libelant is that it has made out a case of damnum obsque injuria.

The libel is dismissed.

UNITED STATES v. WHELPLEY et al.

(District Court, W. D. Virginia. November 7, 1903.)

1. CRIMINAL LAW—LOTTERIES—TRANSPORTATION OF TICKETS—STATUTES—CONSTRUCTION.

Act March 2, 1895, c. 191, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178], provides that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or carry from one state to another in the United States, any ticket of a lottery, shall be punished, etc. *Held*, that such statute did not prohibit the transportation of lottery tickets from a state to the municipality of the District of Columbia.

2. SAME.

Such section did not prohibit the transportation of lottery tickets from one state "through" another state or states, where the ultimate destination of the shipment was not within one of the United States.

Thos. L. Moore, U. S. Atty.
J. B. Stephenson, for defendants.

McDOWELL, District Judge. The defendants have been indicted for a violation of the act of March 2, 1895, c. 191, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178], in relation to the suppression of the lottery traffic. The first count of the indictment charges that the defendants shipped by express certain lottery tickets from Dayton, Va., to West Virginia, for the purpose of disposing of the same. The second count charges that the defendants shipped by express lottery tickets from Dayton, Va., through West Virginia, to Maryland, for the purpose of disposing of the same. The third count charges that the shipment was from Dayton, Va., to the District of Columbia, for the purpose of disposing of the same. The defendants demur to the third count, on the ground that a shipment to the District of Columbia is not prohibited by the statute.

The act, so far as now material, reads:

"That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States; or carried from one state to another in the United States, any * * * ticket * * * of a lottery * * * shall be punishable * * *."

The point made is that the language, "carried from one state to another in the United States," does not include the District of Columbia. This is a highly penal statute, which makes a crime of an act which was formerly not a crime. Such a statute, subject to the rule that "a statute is never to be construed against the plain and obvious dictates of reason," should be strictly construed. See France v. U. S., 164 U. S. 682, 683, 17 Sup. Ct. 219, 41 L. Ed. 595; Justice Harlan's dissenting opinion in Francis v. U. S., 188 U. S. 381, 23 Sup. Ct. 334, 47 L. Ed. 508; U. S. v. Ames (C. C.) 95 Fed. 453. If the intent was to prohibit shipments of lottery tickets from a state to the District of Columbia, such intent can be arrived at only by construing the word "state" as including the municipality of the District of Columbia. Assuming the constitutionality of the statute thus construed, I find no certain indication in the act that Congress intended

that it should thus be construed. And certainly, when a criminal statute is in question, the proper course is to solve a substantial doubt as to the meaning of the statute against, rather than for, the government. If such construction be wrong, Congress can readily prevent a repetition of the error by making clearer its meaning by an amendment. So far as I am able to say, Congress may have intentionally omitted an expression to the effect that the word "state," where used in this statute, shall embrace the territories and the District of Columbia. Assuming the power of Congress to forbid shipments of lottery tickets (such being "commerce"—Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492) from the District of Columbia to a state or territory, or from any territory to a state or another territory, or to the District of Columbia, yet when the inhibition is against a shipment made from a state to a territory or to the District of Columbia there might seem to some minds to be reason to doubt the power of Congress.

"Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Thus reads section 8, art. 1, Const. If Chief Justice Marshall's ruling in Hepburn v. Ellzey, 2 Cranch, 445, 2 L. Ed. 332, is to be the guide in construing the meaning of the word "state" as found in the Constitution, it may seem difficult to find in the commerce clause authority to forbid shipments from any state to a territory or to the District of Columbia. I am not myself expressing an opinion on the constitutionality of an act of Congress regulating commerce from a state to the District of Columbia. I am inclined to think that the implication from the decision in Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637, and the language of Mr. Justice Holmes in Hanley v. Kansas City Southern R. Co., 187 U. S. 619, 23 Sup. Ct. 214, 47 L. Ed. 333, are sufficient to prevent a subordinate federal court from holding such an enactment invalid, even if so inclined. I am, however, arguing that Congress, or some of its members, may have doubted the power of Congress to forbid shipments of lottery tickets from a state to a territory or to the District of Columbia. It was said in the dissenting opinion of Mr. Justice Miller in Stoutenburgh v. Hennick, supra: "Commerce by a citizen of one state, in order to come within the constitutional provision, must be commerce with a citizen of another state; and where one of the parties is a citizen of a territory, or of the District of Columbia, * * * it is not commerce among the citizens of the several states."

In the opinion of the court by Mr. Justice Miller in the Trade-Mark Cases, 100 U. S. 96, 25 L. Ed. 550, we find this:

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

It may be safely asserted that at every session of Congress there are some members who are "strict constructionists." And it is at least possible that, because of some doubt on the part of at least

some of its members as to its power to so legislate, Congress intentionally omitted to include shipments of lottery tickets from states to a territory or the District of Columbia. If there be the slightest force in this suggestion, it affords an additional reason for refusing to read into the statute in question an inhibition which is not unmistakably expressed, and is not necessarily or clearly implied from what is expressed.

It is true that in the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) Congress has undertaken to regulate commerce from any state to any territory or to the District of Columbia. And I do not at present recall that the validity of this feature of the act has ever been assailed. But this does not entirely answer the suggestion. The Forty-Ninth Congress, which enacted the interstate commerce act, and the Fifty-Third Congress, which enacted the anti-lottery act, were composed to a considerable extent of different individuals. The committees which reported these two bills may have been, and doubtless were, differently constituted. The views of the strict constructionists may have been given more weight in 1895 than in 1887. I have not undertaken to examine the history of the enactment of the act of 1895, if there be such available, as I have not the time for such examination, and as such examination would probably be fruitless, or at least quite inconclusive.

I have considered the effect of the statutes which by the second section of anti-lottery act are made to "apply in support, aid, and furtherance of the enforcement of this act," but I find nothing in them which seems to bear on the question under consideration. I am of opinion to sustain the demurrer to the third count.

Counsel requested that, in the event the above conclusion was reached, I express my opinion on another point. It is agreed that the facts in this case are that the defendants made one shipment by express of lottery tickets from Dayton, Va., to some person in the city of Washington. This package passed through West Virginia and Maryland en route to Washington, and it is solely on this fact that the counts alleging shipments to West Virginia and to Maryland are based. The intention of the United States attorney is to dismiss this prosecution if my opinion on this question is also against the government.

Congress has not expressed an intent to inhibit shipments of lottery tickets through any state. As to shipments through a state destined for a foreign country Congress doubtless had no intent to legislate. There was no necessity to inhibit a shipment from a state through another state if destined for still another state. To forbid shipments from any state to another state (meaning by the latter the state of the ultimate destination of the shipment) was sufficient. Shipments from a state to the District of Columbia, through some state other than that from which the shipment started, may possibly have been, as hereinabove suggested, intentionally omitted from the inhibitions of the act.

It is true that under the facts in this case there was literally a carriage from Virginia to West Virginia, in that the package passed

from the one state into the other. But I am of opinion that Congress had in mind the place of shipment and the place of ultimate destination only, and did not intend to forbid a mere carriage through a state.

Moreover, I am inclined to think that the words, "for the purpose of disposing of the same," are properly to be considered as governing the inhibition against causing lottery tickets to be carried from a state to another. The indictment is drawn on this theory; but the government now takes the position that such allegation is unnecessary and mere surplusage. The statute is rather badly expressed, but the act of carrying lottery tickets to a state for any other purpose than to dispose of them is a rather harmless act to be the subject of congressional action; and the shipment might be made for a legitimate purpose, for instance by a government agent for the purpose of using the tickets as evidence. While it may be within the powers of Congress to forbid interstate shipments of lottery tickets through any state, even when their ultimate destination, and the place where they are to be disposed of, is a territory or the District of Columbia, yet I cannot think that such was the intent of this statute. If a shipment were made from New Jersey, through New York, to Canada, it seems very clear that the statute in question would not support an indictment for making such shipment. And unless we can say with certainty that the word "state" in this statute was intended to include the territories and the District of Columbia we have no more warrant for holding that there is any expressed or clearly implied intent to forbid shipments from one state through another state to a territory or to the District of Columbia than for holding that a shipment from New Jersey to Canada is prohibited.

While the word "state" has sometimes been construed to include the territories and the District of Columbia (Talbott v. Silver Bow County, 139 U. S. 444, 11 Sup. Ct. 594, 35 L. Ed. 210; Metropolitan Railroad v. District of Columbia, 132 U. S. 9, 10 Sup. Ct. 19, 33 L. Ed. 231; Geofroy v. Riggs, 133 U. S. 268, 10 Sup. Ct. 295, 33 L. Ed. 642), still Congress surely may be assumed to have known that the word "state" had often been held not to include the territories or the District of Columbia; and if we give that body, which always numbers many able members of the legal profession among its members, credit for such knowledge, we cannot say with certainty that it intended the word "state" to mean territory or District of Columbia.

In re BLUE RIDGE PACKING CO.

(District Court, M. D. Pennsylvania. November 3, 1903.)

No. 355.

1. BANKRUPTCY—MEETING OF CREDITORS—ALLOWANCE OF PARTICIPATING CLAIMS.
The fact that at the head of the proof of a claim in bankruptcy the title of the court is not given, as required by Gen. Order 21 and Form No. 31 (89 Fed. ix, xlii), is not sufficient to vitiate the proof so as to prevent the creditor's participation in the creditors' meeting.

2. SAME.
Where the consideration for a claim against a bankrupt is stated in the proof to be for "printing done for said bankrupt at his request heretofore, to wit, in September, 1903, as per bill rendered," the specification is insufficient, as the items of the account should be given; and the creditor is not entitled to participate in the creditors' meeting.

3. SAME.
Where, in the proof of a creditor's claim in bankruptcy, the debt is said to be for "goods, wares, and merchandise sold and delivered by claimant to bankrupt, at its request, consisting of green truck and vegetables, amounting to said sum of $140, with interest from * * *, being the balance due on said claim on book account," the specification is insufficient, in the absence of the items of the account, and the creditor is not entitled to participate in the creditors' meeting.

4. SAME.
Where the proof of a creditor's claim in bankruptcy recites that the consideration is "2,500 jar tops at $2.00 per 1,000=$50. ⅓ blue, ⅓ white, ⅓ red"—the specification is sufficient, and the creditor is entitled to participate in the creditors' meeting.

5. SAME.
The absence of the date to a creditor's claim in bankruptcy is a fatal defect, which will prevent his participation in the creditors' meeting.

6. SAME—LETTER OF ATTORNEY.
In bankruptcy proceedings under Gen. Order No. 21, requiring that a letter of attorney executed on behalf of a partnership must show that the person executing it is a member of the firm, the fact that such statement is contained in the proof of debt accompanying the letter, though absent from the letter itself, is sufficient to entitle the attorney to represent the creditor in the creditors' meeting.

7. SAME—PROOF OF CLAIM—SUFFICIENCY.
Where, in a creditor's proof of claim in bankruptcy, the consideration is stated as "goods and merchandise sold," as evidenced by two notes, a memorandum of which is said to be given in the bill attached, the specification is insufficient to entitle the creditor to participate in the creditors' meeting, for, if he intends to stand on the account, he should have given the items, and, if on the notes, they should be produced and filed.

8. SAME—PRODUCTION OF LETTER OF ATTORNEY—TERMINATION OF MEETING.
Where a power of attorney authorizing its holder to represent a creditor at a meeting of a bankrupt's creditors is mislaid, and not produced until the meeting is over, the attorney is properly refused the right to participate.

9. SAME—TRUSTEES—QUALIFICATION.
The fact that one who is chosen by the creditors as trustee in bankruptcy advised the voluntary assignment under the state law which constituted the act of bankruptcy, does not render him incompetent as trustee.

10. SAME.
The fact that one who is chosen by a bankrupt's creditors as trustee had a law office with an attorney who represented certain stockholders of the bankrupt, who claimed to be creditors, but whose claims were to be contested, and that these persons were former clients of the trustee, and put their claims into his associate's hands at his suggestion, and that the trustee's election was with the aid of such persons, is insufficient to make his selection an improper one, but merely calls for its close scrutiny.

11. SAME.
The selection by a bankrupt's creditors of a trustee is not to be interfered with by the court unless it clearly imperils the fair and efficient administration of the estate.

In Bankruptcy. On certificate from referee.

R. L. Cannon, for the exceptions.

H. W. Dunning, opposed.

ARCHBALD, District Judge. The exceptions are directed to the action of the referee in receiving and rejecting claims at the meeting of creditors called to elect a trustee, and to his approval of the person there chosen. Objection is made to the allowance of the claims of W. M. Alexander and of A. G. Helfrich because the title of the court is not given at the head of the proof in accordance with general order 21 and form No. 31 (89 Fed. ix, xlii). But this is a mere informality, not enough to vitiate the proof if otherwise good, as it appears to be. There are other signs of carelessness in it, but the substance is there, and I think the claim was properly received.

The claims of Harrold & Fernsler, William Price, and Fred N. Bert were thrown out on the ground, in each case, that the consideration was not sufficiently stated. So far as the first two are concerned, this ruling was unquestionably correct. In the Harrold & Fernsler claim the consideration is said to be for "printing done for said bankrupt at its request heretofore, to wit, in September, 1903, as per bill rendered." This is clearly an insufficient specification. It may inform, to a certain extent, of the origin and character of the debt, but the items by which it is made up should be given. In re Elder, Fed. Cas. No. 4,326; In re Scott (D. C.) 1 Am. Bankr. R. 553, 93 Fed. 418. If this bill was represented by an account, as seems to be implied, other creditors are entitled to have it in all its particulars just as it stands.

In the Price claim the debt is said to be for "goods, wares, and merchandise sold and delivered by claimant to bankrupt at its request, consisting of green truck and vegetables, amounting to said sum of $140, with interest from * * *, being the balance now due on said claim on book account." Here there admittedly is an account, and the claimant is therefore bound to give the items, without which there is nothing in any way sufficiently informing. But I cannot agree with the referee that the same is true of the claim of Fred N. Bert. This is for $50, and the consideration is declared to be for "2,500 jar tops at $2.00 per 1000 = $50. ⅓ blue, ⅓ white, ⅓ red." For all that can be seen, this is as complete as it could be made. The real objection to this claim is that there is no date. This is certainly necessary to help individuate the debt, as well as to show that it is not outlawed, and, while it was not objected to on that ground, the defect is too patent to be passed by.

Begs and Graham made proof of claim, and were represented by power of attorney to Wm. N. Reynolds, Jr., which was held defective because not properly acknowledged. By general order 21 (89 Fed. ix), when a letter of attorney is executed on behalf of a partnership, the person executing it must make oath that he is a member of the firm. There was no such oath upon this instrument, but there was in the proof of debt which accompanied it, and I see no reason why that was not a sufficient compliance without swearing to the same thing a second time. Both were executed on the same day, and presented at the same time, and they should have been received.

The Hazel Atlas Glass Company claim is clearly defective. The consideration is stated as "goods and merchandise sold" as evidenced by two notes, a memorandum of which is said to be given in a bill

attached. If the creditors intend to stand on the account, they should have given the items; if on the notes, they should have been produced and filed. Bankr. Act July 1, 1898, c. 541, § 57b, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

The claim of H. N. Schooley & Son was sought to be represented at the meeting by Mr. Cannon, but, failing to produce a power of attorney to do so, it was rejected. Later in the day, and after the election had been held and closed, the missing paper was brought forward, but the referee held that this was too late. If the meeting of creditors to elect a trustee was still in progress, the vote should have been received; but, according to the report of the referee, which is uncontradicted, it was not, and, if so, the power was produced too late. The other creditors who attended the meeting had the right to inspect it, as well as the proof or debt on which it was based, for the purpose of making possible objections, which they could not do after the meeting had broken up and they had left.

The action of the referee being thus sustained in every instance but one, the result of the meeting is not changed. A. L. Williams was elected over D. A. Fell by a vote of 14 to 8, the debts represented by the majority in number constituting also a vast preponderance in amount. The only question, therefore, is whether the selection so made should have been approved. Mr. Williams is objected to because he advised the assignment for the benefit of creditors under the state law, which was the act of bankruptcy complained of, and was himself the assignee; but I fail to see how this unfits him to act now. The assignment, in purpose, was for the benefit of creditors, and was neither illegal nor fraudulent, whatever ground it may have laid for the present proceedings. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. It is also urged that he is intimately associated with Mr. Dunning in the law, the two having offices together, although not partners; that Mr. Dunning represents certain stockholders of the bankrupt corporation who claim to be creditors, but whose claims are to be contested; that these parties were former clients of Mr. Williams, and put their claims into Mr. Dunning's hands at his suggestion; and that both of them worked with these and other creditors to secure Mr. Williams' election. But, notwithstanding all that is so charged, I am satisfied of the qualification and integrity of Mr. Williams, who is personally known to me, and I take the same view of the matter as does the referee—that these things do not necessarily make the election an improper one, but only call for a close scrutiny of it; and, after a careful examination of the whole situation, I see no occasion to disapprove. It is to be remembered in all such cases that the choice of a trustee is lodged by the law with the creditors constituting a majority in number and amount, and that their selection is not to be interfered with, unless it clearly imperils the fair and efficient administration of the estate. I am not persuaded that there is any such danger in the present instance, and, if it should prove otherwise, the objecting creditors have their remedy by an application hereafter to remove.

The exceptions are overruled, and the action of the referee, except in the one particular noted, is approved.

BOYER v. UNITED STATES HEALTH & ACCIDENT INS. CO.

(Circuit Court, D. Connecticut. November 5, 1903.)

No. 536.

1. PLEADING—SUFFICIENCY OF COMPLAINT—MOTION TO STRIKE OUT.
Allegations of a complaint in an action for breach of a contract appointing plaintiff agent for the procuring of insurance business for defendant considered, and *held* good as against a motion to strike out.

At Law. On motion to strike out paragraphs 5 and 7 of the first count of the substituted complaint.

Wm. H. Ely and H. C. Webb, for plaintiff.
James H. Webb and Walter Pond, for defendant.

PLATT, District Judge. The contention is either very simply solved or raises a complicated situation. Which horn of the dilemma confronts us depends upon a construction of the meaning of paragraph 5 of the first count of the substituted complaint. I quote the count in its entirety:

"(1) On the first Tuesday of October, A. D. 1902, the plaintiff and defendant entered into a contract in writing, a copy of which contract is hereto attached, and marked 'Exhibit A.'

"(2) Thereafter the plaintiff entered upon the discharge and performance of his duties in accordance with the terms of the contract, Exhibit A, and continued in the faithful discharge of his said duties, and fully performed all the duties imposed upon him by the terms of said contract.

"(3) On the 15th day of May, A. D. 1903, the defendant canceled the contract with the plaintiff without giving him any reason therefor, and in truth and in fact up to that time the plaintiff had fully performed all his duties.

"(4) Between said 1st day of October, 1902, and the 15th day of May, 1903, the plaintiff, by himself and his agents, obtained for the defendant, and there were issued by the defendant by reason of the services and acts of the plaintiff, a large number of policies, which, under the terms of the contract, Exhibit A, had earned for the plaintiff on the 15th day of May, 1903, a large sum of money, to wit, $2,000, which the defendant has never paid to the plaintiff.

"(5) Under the terms of said contract, the business obtained by the plaintiff would, had not the defendant canceled said contract, have netted the plaintiff a large sum of money, to wit, $20,000.00.

"(6) The plaintiff, in obtaining said insurance for the defendant, paid out and expended a large sum of money for expenses necessary and proper for the obtaining of said business, to wit, the sum of $2,000.

"(7) By the act of the defendant the plaintiff has suffered damages to a large amount."

Exhibit A is a voluminous contract between plaintiff and defendant. The essential parts of it are these. Defendant, on October 1, 1902, appoints plaintiff its agent to canvass for applications for health and accident insurance. The territory assigned comprises the states of Rhode Island and Connecticut, and the counties of Westchester and Putnam, in the state of New York. The "full and complete compensation" for "all business procured" and for "all services performed" is fixed as follows:

"(1) On commercial business, thirty (30) per cent. of the gross premiums on all policies or renewals thereof procured through said agency as aforesaid, which thirty (30) per cent. shall include the cost of collecting said premiums.

"(2) On industrial business, all the proceeds of the policy fee collected by the agent, and five (5) per cent. of the subsequent premiums received on such business in said territory, which five (5) per cent. shall cover the cost of collecting said premiums.

"(3) The further compensation of thirty-five (35) per cent. of the net profits derived by the company from such commercial and industrial business in the aforesaid territory, such net profits to be ascertained in the following manner."

Then follows a mass of detail as to the manner of fixing up the credit and debit sides of the account.

The continuance of the contract is provided for in paragraph "p":

"(p) This contract shall remain in full force and effect only so long as the agent shall faithfully discharge his duties strictly in accordance with all the terms and conditions herein expressed. In event of the cancellation or termination of this contract for any reason, the agent shall be entitled to receive compensation upon the basis hereinbefore provided, only for the period of time up to the date of such cancellation or termination; however, all sums of money due and accrued to said agent at that time shall be retained by the company until it shall appear by the records of the home office of the company that all claims, accounts and expenses of every kind and nature whatsoever, incurred by or with the consent of the company in said territory, during the continuance of this contract, or for which the company is liable, have been fully paid, after which the profits or losses shall be ascertained and shared by the company and agent as hereinbefore provided."

It will be noticed that the defendant canceled the contract on May 15, 1903, without giving any reason therefor, and that up to that time the plaintiff had fully performed all his duties.

It is conceded that form 85 is a proper form to use in the commencement of an action in all cases where any of its clauses contains a general, although defective, statement of the cause of action which the pleader intends to pursue. It is furnished as a time-saving appliance to the pleader who wishes to preserve his client's rights on the instant, but, as it may lead to the most serious complications, its use should not be too lightly invoked. The objection to its use in this case is that none of its provisions form a stock upon which the present complaint can be grafted. The plaintiff vigorously combats that contention.

At this point it must be evident that it becomes of vital importance to know what the pleader had in mind when he prepared paragraph 5. If he means that the work performed and services rendered prior to the cancellation of the contract are worth $20,000, he is, as I view it, clearly within his rights. I understand that to be his meaning, after a careful examination of the line of reasoning set forth in the latter part of the brief filed with me by his counsel, and, so understanding it, paragraphs 5 and 7 of the substituted complaint may stand.

The motion to strike out is therefore denied.

On the Motion for Bill of Particulars.

The motion is granted in the terms set forth therein, eliminating therefrom, however, on the first page the clause beginning "together with a statement," and ending with "contract," and on the second page beginning at "showing the dates" to the end of the motion.

Let the plaintiff comply with this order within 30 days.

UNITED STATES v. BOHL.

(District Court, D. Connecticut. October 15, 1903.)

No. 1,400.

1. RENOVATED BUTTER—PROVISION FOR INSPECTION AND MARKING—CONSTRUCTION OF STATUTE.

The purpose of section 5, Act May 9, 1902, c. 784, 32 Stat. 196 [U. S. Comp. St. Supp. 1903, p. 269], relating to process or renovated butter, is to provide for the sanitary inspection and the marking and branding of such butter at the place of manufacture, to the end that none shall be shipped from the factory which can in any way be injurious to the health of the consumer, and the section authorizes the Secretary of Agriculture to cause such inspection to be made, and to "make all needful regulations for carrying this section into effect." A regulation, however, which prohibits a dealer, receiving or handling such butter after it has been duly inspected, marked, and branded, and shipped from the factory, from obliterating the marks or brands thereon has no relation to such sanitary purpose, and finds no warrant in the statute, being calculated only to prevent fraud on the part of the dealer in his relations with his customers, and there is nothing in the statute which will support an indictment or information for the violation of such a regulation.

On Demurrer to Information.

The material part of the information was as follows:

"Francis H. Parker, attorney for the United States for the district of Connecticut, who in this behalf prosecutes in the name of the United States and for the United States, comes here into said court on this the twenty-fifth day of August, in the year of our Lord one thousand nine hundred and three, in his own proper person, and, with leave of the court, for the United States gives the said court here to understand and be informed that heretofore, to wit, on the ninth day of February, in the year of our Lord one thousand nine hundred and three, at the town of Waterbury, in the county of New Haven, in the state and district of Connecticut, and within the jurisdiction of this court, Valentine Bohl, of said town of Waterbury, doing business under the name of the Valentine Bohl Company, and being then and there a wholesale dealer in meats, butter, renovated butter, and other food products, then and there had in his possession for sale, in the usual course of his said business, a tub of renovated butter containing thirty pounds, more or less, in weight of said renovated butter, packed in a solid body or mass therein, into the upper surface of which butter, so packed in a solid body or mass in said tub as aforesaid, had been stamped and branded a mark and brand consisting of the words 'Renovated Butter,' in letters not less than one-half inch square, in gothic style, and depressed not less than one-eighth inch, which said mark and brand in the upper surface of said butter was in all respects as required by the statutes of the United States in such case made and provided, and by the rules and regulations made under date of October 20, 1902, and promulgated under date of November 1, 1902, by the Secretary of Agriculture, pursuant to authority vested in him by statute law respecting the marking and branding of renovated butter, said rules and regulations requiring that 'when packed in a solid body or mass there shall be stamped or branded into the upper surface of the butter the words "Renovated Butter" in one or two lines, the letters to be gothic in style, not less than one-half inch square, and depressed not less than one-eighth inch'; which said renovated butter so packed in a solid body or mass in said tub as aforesaid was made and marked and branded as aforesaid, in factory number 5, in the Tenth Internal Revenue Collection District in the state of Illinois, after the first day of July, A. D. 1902, and was thereafter transported from said factory, in said state of Illinois, to the said town of Waterbury, in the state of Connecticut. And said attorney for the United States further gives said court to understand and be informed that said Valentine Bohl, doing busi-

ness as aforesaid, on said ninth day of February, A. D. 1903, at said town of Waterbury, then and there having in his possession for sale as aforesaid said tub of renovated butter, so lawfully marked and branded as aforesaid, did then and there knowingly, wrongfully, and unlawfully deface and destroy the said mark and brand consisting of the words 'Renovated Butter,' as aforesaid, so stamped and branded in letters of the size and style aforesaid, and depressed to the depth aforesaid into the upper surface of the butter, packed in a solid body or mass into said tub as aforesaid, thereafter holding in his possession for sale the renovated butter in said tub contained without the said mark or brand by statute law of the United States and the rules and regulations made and promulgated by the Secretary of Agriculture required as aforesaid, which said defacing and destroying of said mark and brand so stamped and branded into the upper surface of said renovated butter, so packed as aforesaid in a solid body or mass in the tub aforesaid, was and is against the peace and dignity of the United States, and contrary to the form of the statutes of the United States in such case made and provided, and to the rules and regulations of the Secretary of Agriculture made and promulgated in pursuance of such statutes; for which said offense said Valentine Bohl, upon a complaint against him, in writing and under oath, was duly examined before William A. Wright, a United States commissioner, by whom probable cause to hold said Valentine Bohl to bail to answer in this court therefor was duly found, as by a transcript of the proceedings before said United States commissioner on file in this court fully appears."

Francis H. Parker, U. S. Atty.
Nathaniel R. Bronson, for defendant.

PLATT, District Judge. The subjects of section 5 of the act of May 9, 1902, c. 784, 32 Stat. 196 [U. S. Comp. St. Supp. 1903, p. 269], are clearly "process or renovated butter," and the marking and branding thereof, prior to transportation. It is equally clear that the purposes of the section are to provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumer.

The acts of August 30, 1890, and March 3, 1891, cc. 839, 555, 26 Stat. 414, 1089 [U. S. Comp. St. 1901, pp. 3185, 3189], as amended March 2, 1895, c. 169, 28 Stat. 727, so far as they touch upon these subjects and purposes, are ingrafted into section 5 of act of 1902, and all rules and regulations adopted by the Secretary of Agriculture, which are calculated to carry such subjects and purposes into full effect, have all the force of the statute itself. Other portions of the act in question may gain their efficacy from the taxing clause of the Constitution, but section 5 goes to the commerce clause as the fountain whence its vigor springs.

It is idle to discuss whether or not the tub of butter, when it reaches the wholesaler, is still an article of interstate commerce.

Our crucial question is this: Does a rule or regulation forbidding the obliteration of the brand, as charged, tend in any manner to aid in the enforcement of strict sanitary inspection and care, or, if it pleases the inquirer, in the collection of the tax thereon? It is my opinion that the rule was of no value in either regard; it was, on the contrary, calculated to prevent fraud and subterfuge on the part of the dealer in his relations with the consumer. I do not decide that Congress has no power to take up that matter. I am content to say that in section 5 no such action was taken, nor was any attempt made

to do so. Beyond all this, if the Congress did intend to take such a step it signally failed in its effort.

It would be necessary to read into section 5, not only the general provisions of the acts relating to the inspection of meats and carcasses, but also the definite penalty inflicted for an infraction of the former laws, in a situation analogous to that which the Secretary of Agriculture attempts to provide for in his rules and regulations under this act. Such action is not permissible, either on strict legal principles or upon the basis of fair dealing with the individual citizen. It follows from what I have said that the statute in question affords no warrant for the information which the learned District Attorney seeks to found upon it. The demurrer is sustained.

Let the information be dismissed.

UNITED STATES v. SING LEE.

SAME v. HAY FOON.

(District Court, W. D. New York. October 8, 1903.)

1. CHINESE EXCLUSION—PROCEEDING FOR DEPORTATION—BURDEN OF PROOF.
   The burden of proof rests upon a Chinese person arrested for deportation, as being unlawfully within the United States, to sustain his right to remain, although based on a claim of citizenship, or, in case he is ordered deported, to sustain his claim of right to be removed to a country other than China, on the ground that he is a subject or citizen of such country.
2. SAME—SUFFICIENCY OF EVIDENCE.
   The findings of a commissioner against the right of a Chinese person, claiming to be a native of the United States, to remain in this country, and against the right of another to be deported to Canada as a naturalized British subject, *held* justified under the evidence.

Proceedings for Deportation of Chinese Persons. On appeal from decision of commissioner.

McInerny & Bechtold, for appellants.
Wesley C. Dudley, for the United States.

HAZEL, District Judge. The Chinese persons above named are awaiting removal from the United States to China pursuant to an order of removal dated June 3, 1903, made by Commissioner Hebbard, before whom the appellants were adjudged Chinese laborers unlawfully in the United States. From the decree of deportation they have appealed to the District Court within the period of 10 days allowed by law. For Sing Lee it is contended that he is a British subject, and that, having been found to be unlawfully in this country, his removal therefrom should be to the Dominion of Canada, his place of domicile, and the country of which he is a citizen. Upon the hearing the appellant, in corroboration of his testimony as to citizenship, produced a passport issued and dated as long ago as January 17, 1901, by the Under Secretary of State of the Dominion of Canada, certifying that a Chinese person by the name of Sing Lee is a British subject by naturalization. It is provided by section 2 of the Chinese

exclusion act of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], that a Chinese person who is unlawfully within the United States shall be removed therefrom to China, unless it shall appear to the commissioner before whom the trial takes place that such Chinese person is a subject or citizen of some other country, in which case the decree of deportation shall direct the removal to such country. But, in any case where such country shall demand any tax as a condition of the removal to that country, then such Chinese persons shall be removed to China. At the argument counsel for the appellant contended that the evidence conclusively established Sing Lee's right to removal to the Dominion of Canada, and it was said that he or friends for him would pay any tax that might be demanded or imposed upon his return to Canada. This question is not before the court for decision, as the evidence fails to establish the appellant's right to removal to the Dominion of Canada, irrespective of the question of head tax. It need hardly be said that the passport is not conclusive evidence of its contents. The cross-examination of the appellant by the United States attorney quite clearly shows the danger of giving undue weight to the facts asserted in the passport. Its possession by the appellant was not satisfactorily accounted for. The document upon its face bears the name of Sing Lee, written in English, and purports to be the signature of the bearer. The appellant, however, admits the signature is not in his handwriting, and fails to give any further information regarding it. The burden of proof in this class of cases, both as to the right to remain within the United States and the right of removal to a country other than China, rests upon the accused. A United States commissioner before whom a Chinese person claimed to be unlawfully in this country is tried, is charged in the first instance with ascertaining aud determining the facts regarding the illegal entry into the United States. He is not obliged to accept as true the testimony of the person proceeded against, even though such testimony is uncontradicted and apparently corroborated. The general rule that where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited, is well understood to be subject to many exceptions. Elwood v. Western Union Telegraph Co., 45 N. Y. 549, 6 Am. Rep. 140; Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501. The exception to the rule, which may be said to be almost as firmly established as the rule itself, was, I think, properly applied in this case. In the absence of particularity in the statements of the appellant, the commissioner might well believe that the pretended passport was improperly procured to aid in evading the law and to delude judicial vigilance.

For Hay Foon, it is asserted that he is a citizen of the United States by birth, and his permanent domicile and residence is in the city of Baltimore. The appellant's testimony tended to establish his asserted citizenship and his right to remain in this country. Chew Wing, a witness for the appellant, gave testimony in support of this claim. As has been stated, the exclusion act expressly puts the burden upon Chinese persons to establish their right to remain in the United States. The burden does not shift because of the asserted claim of citizenship.

The recent case of Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, is decisive authority upon this point. Chief Justice Fuller, writing for the Supreme Court, uses this language:

"By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.' As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."

I am unable to say from the evidence that the commissioner erred in not giving credence to appellant's professions of citizenship. Having had the witnesses before him, he was enabled to carefully observe their manner and conduct in giving testimony; hence his judgment and decision upon the disputed facts must be given great weight. Some slight contradictions appear in the appellant's showing; but the government does not rest upon any assumption that might arise therefrom. Evidence was given tending to show that, on the day preceding his unlawful entry into the United States, Hay Foon was seen by a government inspector on a passenger train proceeding from Hamilton, Canada, to the frontier at Buffalo, N. Y. He was accompanied by the appellant Sing Lee, and by another Chinese person named Chong Due, who was also found by the commissioner to be unlawfully in this country, but who has not appealed from the decree of deportation. The evidence on this point is positive and direct. Hay Foon testified, by way of explanation, that he went to Buffalo from Baltimore to meet his cousin Sing Lee, and awaited his arrival from Toronto at the depot in Buffalo, from whence he (Sing Lee) and Chong Due proceeded to the city of Rochester, where all three were arrested and tried. Evidently the commissioner discredited the showing of the appellant and gave credence to that of the government. Sufficient reason does not appear for disturbing the finding of the commissioner.

The order of removal in each case is affirmed.

In re CHAMBERLAIN.

(District Court, W. D. New York. September 25, 1903.)

No. 1,083.

1. BANKRUPTCY—CONTESTED APPLICATION FOR DISCHARGE—BURDEN OF PROOF. The burden of proof is upon an opposing creditor to establish the ground for refusing a discharge by clear, positive, and direct evidence; and where the ground specified is the failure to keep books, and the adjudication was prior to the amendment of the bankruptcy act of 1903, it must be satisfactorily shown that the failure to keep books was with fraudulent intent and in contemplation of bankruptcy.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 720, 752.

2. SAME—FAILURE TO KEEP BOOKS.

The fact that a bankrupt failed to keep books fully showing his true financial condition does not warrant a refusal of his discharge, where there was no concealment or destruction of books, no fraudulent disappearance or shrinkage of assets at any time, and where the bankrupt appeared and testified fully and with apparent candor in respect to all his business transactions, and produced such books and records as he kept, which contained no false or misleading entries.

In Bankruptcy. On motion to confirm referee's report recommending the bankrupt's discharge.

George E. Zartman, for objecting creditors.
George F. Ditmars, for the bankrupt.

HAZEL, District Judge. This is a motion to confirm the report of Asa B. Priest, referee, as special master, upon the hearing of certain specifications filed in opposition to the bankrupt's discharge. The bankrupt was adjudicated on June 17, 1902. The objections, therefore, to his discharge, and the evidence adduced to establish the specifications, are governed and controlled entirely by the provisions of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) as it existed prior to the amendatory act of 1903. The sole ground for refusing a discharge relied upon by counsel for opposing creditors is that the bankrupt has failed to keep proper books of account or records from which his true financial condition may be ascertained. The evidence admitted to sustain this objection is wholly insufficient. The master has correctly applied the rule that specifications in opposition to the debtor's application for a discharge must be substantiated by evidence which is clear, positive, and direct. See In re T. R. McGurn, 4 Am. Bankr. R. 461, 102 Fed. 743, and cases cited. The burden of proof is upon the opposing creditor to establish the ground for refusing a discharge by satisfactory and sufficient evidence. In re Hixon (D. C.) 93 Fed. 440. Moreover, it must satisfactorily appear that the bankrupt's failure to keep books of account or records from which his true financial condition may be ascertained must have been with fraudulent intent to conceal such condition, and in contemplation of bankruptcy. In re Idzall (D. C.) 96 Fed. 314; Brandenburg on Bankruptcy, p. 230. The evidence disclosed that the bankrupt repeatedly appeared before the master at the request of counsel for creditors, giving his testimony without hesitation, to disclose his true financial condition. There is much in the evidence justifying the inference that all the questions propounded to the bankrupt were answered fully and truly. There was no concealment or destruction of books; no fraudulent disappearance or shrinkage of assets at any time preceding the bankruptcy. Neither were there any false or misleading entries in such books as were produced. The evidence, in its entirety, shows a willingness on the part of the bankrupt to explain his business transactions, and the absence of more complete books and records. The bankrupt was engaged in a small way in the business of buying and selling pianos, organs, and musical instruments generally. He kept no accurate books from which the number of organs and pianos sold, to whom sold, and the prices received, might be ascertained. Books were produced by the

bankrupt showing bills payable, and some sales of pianos and prices received subsequent to the year 1900. A few entries of sales of pianos after January 1, 1899, were made; but such books do not contain all the sales since that period, as appears not only by the evidence of the bankrupt, but by conditional sales contracts, which enabled the bankrupt to testify as to the number of sales of pianos and organs, and the prices received. The bankrupt appears to have used these contracts of sales which were in his possession as a substitute for a complete set of books. No knowledge or contemplation of insolvency can be predicated upon the mere failure to keep more complete books. If the evidence warranted finding that the bankrupt knew of his insolvency preceding the filing of the petition to be adjudged bankrupt, and because of his insolvency he failed to keep proper books and records, a different question would be presented. In re Feldstein, 8 Am. Bankr. R. 160, 115 Fed. 259, 53 C. C. A. 479. No inference of fraudulent intent to conceal his property, within the meaning of section 14 of the original act (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), can fairly be drawn from the bankrupt's failure to keep more accurate books, and therefore the authorities cited by counsel for creditors do not strictly apply. The evidence of the bankrupt, as a whole, leads to the conviction that his failure to keep more complete books of account than such as were exhibited at the hearing was not owing to any fraudulent intent or in contemplation of bankruptcy. The fraudulent intent was the primal element necessary to bar a discharge under section 14, prior to the amendatory provision. Such a finding is not warranted by the evidence.

The report of the special master is confirmed, and an order discharging the bankrupt may be entered, with costs of the reference to the special master against the objecting creditor.

JOHNSON v. BRIDGEPORT DEOXIDIZED BRONZE & METAL CO.

(Circuit Court, D. Connecticut. October 20, 1903.)

No. 512.

1. FEDERAL COURTS—FOLLOWING STATE PRACTICE.
   It is the settled rule of the federal court in Connecticut that it will follow the practice of the state court which permits a defendant to suffer a default and have a hearing in damages to the court.
2. REMOVAL OF CAUSES—CONDITION OF CAUSE AFTER REMOVAL.
   A defendant in a state court in Connecticut, who, after filing notices of his intention to suffer a default and to refuse to plead over and to move for a hearing in damages to the court, in accordance with the state practice, removes the cause into the federal court, is not required to file such notices a second time in that court, the cause standing after removal in the same condition as it did before in the state court.

On Plaintiff's Motion for Assessment of Damages by Jury.

D. G. Perkins, for plaintiff.

S. C. Loomis, for defendant.

¶ 2. See Removal of Causes, vol. 42, Cent. Dig. § 241.

PLATT, District Judge. Since the decision of Judge Shipman in Raymond v. The Danbury & Norwalk R. Co., 14 Blatchf. 133, Fed. Cas. No. 11,593, this court has invariably followed in this matter the practice which has prevailed for ages in the state courts. The statute upon which the practice is founded is undoubtedly peculiar, but the Raymond Case settled absolutely for this court that it touches only upon a matter of practice, and in no sense invades a constitutional right. The line of argument is too threadbare to endure repetition. The main contention of the plaintiff is therefore easily disposed of.

In the case under consideration, however, the plaintiff raises an additional objection to the well-established rule by reason of the following facts: The action under discussion was made returnable to the superior court for New London county on the first Tuesday of December, 1901. On December 3, 1901, the defendant filed with the clerk of said court his notice of intention to suffer a default, and to refuse to plead over, and to move for a hearing in damages to the court. On the same day he also filed with the clerk his notice of defense, as required by the statutes and by rules of the state courts. Having filed these notices, he proceeded in the usual manner to bring about the removal of the cause to this court, and on December 6, 1901, the order of removal was passed. Separate notices were not filed in this court within the time required by the statute and rules of the state court. It is beyond dispute that the cause comes into this court laden with whatever proceedings had properly attached thereto in the state court before its removal, but the plaintiff stoutly contends that the notices of intention and of defense only apply to the cause in the condition it was in at the time, and in no sense evidence his intended action in the later forum to which he, of his own motion, has removed it. Such position is altogether too narrow and technical. If the cause had been removed to some other county under the state practice, the objection would have been quite as meritorious as it is here. Any person familiar with the machinery of the federal and state courts in Connecticut can easily imagine a situation in which, if the plaintiff's contention prevails, it would be impossible for the defendant to avail himself of a right which the local statute has given him. Passing that, however, I think that he is wrong on principle. It is a notice of intention to take a certain position in any forum, federal or state, where jurisdiction of the controversy attaches. The cause enters this forum with that intention, and proceeds according to the federal statute, as if it had been brought here originally. The motion filed by plaintiff on October 13, 1903, is denied. The damages will be assessed by the court.

In view of the stress of affairs which burdens the present incumbent of the bench, the clerk may hear the facts and report his conclusions, if the parties desire such action.

MARTHINSON et al. v. WINYAH LUMBER CO.

(Circuit Court, D. South Carolina. June 24, 1903.)

1. ESTOPPEL BY PLEADING—ERRONEOUS ALLEGATION OF CITIZENSHIP.
The fact that a complainant in a bill, which he afterward dismissed through an error, styled himself a citizen of the District of Columbia, does not estop him from showing in a second bill that he is in fact an alien.

In Equity. On motion by defendant to dismiss.

Mordecai & Gadsden and Montgomery & Stackhouse, for complainant.

Walter Hazard, for defendant.

SIMONTON, Circuit Judge. The complainant in this case some time heretofore filed a bill against this same defendant, styling himself a citizen of the District of Columbia. Discovering his error, the complainant discontinued those proceedings, and has filed the present bill, styling himself an alien, subject to the King of Denmark. The plea having been filed, the complainant did not answer same until two rule days after the filing of the plea. A motion is now made to dismiss the bill upon the ground that the replication to the plea in abatement was not filed in time, and upon the further ground that the complainant, having instituted proceedings styling himself a citizen of the District of Columbia, is estopped from filing a subsequent proceeding styling himself an alien. He is not estopped, because in his first bill he styled himself a citizen of the District of Columbia, from showing that he is in fact an alien. Carson v. Hyatt, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167. The testimony submitted shows conclusively that he never was a citizen of the United States, having been born a subject to the King of Denmark and never been naturalized.

With regard to the failure to reply to the plea on the rule day after the plea was filed, sufficient excuse has been shown by complainant's attorney, and the motion of the defendant is overruled on both grounds. An order will be entered accordingly.

In re HAWKINS.

(District Court, W. D. New York. September 17, 1903.)

No. 1,322.

1. BANKRUPTCY—PRIVATE SALE OF PROPERTY OF ESTATE—DISCRETION OF REFEREE.
A court of bankruptcy or a referee has discretionary power to order a private sale of a bankrupt's property, with or without notice, and the action of a referee in directing such a sale ought not to be disturbed, unless it clearly appears that his discretion was improvidently exercised.

In Bankruptcy. On motion to vacate private sale of bankrupt estate by trustee pursuant to directions of referee.

Werner & Harris, for objecting creditors.
E. J. Fisk, for trustee.

HAZEL, District Judge. The Supreme Court, by general order No. 18, subd. 2 (18 Sup. Ct. vi), must be regarded as giving a construction to the bankrupt act authorizing a court, including the referee, to direct a private sale, with or without notice, for good and sufficient cause shown. District rule 14 carries out this view. On May 28, 1903, an application was made by the trustee to the referee for leave to sell the property of the bankrupt at private sale. The referee becoming satisfied that the bankrupt estate, on account of the reasons set forth in the application, would be benefited by private sale, directed such sale without notice to creditors, and pursuant thereof certain property of the bankrupt has been sold and delivered, and the purchase price fully paid. The sale of other property, consisting of lands situated in a Western state, has been agreed upon, the terms being satisfactory to the trustee, who is ready to deliver the deed upon receiving the purchase price. The discretionary power of the referee directing a private sale of a bankrupt estate ought not to be disturbed, unless it clearly appears to have been improvidently exercised. The facts appearing by the moving papers do not disclose an abuse of discretion or lack of good faith by the trustee or the appraisers or any one acting in behalf of the bankrupt estate. In the absence of such a showing the judgment of the referee that "the trustee has done remarkably well as regard both the personal property and real estate in realizing a sum therefor equal to the appraiser's valuation," will be accepted by this court as final.

Motion denied.

HELMRATH v. UNITED STATES.

(Circuit Court, D. Massachusetts. May 26, 1903.)

No. 1,121.

1. CUSTOMS DUTIES—CLASSIFICATION—LEATHER—SKINS FOR MOROCCO—SHEEPSKINS.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 438, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "skins for morocco," is not limited to goatskins, but includes also certain sheepskins known as "New Zealand basils," or "Cape sheepskins."

On application by the importer to review a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of Boston on the importation in question.

The decision of the board was an unpublished one, following In re Goat & Sheepskin Importing Company, G. A. 4835, which reads as follows:

"FISCHER, General Appraiser. The merchandise in question consists of tanned, but unfinished, sheepskins, which were returned for duty by the local appraiser as 'leather not specially provided for.' Duty was assessed thereon at the rate of 20 per cent. ad valorem, under the provisions of paragraph 438 of the act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 (U. S. Comp.

St. 1901, p. 1676). The importer claims said merchandise is dutiable at the rate of 10 per cent. ad valorem, under the provisions of said paragraph, as 'skins for morocco, tanned but unfinished.' These are skins of the sheep known as 'New Zealand basil' or 'Cape sheep.' The evidence fully convinces us that the morocco leather of commerce is made only from the skins of goats, and that the class of leather made from the kinds of skins before us is not known as morocco, but is known as imitation morocco. Commerce clearly distinguishes between the two. When morocco leather is asked for, leather made from goatskins is clearly intended, and when dealers buy leather made from sheepskins it is designated as imitation morocco. Upon all the evidence before us, we find that the articles in question are not skins for morocco, and overrule the protest. Reference is made to the case of United States v. Stone, 101 Fed. 713, 41 C. C. A. 624, wherein the United States Circuit Court of Appeals held that paper known commercially as 'imitation parchment paper' was not dutiable as parchment paper, but as paper not otherwise provided for."

On proceedings to review this decision before the Circuit Court much evidence additional to that before the board was taken in behalf of the importer, eight or nine witnesses being examined, whose evidence showed that, while goatskins are chiefly used for making morocco, certain kinds of sheepskins, particularly the kind in question, known as "New Zealand basils," or "Cape sheepskins," are not only chiefly used for this purpose, but almost exclusively.

J. Stuart Tompkins and Charles P. Searle, for the importer.
Mr. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. By the great preponderance of evidence in this case, a large proportion of which was not before the Board of General Appraisers, the importations in question are shown to be "skins for morocco, tanned but unfinished," and therefore dutiable at 10 per cent. ad valorem, under Act July 24, 1897, c. 11, § 1, schedule N, par. 438, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676). It follows that judgment must be entered for the petitioner.

Judgment for the petitioner.

Order.

The court finds that the term "skins for morocco" is not a commercial or trade term or designation definitely, uniformly, or generally used in the United States, and applied to the class of merchandise in controversy. The court further finds that "skins for morocco," in the commercial sense of the term, describes the merchandise in controversy. Upon the foregoing findings of fact the court rules that the merchandise in question is properly dutiable at 10 per cent. ad valorem, under paragraph 438 of the tariff act of 1897, as "skins for morocco, tanned but unfinished."

FENNO et al. v. PRIMROSE et al.

(Circuit Court, D. Massachusetts. October 28, 1903.)

No. 1,580.

1. EQUITY—PROCEDURE—FRAMING ISSUES FOR JURY.

A federal court of equity will not, on demand, after the joining of issue by the pleadings, but before the evidence has been taken in accordance with the usual practice in equity, frame issues to be submitted to a jury, especially when it cannot be known at that stage of the case that such issues will be decisive or even material.

In Equity. On application to frame issues for a jury. See 116 Fed. 49.

Storey, Thorndike, Palmer & Thayer, for complainants.
Whipple, Sears & Ogden, for defendants.

PUTNAM, Circuit Judge. This is an application of complainants in a cross-bill in a cause in equity to frame issues for a jury. The case has been put in issue by an answer and replication, but has proceeded no further. The opposing party claims that at this stage of the case the court has no power to grant the application. Of course, following the usual definition of power as frequently used in equity proceedings, this means that at this stage of the case the court cannot properly exercise judicial discretion in behalf of the application.

The court inquired of counsel at the hearing whether the ordinary practice in this particular had been modified by late statutes in reference to the method of taking proofs in equity, having special reference to Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664]. Apparently neither party is of the opinion that the statute is relevant. Whatever doubts the court might have had on that question are removed by the practical construction given this statute by the Supreme Court in the rule adopted at the October term, 1892, promulgated in the appendix to 149 U. S., and now constituting the last paragraph of rule of practice in equity No. 67, according to the authorized edition of the rules of 1903. This reads as follows:

"Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing."

The limitation of this rule of the application of the statute to final hearings clearly removes it from our present consideration.

The bill and the cross-bill relate to certain consignments of wool by the plaintiffs in the cross-bill to the defendants therein, as to which, among other things, the plaintiffs in the cross-bill maintain that the defendants therein disobeyed instructions with reference to sales, and otherwise failed to properly perform their duties as consignees. In the proposed issues for the jury the word "defendants" means the defendants in the cross-bill, and the word "plaintiffs" the plaintiffs therein. The proposed issues are as follows:

"(1) Were the sales of wool made by the defendants between January 18, 1898, and November 8, 1898, inclusive, made in the service of reasonable skill and prudence on the part of the defendants, and at prices authorized or ratified by the plaintiffs?

"(2) Did the plaintiffs authorize or confirm the sale of Denver and Utah wool made by the defendants, except with the understanding that the price realized for the whole lot should be twenty cents all around?

"(3) Were the sales of wool made by the defendants between July 31, 1899, and September 2, 1899, inclusive, made by the defendants in the exercise of proper skill, discretion, and judgment, or not?

"(4) If this question is answered in the negative, have the sales of wool made by the defendants between July 31, 1899, and September 2, 1899, been ratified and confirmed by the plaintiffs?

"(5) Have the plaintiffs ever authorized or ratified the sales of wool which were not reported to them, made by the defendants between March 11, 1899, and June 13, 1899, inclusive?

"(6) Did the defendants agree to credit the plaintiffs with a rebate of two per cent. on the twenty thousand dollars advanced by the plaintiffs to the defendants?

"(7) Did the defendants have authority to sell any wool on behalf of the plaintiffs after October 12, 1899?

"(8) Did the defendants on or before October 12, 1899, wrongfully exercise the power of disposition over the plaintiffs' wool then in their possession, and thereby or otherwise convert the same to their own use?

"(9) Did the defendants on or after October 12, 1899, fail to exercise reasonable care, skill, and diligence in the performance of their duty as commission merchants in reference to the plaintiffs' wool then in their possession; and, if so, what is the amount of damage, if any, which the plaintiffs suffered thereby?"

If these issues involved only a single fact, which lay at the very foundation of the suit, as to which it was apparent to the court that the determination thereof by the jury, at least in one direction, would dispose of the litigation, it would probably be within our discretion to direct the framing of issues at this stage. Such apparently seems to be the rule as stated in Daniell's Chancery Practice, vol. 2, 735, edition of 1840, which edition has been accepted by the Supreme Court. On the other hand, the same author, at the same page, says, "In general, however, the court will not grant an issue upon motion before hearing unless upon consent." But the rule is laid down positively in an authority which we need not go beyond. Adams, Equity (8th Ed.) *376, speaking of framing an issue, says:

"It can, however, only be adopted where the evidence creates a doubt, and not as a substitute for omitted evidence, and therefore the party claiming the issue must first prove his case by regular depositions."

The reason of this rule is apparent, and it is well illustrated by an inspection of the proposed issues submitted to us. At this stage it is impossible to determine whether such issues will ever become material, or, if yes, whether they can now be put in such form as to answer the purpose sought to be accomplished, or whether, when the proofs have been taken according to the ordinary procedure in equity, any substantial dispute will be left in reference to any of them. In other words, with issues of this character, it is apparent that at this stage the court, if it ordered a trial by jury, would have no reasonable certainty of accomplishing anything thereby, except plunging the parties into expensive, protracted, and useless collateral litigation.

The applicants call attention to the facts that the issues they present arise peculiarly at common law, as to which there is ordinarily a clear right to a trial by jury, and that they attempted to present these issues in a suit brought by them, which suit was restrained by the bill to which they have replied with the cross-bill, raising the controversies which the issues seek to present. The court has not overlooked these propositions, but they do not outweigh the difficulty we have explained. Of course, there is a probability that at the proper time the court may permit framing issues covering the substance of what is now proposed, or may direct the pith of them to be tried in the pending suit at law, either of which it may do according to the settled practice in equity, provided it hereafter appears that either party would be duly advantaged thereby. Consequently the order dismissing this application will be a qualified one.

The application of the plaintiffs in the cross-bill that issues may be framed for a jury is denied, for the reasons stated in our opinion passed down this day, without prejudice to a renewal hereafter.

SCHNEIDER v. ELDREDGE.

(Circuit Court, N. D. Illinois, N. D. November 2, 1903.)

No. 26,690.

1. REMOVAL OF CAUSES—CAUSES REMOVABLE—SUIT ON CLAIM AGAINST ESTATE.
A suit on a claim against the estate of a decedent is within the removal act, although the claim was originally filed in the probate court.

2. SAME—DIVERSITY OF CITIZENSHIP—REAL PARTY IN INTEREST.
Under the Illinois statute, which gives any one aggrieved by the order of a probate court allowing a claim the right to appeal, as construed by the Supreme Court of the state, any person appealing, other than the administrator, may prosecute the appeal in his own name. *Held*, that where the claimant was the administrator, and an administrator pro tem. was appointed by the probate court to represent the estate, but the claim was actually contested by an heir of the decedent, who appealed from an order allowing the claim, the question of diversity of citizenship between the parties was to be determined upon the citizenship of such appellant, and not upon that of the administrator pro tem.

3. SAME—TIME FOR REMOVAL—TRIAL IN PROBATE COURT.
An heir of a decedent, who contests a claim against the estate in the probate court in Illinois, which is a court of record, and there goes to trial on the merits, cannot thereafter remove the cause from the circuit court, to which he has taken it on appeal.

On Motion to Remand to State Court.

H. M. Kelly and F. D. Ayers, for claimant.
John F. Haas and Frank E. Hayner, for objector.

KOHLSAAT, District Judge. Plaintiff was duly appointed and qualified as administratrix of the estate of Bertha C. C. Schneider, deceased, by the probate court of La Salle county, Ill. On November 19, 1901, while still acting as such administratrix, she filed her two claims against her decedent's estate, one in the sum of $550, for moneys paid out by her for her intestate, and the other in the sum of $7,200, for services as nurse and for care and maintenance. On November 25, 1901, the probate court appointed Edgar Eldredge administrator pro tem. in both causes. On November 26, 1901, William F. Mayer appeared as an heir at law of claimant's decedent, and filed his objections to the allowance of said claims, setting up that he had an interest in the estate which would be affected by the allowance or rejection thereof. On December 10, 1901, claimant was permitted by the court to increase her demands in the sum of

¶ 1. Probate jurisdiction of federal courts, see note to Bedford Quarries Co. v. Tomlinson, 36 C. C. A. 276.

¶ 2. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

¶ 3. See Removal of Causes, vol. 42, Cent. Dig. § 10.

$876. On January 2, 1902, the said claims were consolidated. On January 3, 1902, a trial was had before a jury of six men, who rendered a verdict for claimant in the sum of $7,595.39, and the court thereupon allowed said consolidated claims for said sum as of class 7. From this order said Wm. F. Mayer prayed an appeal to the circuit court of La Salle county, aforesaid, which was granted upon his filing his appeal bond in the penal sum of $250. On January 11, 1902, the same was approved. The appeal was afterwards duly perfected, and the cause proceeded, entitled as above. Afterwards the said circuit court forced the cause to trial, and rendered judgment for the claimant against the protest of Mayer, who then took an appeal to the proper appellate court. On hearing had, that court reversed the said circuit court judgment on the ground that the court had not at the time of such action jurisdiction in the matter for that purpose. Said cause was docketed in the appellate court under the title of Wm. F. Mayer v. Mary L. C. Schneider. Afterwards, and on March 9, 1903, and in due time, said Mayer presented his petition and bond for removal, which were in proper form. On March 19, 1903, the petition was denied by said La Salle county circuit court. Thereupon the record was on March 26, 1903, duly filed in this court.

The cause now comes on to be heard upon motion to remand. In support of the motion, plaintiff insists:

(1) That because the suit is founded upon a claim filed originally in the probate court it does not come within the meaning of the statute granting a removal. I do not deem this point well taken, and it is overruled.

(2) That the administrator pro tem. and the plaintiff both being citizens of this state, there is no diversity of citizenship. It appears that defendant Mayer is now, and was when the claim was filed, and also at the time of filing the petition for removal, a nonresident, and a citizen and resident of Columbus, Ohio. Was the question of diversity of citizenship to be determined upon the citizenship and residence of the administrator pro tem? Under the statute of Illinois, any one aggrieved by the order of a probate court allowing a claim has the right to appeal. Section 72 of the administration act of Illinois (Hurd's Rev. St. 1899, c. 3) provides that, "when an administrator or executor presents a claim against the estate of his decedent or testator, the court shall appoint some discreet person to appear and defend for the estate, and upon the hearing the court or jury shall allow such demand or such part thereof as is legally established. * * * Should any executor or administrator appeal in such case, the court shall appoint some person to defend as aforesaid." While this, by its terms, applies only to appeals by the claimant, executor, or administrator, it determines the status of the administrator pro tem. His duties would seem to end with the probate court. However that may be, in the case of Pfirshing v. Falsh, 87 Ill. p. 260, the court holds that, under the statute allowing any one aggrieved an appeal, any person, other than the administrator appealing, may prosecute the appeal in his own name, and need not use the name of the administrator. The appeal in this case seems to have been docketed by the clerk of the circuit court in

the name of the administrator pro tem., who, it seems, did not appear nor pay any further attention to the case. There would seem to be some confusion as to the manner of docketing such cases in the circuit court, as the statute does not prescribe the method. But, from the records of all three of the courts in which the case was heard, it is manifest that Mayer was the only moving party, especially in the circuit and appellate courts. It is true that the record does not disclose the condition of decedent's estate as to whether there will remain anything for distribution to the heirs at law of decedent. In the absence, however, of any suggestion of such a situation in the record, I must assume that the defendant Mayer has a substantial interest in the case. While it is well established that the residence of the representative of a deceased person controls the question of jurisdiction, yet in a case such as this, considering the Illinois law, this court will take into consideration the actual party in interest, Mayer, as though he were the original defendant. He was at the time of the filing of the claim, and at the time of filing of the petition for removal, a nonresident and a citizen and resident of Ohio. The diversity of citizenship required by the statute in such case is therefore established.

(3) The claim that both of the heirs of claimants decedent should join in the petition for removal is not well taken, and is overruled.

(4) It is urged that Mayer did not file his petition to remove the cause in apt time. Under the removal act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], the cause was removable from the state court having original jurisdiction. Clearly the probate court had original jurisdiction in that matter, as had also the circuit court of La Salle county and this court. Having gone to trial in the probate court, and the case having been disposed of upon the merits, Mayer has lost his right to bring the cause to this court. He is no more a party to the proceeding now than he was at the time he filed his objection in the probate court to the allowance of the claim. The trial in that court was the full equivalent of the words, "any time before the defendant is required by the laws of the state or rule of the state court * * * to answer or plead." There could be no removal from the circuit court, after such a trial, even though the statutes provide for a trial de novo. Craigie v. McArthur, Fed. Cas. No. 3,341, decided by Judges Nelson and Dillon; Hess v. Reynolds, 113 U. S. p. 80, 5 Sup. Ct. 377, 28 L. Ed. 927 (arguendo). The cases seemingly holding to the contrary, so far as I have been able to ascertain, are based upon the theory that the trial body was not a court of record. Cases cited and turning upon the right of removal on account of prejudice are not in point. The probate court of Illinois is a court of record. The case at bar was tried by a jury.

The motion to remand is granted.

In re MOY QUONG SHING et al.

(District Court, D. Vermont. October 6, 1903.)

1. ALIENS—CHINESE—DEPORTATION—HABEAS CORPUS—DETENTION—AUTHORITY.
Under Act Cong. Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 [U. S. Comp. St. Supp. 1903, p. 46], placing jurisdiction of the deportation of aliens in the Department of Commerce and Labor, a return to a writ of habeas corpus by an alleged Chinese alien, showing that defendant was an officer of immigration under control of the commissioner general in charge of the port where the alien attempted to enter, by designation of the Secretary of Commerce and Labor, and that he held such Chinese person as such officer, sufficiently showed authority for the detention.

2. SAME—PLACE OF BIRTH—DETERMINATION—JURISDICTION OF EXECUTIVE OFFICERS.
Under Act Cong. Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 [U. S. Comp. St. Supp. 1903, p. 46], giving the Department of Commerce and Labor jurisdiction of the admission of aliens, and authorizing such department to prescribe rules and regulations for the determination of the rights of aliens to admission, the executive officers of such department had authority to determine whether or not a Chinese person seeking admission had been born in the United States, and was therefore a citizen entitled to enter.

3. SAME—RULES.
Under Act Cong. Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 [U. S. Comp. St. Supp. 1903, p. 46], placing jurisdiction of the admission of aliens in the Department of Commerce and Labor, such department had authority to prescribe rules of evidence relating to presumptions and burden of proof in the determination of an alien's right to admission.

On Habeas Corpus.

Fuller C Smith, for relators.
James L. Martin, U. S. Atty.

WHEELER, District Judge. The persons detained are of the Chinese race, lately from China, and are restrained of their liberty at the port of Richford, where they sought to enter this country. The petition set forth restraint in a detention house by persons acting as officers of the United States, and challenged their authority and the legality of their proceedings. The return of the petitionee, Weeks, shows that he is an officer of immigration, detaining the men under direction of Officer Schell, whose return, filed by leave of court, shows that he is an officer of immigration under control of the commissioner general in charge of this port by designation of the Secretary of Commerce and Labor. This seems to show regular and sufficient authority, within Act Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 [U. S. Comp. St. Supp. 1903, p. 46], placing jurisdiction in the Department of Commerce and Labor.

The proofs show that the men came by train, and presented themselves for admission, and, when reached, were informed that they would then be examined as to their right to come in, and that, being questioned through an interpreter, they said they had been told by

1. Citizenship of Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.

their parents that they were born in the United States, of which they had no recollection, and claimed to come in as native-born citizens. That such citizen, of whatever race, on arriving at a port of this country, is entitled to come in, is not questioned or questionable. The contention now is that when such a claim is made the executive officers have not authority to pass upon it, and that it must go for decision, if denied, to courts or judicial officers on some proper proceeding, of which this is said to be one. That the legislative department may exclude any race, or classes of any race, not citizens, from the country, and identify and return those not entitled to come by executive as well as judicial officers, seems to be too well settled by numerous and uniform decisions of the Supreme Court to require or warrant citations. And in Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, Mr. Chief Justice Fuller, for the court, said, after referring to United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, where it was held that Chinese persons born in the United States are citizens:

"It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision."

It seems equally impossible to hold that, when Congress can commit the execution of the law, and the decision of questions arising therein, to the decision of executive officers, it cannot also include the fact as to place of birth. The judicial powers of a commissioner are wholly conferred by act of Congress, and power to decide questions arising in executive proceedings may as well be conferred upon executive officers as upon others. These questions as to the place of birth of these applicants arose for decision with other questions before this officer, and no other way but for him to decide them is made apparent.

It is claimed that the proceedings of this immigration officer, Schell, did not so conform to the rights of the applicants that the detention pursuant thereto was lawful. In the Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721 (at page 100, 189 U. S., page 614, 23 Sup. Ct., 47 L. Ed. 721), Mr. Justice Harlan said:

"But this court has never held, nor must we now be understood as holding, that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law,' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity at some time to be heard before such officers in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

It appears that the immigration officer is governed by Chinese regulations made by the Department of Commerce and Labor, among which are:

"Rule 6. Immediately upon the arrival of Chinese persons at any port mentioned in rule 4 it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly as by law provided, touching their rights to admission, and to permit those proving such right to land.

"Rule 7. The examination prescribed in rule 6 should be separate and apart from the public, in the presence of government officials and such witness or witnesses only as the examining officer shall designate, and, if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal, and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based."

"Rule 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to, or residence within, the United States, to establish such right affirmatively and satisfactorily to the appropriate government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States government."

It also appears that in these cases the officer in charge, with commendable care, informed each applicant that other witnesses would be heard and sent for, if there were any, and that no claim was made that there were any.

In the Japanese Immigrant Case, Mr. Justice Harlan further said:

"The traverse to the return made by the immigration inspector shows upon its face that she was before that officer pending the investigation of her right to be in the United States, and made answers to questions propounded to her. It is true that she pleads a want of knowledge of our language, that she did not understand the nature and import of the questions propounded to her, that the investigation made was a 'pretended one,' and that she did not at the time know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts."

Here the applicants presented themselves for examination for admission, and were held till, and were present when, it was had, and knew what was going on. They came for the examination, and should have come prepared with any evidence they had and wished to introduce to maintain their claims. That others were kept from them before or during the examination, or any prejudice to them in consequence of the rule, is not shown. They had, so far as appears, all the examination they wanted.

The rule of evidence prescribed may put upon the applicants more than proof to the satisfaction of the officer, and require that beyond doubt; but the rules of evidence go with the authority to decide, and are included in it, and their correctness or their application furnishes no ground for interference.

Persons remanded.

TREAT v. CITY OF CHICAGO et al.

(Circuit Court, N. D. Illinois, Northern Division. November 2, 1903.)

No. 26,308.

1. MUNICIPAL CORPORATIONS—VALIDITY OF SPECIAL ASSESSMENT—EFFECT OF JUDGMENT UNDER ILLINOIS STATUTE.

Section 7 of the Illinois local improvement act of 1897 requires the resolution ordering an improvement to include the itemized estimate of the engineer, and such requirement, under the decision of the Supreme Court of the state, is jurisdictional. But section 66 of the same act, as amended in 1901 (Starr & C. Ann. St. Supp. 1902, c. 24, par. 103), provides that when an application is made for judgment of sale on an installment of an assessment payable in installments all questions affecting the jurisdiction of the court to enter the judgment of confirmation and the validity of the proceedings shall be raised and determined on the first of such applications, and that on an application for judgment of sale on any subsequent installment no defense, except as to the legality of the pending proceeding, the amount to be paid, or actual payment, shall be made or heard. *Held* that, construing such provisions together, the inclusion of the engineer's itemized estimate in the resolution is made jurisdictional only in case the question is raised on the application for judgment on the first installment, and that where it is not so raised the judgment in such proceeding is conclusive of the validity of the assessment.

In Equity. On demurrer to bill.

George W. Wilbur, for complainant.
Edgar B. Tolman, for defendant city of Chicago.

KOHLSAAT, District Judge. Complainant files his bill for an injunction restraining the city from causing certain premises belonging to him to be sold to satisfy the second installment of a special assessment against the same. The first installment was duly paid. The payment of this second installment has been resisted in the state courts, Circuit and Supreme, and decided adversely to complainant.

The bill proceeds upon the theory that the state court proceedings were and are void for want of jurisdiction, for the reason that the board of local improvements of the city of Chicago failed to include in its resolution the itemized estimate of the engineer, citing the case of Joseph Bickerdike et al. v. City of Chicago (decided by the Supreme Court of Illinois, Oct. 20, 1903, and not yet officially reported) 68 N. E. 161, wherein the court holds, on an appeal taken from the judgment of the county court of Cook county, Ill., imposing a special assessment for street improvement, that "the proceedings prior to the adoption of the ordinance required by the statute are jurisdictional, without which no valid ordinance can be passed, and consequently no valid assessment be made." The court there proceeds to hold the ordinance in that case invalid for the want of an itemized engineer's estimate, as is insisted on by complainant in this case.

Defendants demur to the amended bill, and set up section 66 of the local improvement act of 1897, as amended in 1901, which provides that:

"Upon the application for judgment of sale upon such assessment or matured installments thereof, or the interest thereon, or the interest accrued on

installments not yet matured, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for confirmation thereof, and no errors in the proceeding to confirm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application herein provided for. When such application is made for judgment of sale on an installment only of an assessment payable by installments, all questions affecting the jurisdiction of the court to enter the judgment of confirmation and the validity of the proceedings shall be raised and determined on the first of such applications. On application for judgment of sale on any subsequent installment, no defense, except as to the legality of the pending proceeding, the amount to be paid, or actual payment, shall be made or heard. And it shall be no defense to the application for judgment on any assessment or any installment thereof that the work done under any ordinance for an improvement does not conform to the requirements of such ordinance, if it shall appear that the said work has been accepted by or under the direction of the board of local improvements. And the voluntary payment by the owner or his agent of any installment of any assessment levied on any lot, block, tract or parcel of land, shall be deemed and held in law to be an assent to the confirmation of the assessment roll, and to be held to release and waive any and all right of such owner to enter objections to the application for judgment of sale and order for sale." Starr & C. Ann. St. Supp. 1902, c. 24, par. 103.

Ordinarily a void proceeding cannot be made valid by laches or even consent. If it is void, no one is bound by it at any stage thereof. If said amended section 66 is to be construed to mean that courts can be by statute deprived of the power to inquire into a jurisdictional point at any time, the legislature must be held to have exceeded its prerogatives.

The courts are an independent arm of the government, and have a constitutional power distinct from that of the other branches of government in which they are supreme. They cannot be deprived of the power to declare void any proceeding which is the result of the assumption of unconstitutional powers by its author.

In the case of Downey et al. v. People, etc. (decided by the Illinois Supreme Court at its October, 1902, term, but apparently not officially reported) 68 N. E. 807, section 66 is sustained. It would seem that the term "jurisdiction" is used somewhat loosely in the act. It will be observed, however, that the jurisdictional clause herein raised grows out of the statute, and does not present a constitutional question. It was within the power of the state Legislature to have made the inclusion in the resolution of the board of a summary statement of the engineer's estimate of the amount required a basis for the assessment, instead of an itemized statement thereof.

Considering now that said section 66 is a part of the very act which prescribes the initial step aforesaid, and considering them both together, it is quite in accord with the rule obtaining in the construction of statutes to read them as one section, each qualifying the other. We should then have section 7 of the act of 1897 of the Illinois Legislature and amended section 66 thereof so reading as to provide that the inclusion of the engineer's itemized estimate in the resolution should not be deemed a prerequisite in such case, unless raised and determined upon the application for judgment of sale upon the first installment. If the objection had been raised at that hearing, the ruling in Bickerdike v. City of Chicago would apply. It was

within the power of the Legislature to pass such an act. This court will give effect to the whole act. So construed, there remains no ground for questioning the terms of the act.

There is no such lack of jurisdiction in the original proceedings as would take the case out of the ordinary rule of law, which provides that judgment of a court shall not be attacked collaterally. The remaining point, of want of proper notice, was disposed of in the state court proceedings.

The demurrer is sustained, and the bill dismissed, for want of equity.

CORNWALL et al. v. J. J. MOORE & CO.

(District Court, N. D. California. October 29, 1903.)

No. 12,619.

1. SHIPPING—CONSTRUCTION OF CHARTER—OPTION OF CHARTERER TO CANCEL.
A charter party contained the following provision: "Captain to furnish charterers a certificate from charterers' marine surveyor (at San Francisco) that the vessel is in proper condition for the voyage. Should the vessel fail to pass a satisfactory survey this charter to be void at charterers' option." *Held*, that such provision was for the purpose of determining the seaworthiness of the vessel for the voyage in hull and equipment, and that the charterers could exercise the option given to cancel the charter only on an adverse report of their surveyor after an actual survey, which it was incumbent on them to have made unless prevented by the fault of the owners.

2. SAME—SEAWORTHINESS OF VESSEL—DUTY OF CHARTERER TO MAKE SURVEY.
Neither the age of a vessel, nor the length of time she had been upon her copper, nor the fact that owing to her age insurance could not be obtained on the cargo intended to be shipped by the charterers, establishes that she was in fact unseaworthy for the voyage, so as to authorize the charterers' surveyor to so certify and entitle the charterers to cancel the charter, where it provided for a certificate to be made on an actual survey.

3. SAME—BREACH OF CHARTER—MEASURE OF DAMAGES.
The measure of damages for a total breach of a charter by the charterer by refusing to accept the vessel is the net amount that would have been earned by the vessel under the charter, less the net amount earned, or which might with reasonable diligence have been earned during the time required for the making of the voyage under the charter.

In Admiralty. Action for damages for breach of charter.

Monroe & Cornwall, for libelants.
Nathan H. Frank, for respondent.

DE HAVEN, District Judge. This is a libel in personam to recover damages from the defendant, a corporation, for the alleged breach of a charter party by the terms of which the defendant chartered the whole of the ship Spartan, "with the exception of the cabin and necessary room for the crew and the stowage of provisions, sails, and cables," for a voyage from San Francisco to Australia; the defendant agreeing to provide and furnish the said vessel with "a full and complete cargo of Grain, Lumber and/or other lawful merchan-

dise." The charter party contains the following, among other, provisions:

"The said vessel shall be tight, staunch, strong and in every way fitted and provided for said voyage. * * * Captain to furnish Charterers a certificate from Charterers' Marine Surveyor (at San Francisco) that the vessel is in proper condition for the voyage. Should the vessel fail to pass a satisfactory survey, this Charter to be void at Charterers' option. Vessel to dunnage and ballast sufficient for the proper care and loading of the aforesaid cargo, and to be stowed under the Captain's supervision and direction."

A few days after the execution of the charter, the defendant was notified by the libelants that the Spartan was ready to take on cargo. In reply the defendant, on January 24, 1902, in a letter addressed to the ship's managing owner, said:

"We beg to notify you that our Surveyor, Captain Perriman informs us that the vessel has got considerably more ballast in her than is necessary for the freighting of the cargo which will go in the ship, consequently she is not ready to commence receiving cargo under the conditions of the charter-party. We also understand from Captain Perriman as well as Captain Polite, master of the ship, that water was found on the 'transom' on her last voyage, indicating a leak in the ship and that although the vessel was docked to find this leak it was not found. In as much as the vessel will carry perishable cargo it will be necessary for us to have a certificate that the vessel is in first class order and condition, and in as much as we have cargo waiting for the ship and want to commence loading her, we must ask you to give this important matter your immediate attention."

The libelants replied to this on the following day, stating that there was no more ballast in the ship than in the judgment of her master was necessary for her safety in carrying such cargo as could reasonably be offered under the terms of the charter party, but at the same time they requested a written statement of the cargo to be loaded, so that it might intelligently be determined by surveyors how much ballast was required, and added that:

"If the ballast now in her hold is considered by them to be more than necessary, the surplus shall be taken out and the ship turned over to your company to be loaded in accordance with your cargo statement and the judgment of the surveyors. It is not true that there is or has been a leak in the ship; neither is it true that the vessel was docked for the purpose of finding a leak."

On January 27, 1902, the libelants requested the defendant's surveyor to go with two surveyors selected by them and make a survey of the vessel. This he refused to do, and the surveyors selected by the libelants, having previously secured from the defendant's clerk an unsigned pencil memorandum of the proposed cargo, made a survey, and certified that in their judgment the vessel was seaworthy and well fitted for the voyage named in the charter. The defendant was informed of the result of this survey, and after some further correspondence between the parties, not necessary to be here set out, the defendant, on January 29, 1902, gave notice to the libelants that because of their failure to furnish "a certificate from Charterers' Marine Surveyor at San Francisco, that the vessel is in proper condition for her proposed voyage, as provided in the charter-party," the defendant availed itself of the option contained therein to consider the charter party

void and to declare the same accordingly canceled. On the next day the libelants again made demand upon the defendant's surveyor for the certificate called for in the charter party, and in making the demand said, "For the purpose of making any examination necessary to the issuance of said certificate herein demanded you are hereby granted free access to said ship Spartan and to all her parts." It may be here stated that the defendant's surveyor never made any survey of the vessel, and at the trial testified that he was unable to do so because of the ballast which was then in the vessel, and that the master refused to remove the same; but I am unable to accept this statement as true. The letters of the defendant contain no intimation that the survey could not be made until the vessel's ballast was removed, and it is clear from the evidence that the only controversy about the removal of ballast was in relation to the amount which the ship ought to carry upon the voyage. The defendant's surveyor did not at any time notify the libelants or the master of the vessel that he was ready to make a survey when the ballasting in the ship should be removed, or that it was necessary this should be done in order to enable him to make the survey; and, placing the most favorable construction upon his action, it may be said that his refusal to make the survey and give the certificate required by the charter was because of the difference in the opinions held by himself and her master as to the amount of ballast to be carried, and upon consideration also of the vessel's age and the length of time she had been upon her copper, making it difficult, if not impossible, to obtain insurance upon her cargo, and the further fact that he had been told she had sand in her limbers. My conclusion from the evidence is that the libelants did nothing to prevent, but on the contrary made reasonable efforts to secure, the survey contemplated by the charter.

1. In view of the foregoing statement of facts, was the defendant justified in declaring the charter party canceled? The provision upon which the defendant relies for such justification is as follows:

"Captain to furnish Charterers a certificate from Charterers' Marine Surveyor (at San Francisco) that the vessel is in proper condition for the voyage. Should the vessel fail to pass a satisfactory survey, this Charter to be void at Charterers' option."

The survey here referred to is one which was to be made for the purpose of ascertaining whether the vessel was seaworthy in hull and equipment when tendered for the reception of cargo under the charter. The clause was inserted in the charter for the purpose of providing for the settlement of any dispute which might arise between the libelants and defendant as to the seaworthy condition of the vessel in hull and equipment. It was for the benefit of the defendant, and gave to it the option of declaring the charter void, if after a proper survey the vessel was not in the judgment of its surveyor deemed seaworthy in these respects, and if the defendant desired to insist upon compliance with this stipulation it was incumbent upon it to select its surveyor and cause him to make the survey contemplated. In the absence of such a survey and the adverse judgment of the surveyor thereon as to the seaworthiness of the vessel, the defendant had no right to declare the charter void, unless the failure to make the survey

was caused by the fault of the libelants. In the case of Herrick v. Belknap's Estate, 27 Vt. 673, the court, in the opinion delivered by Redfield, Ch. J., said:

"This being a bill brought to obtain payment for work done on the Vermont Central Railroad beyond or aside of the estimates of the engineers, and the contract by which the company let the work to Belknap, and also that by which he underlet a portion of it to the plaintiff, containing a provision in these words, 'and the engineer shall be the sole judge of the quality and quantity of the work, and from this decision there shall be no appeal,' the recovery can scarcely be claimed upon any other but one of two grounds: (1) That the engineers, without the fault of the plaintiff, have failed to make an estimate within the fair import of the contract; or (2) that, having made one, it is so erroneous as not to be binding upon the parties under the contract. * * * But, this being a peculiar species of contract, so far as the umpirage is concerned, that being referred to the agents and servants of one of the contracting parties, persons in the employ, under the control, and in the pay of that party, it seems from necessary implication to impose upon that party the obligation to employ competent, upright, trustworthy persons, in this service, and to see to it that they did this service in the proper time, and in the proper manner."

In Smith v. Boston, Concord & Maryland Railroad, 36 N. H. 458, it is said:

"So where it is agreed that the work shall be done under the superintendence of an engineer, that he shall measure, etc., there is an implied agreement on the part of the employer that a suitable engineer shall be employed, and that he shall do all that the contract requires to be done by him in due season, and an action will lie against the party who neglects to furnish such engineer. * * * And the party who does or should employ him can take no advantage of any failure on the part of the engineer to do anything required by the contract."

The case of McMahon v. The New York and Erie R. R. Co., 20 N. Y. 463, may also be cited as an authority for the same proposition. That was an action which arose under a contract for the construction of a railroad, by which all measurements were to be made and the amount of labor determined by the defendant's engineer, whose decision was to be final. Ex parte measurements were made by the engineer which were not satisfactory to the plaintiff, and he thereupon requested the defendant to have other measurements made, and this request was refused. The court held that the measurements made by the engineer at a time when the plaintiff was not present were not such as were contemplated by the contract, and that the plaintiff had done all that was incumbent upon him when he requested that other measurements should be made. In its discussion of the question the court said:

"This was all, I think, that it was incumbent upon the contractor to do. The engineer was entirely under the control of the company, subject to its order and removal by its will; and after the company had absolutely refused to direct him to make an estimate, or to review what he had already made, it would have been useless for the contractor to apply to him, and I think he was under no obligation to do so. The referee was justified, therefore, in considering the amount of the work an open question, to be determined upon the proof at large."

So here, it was the duty of the defendant to cause its marine surveyor to make a survey of the Spartan when the request for such survey was made by the libelants, and, as it did not do so, the de-

fendant had no right to declare the charter party canceled because of the failure of the libelants to furnish it with a certificate from such surveyor that the vessel was in a proper condition for the voyage. The libelants, in requesting the survey to be made, did all they could reasonably be required to do in the premises, and were not in default. It is said, however, that the defendant's marine surveyor acted in good faith in refusing to make the survey, and declined to give the required certificate because in his judgment the vessel was not seaworthy, and that by the terms of the charter party, his judgment having been honestly exercised, was conclusive as to that fact, and justified the defendant in declaring the agreement canceled. The answer to this suggestion is that the charter contemplated an actual survey of the vessel by the defendant's marine surveyor; that is, an inspection accompanied by the usual and necessary tests to enable him to form an intelligent opinion as to her seaworthiness, and without such survey he was not authorized to pronounce the vessel unseaworthy and refuse the certificate called for by the charter. He had no right to act upon mere hearsay as to the condition of the ship's limbers. Spencer v. Duplan Silk Co. (C. C.) 112 Fed. 638. Nor was he justified, without a survey, in refusing the certificate because of her age or the length of time she had been upon her copper, nor by reason of any arbitrary rule of the insurance companies not to insure perishable cargoes carried by wooden vessels of her age. All of the expert witnesses, including the defendant's surveyor, testified that the age of the vessel and the length of time she had been upon her metal would not conclusively show that she was not in fact seaworthy, and that the actual fact could only be determined by a survey. It follows from what has been said that if the Spartan was in fact seaworthy the libelants are entitled to recover the actual damages sustained by them because of defendant's refusal to furnish her with a cargo as provided in the charter. The argument against her seaworthiness is based entirely upon the facts that she was to carry a cargo of grain, that she is a wooden vessel, and at the date of the charter was 28 years of age and had been upon her metal for 8 years; and the further fact, shown by the evidence, that insurance could not have been obtained upon a cargo of grain carried by a wooden vessel of that age upon the voyage for which she was chartered. It does not, however, necessarily follow from these facts that the Spartan was not seaworthy with respect to the cargo and voyage contemplated; and, upon consideration of the evidence of the witnesses who inspected her and testified as to her actual condition, I am satisfied that she was in fact seaworthy, and able to perform all that she was required to do by the charter party. The case will be referred to the commissioner to take and report the testimony in relation to the damages sustained by the libelants, together with his findings thereon. In ascertaining the amount of damages the commissioner will be governed by the rule approved in Leblond v. McNear (D. C.) 104 Fed. 826, and there stated in this language:

"The measure of damages in this class of actions seems to be well settled. In an action against the charterer of a ship for a total breach of his contract, the measure of damages is the net amount that would have been

earned by the vessel under the charter sued on, less the net amount earned, or which might with reasonable diligence have been earned, by the vessel during the time required for the performance of the voyage named in such contract of charter. Smith v. McGuire, 3 Hurl. & N. 554; Utter v. Chapman, 38 Cal. 659; Id., 43 Cal. 279; Ashburner v. Balchen, 7 N. Y. 262; Dean v. Ritter, 18 Mo. 182; Steamship Co. v. Card (D. C.) 59 Fed. 159, 3 Suth. Dam. pp. 179–181."

Let a decree be entered in accordance with the foregoing opinion.

In re BOESHORE.

(Circuit Court, E. D. Pennsylvania. October 30, 1903.)

No. 14.

1. WITNESSES—FAILURE TO OBEY SUBPŒNA—NECESSITY OF TENDERING FEE.
A witness is not subject to attachment for contempt for failure to appear and give testimony in a contested case pending in the Patent Office in obedience to a subpœna served on him as provided by Rev. St. § 4906 [U. S. Comp. St. 1901, p. 3390], unless his traveling expenses and witness fee for one day were tendered him at the time of the service of the subpœna, as required by section 4908, or such tender or payment was expressly or impliedly waived by him; and his failure to object that no tender was made is not such an implied waiver.

On Rule for Attachment of Witness.

Paul V. Connolly, for petitioner.
C. F. Eggleston, for respondent.

J. B. McPHERSON, District Judge. Under section 4906 of the Revised Statutes [U. S. Comp. St. 1901, p. 3390] the respondent was duly subpœnaed to appear as a witness before a notary public in the city of Philadelphia to testify in a contested interference proceeding pending before the Patent Office. He failed to appear, and a rule to show cause why an attachment should not issue was thereupon granted. The respondent's answer sets up, among other excuses, that the process served "did not at said time pay or offer to pay to deponent his car fare or expenses to the hearing referred to, nor did he pay or tender to deponent a witness fee for so attending, in accordance with section 4908 of the Revised Statutes of the United States." By this section it is provided that a witness who does not appear after being served with a subpœna may be punished as in other like cases, but with the express direction that "no witness shall be deemed guilty of contempt for disobeying such subpœna, unless his fees and traveling expenses in going to and returning from, and one day's attendance at, the place of examination are paid or tendered him at the time of the service of the subpœna."

It is possible to interpret this section as merely giving the witness a personal privilege, which he may waive if he chooses so to do, and to hold that, if he fails to demand his fees and traveling expenses, he does impliedly waive the protection offered by the statute. Reasons of some weight might be given in support of this view, but I do not feel at liberty to adopt it. Not only are the plain words of the statute

more easily construed to mean that the witness cannot be attached for contempt unless the tender prescribed by the statute has been made, but the weight of authority also is in favor of this position. Many cases are referred to in 22 Enc. of Pleading & Practice, at page 1339, and they bear out the statement in the text that "in civil cases it is requisite, in order to validate the service of a subpœna, to pay or tender in advance, to the person whose attendance is required, his lawful fees and expenses." No doubt the witness may expressly waive payment or tender, or waiver may be implied from his acts, and in either event he is liable to attachment for contempt in case of his failure to attend. But mere failure at the time of service to object that no tender has been made is not sufficient evidence of implied waiver. Hurd v. Swan, 4 Denio, 79. See, also, 24 A. & E. Enc. of Law (1st Ed.) 166, and cases cited in the notes.

In the federal courts the precise question now being considered does not seem to have been decided. In re Thomas, 1 Dill. 420, Fed. Cas. No. 13,889, decided that, where a witness demanded his fees in advance, and was not paid, a state statute which relieved the witness from the obligation to obey the subpœna would be enforced in the Circuit Court, and the witness would not be attached for failing to appear. In United States v. Durling, 4 Biss. 509, Fed. Cas. No. 15,010, Judge Drummond gave the following instructions, among others, to the district attorney, for his guidance in criminal cases:

"Again, where there is a witness residing in another district, the process of this court goes to that district. It is issued to the marshal of that district, and it is the duty of the person to whom it is addressed, if he has the means, to travel here to give his testimony. If he has not, the proper officer of the government will furnish him with means. It is not necessary, if he has the means, that the fees should be tendered to him before he is required to obey the process. An attachment would issue, and the court would punish a man who could pay his expenses and would not come because the money was not tendered. It is only where a man has not the means of paying his expenses that it is necessary for the money to be tendered to the witness in order to make it incumbent on him to obey the process of the court."

In Norris v. Hassler (C. C.) 23 Fed. 581, after the service of a subpœna, which had included a partial tender of expenses, had been sustained on other grounds, the substance of the instruction just quoted was approved by Judge Nixon in a civil case arising in the circuit court, but apparently without adverting to the fact that the rule is different in civil cases, and that Judge Drummond was speaking of criminal cases only. In re Griffen, Fed. Cas. No. 5,810, is more to the point. That case arose under the bankrupt act of 1867. By general order 29 it was provided that "in the case of witnesses their fees shall be tendered or paid at the time of the service of the summons or subpœna, and shall include their traveling expenses to and from the place at which they may be summoned to attend." This was interpreted by Judge Blatchford to mean that the fees so to be tendered at the time of service were the fees for going and returning once, and for one day's attendance; but he ruled distinctly that these fees must be tendered or paid at the time the subpœna was served. It seems to me, therefore, that both by the plain language of section 4908 and by the weight of authority it should be held that a witness summoned to ap-

pear under section 4906 is not subject to attachment for contempt unless his fees and expenses were offered to him at the time of service.

The rule for an attachment is accordingly discharged at the costs of the petitioner.

In re KERBER.

(District Court, E. D. Pennsylvania. October 31, 1903.)

No. 1,689.

1. BANKRUPTCY—FAILURE OF WITNESS TO OBEY SUBPŒNA—TENDER OF FEE.
Under Bankr. Act July 1, 1898, c. 541, § 41, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437], as well as by the general rule in civil cases, a witness is not subject to attachment for failing to appear and testify before a referee in obedience to a subpœna unless his mileage and fee for one day's attendance were paid or tendered to him.

2. SAME—RULE FOR ATTACHMENT—PROCEDURE.
Where a witness fails to attend before a referee in obedience to a subpœna, Bankr. Act, § 41, requires the referee to certify the facts to the judge, and an application to the court for an attachment in the first instance, without such certificate, is irregular.

In Bankruptcy. On rule for attachment of witness.

Samuel Englander, for trustee.
Abram Peterzell, for witness.

J. B. McPHERSON, District Judge. This is a proceeding to punish a witness for contempt in not obeying a subpœna to appear before a referee at a meeting held in this city. When service was made upon the witness, who also resides in Philadelphia, there was no payment or tender of expenses and fees, and this is set up as a defense to the pending rule. I think the defense must prevail. Section 41 of Bankr. Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437] provides, inter alia, "that no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than 100 miles from said place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered him." The general rule in civil cases also requires payment or tender of fees and expenses, as I have recently had occasion to decide in an opinion filed in the Circuit Court in Boeshore's Case (Oct. Term, 1903) 125 Fed. 651. Whether, therefore, the present case is governed by section 41 or by the general rule, the result is the same. No tender having been made, no attachment should issue.

I desire to add that the practice pursued in this case was not correct. The application for an attachment was made directly to the court, whereas section 41 provides distinctly that, if any person shall do any of the acts forbidden by the section, the referee shall certify the facts to the judge. It is only after this has been done that "the judge shall thereupon in a summary manner hear the evidence as to the

acts complained of," etc. There is no certificate here by the referee, and the proceeding is therefore irregular.

The rule for an attachment is discharged at the costs of the petitioner.

COX v. STATE BANK OF CHICAGO.

(Circuit Court, N. D. Illinois, N. D. November 2, 1903.)

No. 26,761.

1. BANKRUPTCY—LIENS—ATTACHMENT AFTER FILING OF PETITION.
A sale of property of a bankrupt under a judgment obtained in an attachment suit commenced against him after the filing of the petition in bankruptcy, on which the adjudication was subsequently made, was void as to the creditor, and the trustee is entitled to recover the proceeds.

At Law. Action by trustee in bankruptcy. On demurrer to declaration.

William Ritchie, for plaintiff.
Parker & Hagen, for defendant.

KOHLSAAT, District Judge. Plaintiff brings this suit to recover from defendant the proceeds of certain goods and chattels, choses in action, and open accounts, alleged to be the property of the bankrupt. Defendant claims the same by virtue of sale had and garnishee proceedings, by virtue of certain attachment proceedings and a judgment recovered thereon, which were instituted subsequent to the filing of the petition in involuntary bankruptcy in the Western District of New York. It further appears that afterwards said bankrupt was duly adjudged to be a bankrupt, which proceeding is still in full force and effect. The declaration consists of the common counts and one special count. To the common counts defendant pleads. To the special count he demurs. The cause now comes on to be heard upon the demurrer.

The special count sets out the filing of the petition in bankruptcy, the adjudication, the commencement of defendant's suit subsequent to the filing of the petition, the judgment, sale, and receipt of the proceeds by defendant, and charges that defendant thereby became indebted to and promised to pay said money on request, but that, being often requested, it has failed and refused so to do. Defendant insists that plaintiff does not, by the allegations of this count, bring himself within the terms of the bankruptcy act, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

I am of the opinion that the proceeding, so far as it laid hold of the assets of the bankrupt, even before adjudication, was void, and that plaintiff is entitled to recover on the facts as pleaded in the special plea. Kinmouth v. Braeutigam, 63 N. J. Eq. 103, 52 Atl. 226.

The demurrer is overruled.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 422.

In re HENVIS.

(Circuit Court, E. D. Pennsylvania. October 28, 1903.)

No. 28.

1. CONTEMPT—ALLEGED VIOLATION OF INJUNCTION—TRIAL OF QUESTION OF INFRINGEMENT OF PATENT.
Where, in a proceeding for contempt against a defendant for infringing a patent in violation of the court's injunction, the question whether the article sold by defendant is an infringement is in dispute and doubtful, it will not be determined on ex parte affidavits, but only after a regular and orderly hearing.

Proceeding for Contempt.

Albert B. Weimer, for petition for order for contempt.
A. T. Johnson and A. B. Stoughton, for respondent.

J. B. McPHERSON, District Judge. Whether or not the respondent, Henvis, is again infringing the complainant's patents, is a question that I am not willing to decide upon the affidavits before me. In substance, the dispute arising upon the ex parte evidence resembles the ordinary controversy where infringement is alleged by a bill in equity and is denied by the answer. The validity of the complainant's patents has been conclusively determined by the decree already made, and, upon a former proceeding for contempt, one form of ventilator that the respondent sold since the entry of the decree has been adjudged to infringe. The kind of ventilator that is now under consideration, however, differs in some respects from the kind that has already been before the court, and is averred to conform strictly to the device of an expired patent that is much earlier than the patent of the complainant. If this be true, the respondent is not guilty of contempt, but I do not think that the evidence in support of this averment is of a quality on which I ought to act. There should be a regular, orderly hearing, with an opportunity for cross-examination upon a subject of so much importance.

Accordingly, Jos. C. Fraley is hereby appointed examiner and master to hear evidence on the question whether the ventilator now being made by the respondent infringes the ventilator of the complainant, and to report the testimony and his findings of fact and of law to the court at his early convenience.

BOARD OF WATER COM'RS OF CITY OF NEW LONDON v. ROBBINS & POTTER et al.

(Circuit Court, D. Connecticut. November 2, 1903.)

No. 534.

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—SUFFICIENCY OF SHOWING.
A federal court will not grant a petition for removal of a suit, in which a municipal corporation is plaintiff, on the ground of local prejudice, based solely on an apprehension of the effect of such prejudice on the jury in case of a jury trial, where the judge of the state court has power, if justice requires it, to transfer the cause to another county.

On Petition for Removal of Suit from the Superior Court of New London County.

R. P. Freeman, Jr., for petitioner.
Brandegee, Noyes & Brandegee, opposed.

PLATT, District Judge. It is conceded by counsel for the petitioner that they are not worried lest justice might escape them in the state court on account of prejudice or local influence, if their case shall be submitted to any of the local judges having jurisdiction. Indeed, it is not reasonable that in such an event they should worry, since all the judges of the superior court are of the highest character, and, traveling on circuit, as they do, will be very likely to reside in a portion of the state farther from the scene of action than the federal judge. It is the fear of the effect of local prejudice and influence upon the jury which is the exciting cause of the petition. In such case it would seem that Rev. St. § 550, might be invoked by the petitioner. Under that section a judge holding the superior court in New London county may, if in his opinion the cause of justice requires it, order the cause, as soon as it has been put to the jury, to be transferred to the superior court in any other county.

In the circumstances, the moving party will perhaps thank me for expressing no decided opinion upon the controverted issue which is before me. It would seem clear that the state judge, sitting upon the very ground where the controversy exists, could determine the matter very much more satisfactorily than I can, at a distance, and with somewhat meager affidavits to guide me.

The petition is denied.

¶ 1. Prejudice or local influence as ground for removal of cause to federal court, see note to P. Schwenk & Co. v. Strang, 8 C. C. A. 95.

CARRAU v. O'CALLIGAN et al.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 925.

1. FEDERAL COURTS—EQUITY JURISDICTION—SETTING ASIDE PROBATE OF WILL.
A federal court of equity is without jurisdiction of a suit to set aside the probate of a will, unless by the law of the state a suit in equity for the purpose may be maintained in a state court, in which case a similar suit may be maintained in a federal court, where the requisite diversity of citizenship and other jurisdictional facts exist.

2. SAME—WASHINGTON STATUTE.
By the Constitution and Statutes of Washington the superior court in the county of which a decedent was a resident at the time of his death is vested with probate jurisdiction over his estate, and provision is expressly made for the contest, within one year, of any will theretofore admitted to probate, for any cause affecting the validity of the will, by petition to the superior court having jurisdiction, in which contest issues are required to be made up, tried, and determined in that court; and it is further provided that, if no person shall so appear within the time limited, the probate of such will shall be binding. *Held*, that under such statutes the contest of a will is strictly a probate proceeding, and the proper forum for its determination is that department of the superior court having jurisdiction of the estate and engaged in its administration; that such a proceeding is not a suit between parties within the general jurisdiction of the superior court, or which can be maintained in a federal court.

3. PARTIES—SUIT TO ESTABLISH HEIRSHIP.
To a suit to set aside the probate of a will and establish the status of plaintiffs as heirs of the decedent, other persons, claiming to be sole heirs, and therefore adversely to plaintiffs, and who have asserted their claims by appropriate proceedings in the probate court, are indispensable parties.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

For opinion below, see 116 Fed. 934.

The appellees were complainants in the court below in a suit to which Terrence O'Brien, as administrator of the estate of John Sullivan, deceased, and Marie Carrau, were made defendants. In their bill, after alleging the complainants to be British subjects and the defendants to be citizens of the United States and residents of the state of Washington, and the defendant Terrence O'Brien to be the duly appointed, qualified, and acting administrator of the estate of the deceased, Sullivan, they averred: That on the 26th day of September, 1900, Sullivan died in the city of Seattle, state of Washington, intestate, leaving therein real property of the value of over $400,000, and personal property of the value of more than $20,000. That Sullivan left surviving him no widow, children, or lineal descendants, nor father, mother, sister, brother, uncle, aunt, nephew, niece, nor any granduncle nor grandaunt, nor any grandnephew or grandniece, nor any ancestor, lineal or collateral, nor any first cousins other than the complainants, nor any relative whomsoever as nearly related to him as the complainants. That each of the complainants is a first cousin of the deceased, Sullivan, and that they are his only heirs at law and next of kin. That shortly after Sullivan's death a special administrator of his estate was appointed by the superior court of King county, Wash., who took charge of the estate until some time in November, 1900, when the defendant O'Brien was by that court duly appointed general administrator of the estate. That O'Brien immediately qualified as such administrator, and entered upon the discharge of his duties as such.

¶ 1. See Courts, vol. 13, Cent. Dig. §§ 797, 798.

That the defendant Marie Carrau, and a relative of hers by the name of Louis Daussat, shortly after the appointment of the special administrator of the estate of Sullivan, filed a petition in the superior court of King county, wherein they alleged that Sullivan died in that county without leaving any will, and seised of an estate in the county, consisting of real and personal property, exceeding in value the sum of $400,000, and claiming that Sullivan was indebted to them in about $35 for board, and as such creditors they prayed that one I. D. McCutcheon be appointed administrator of the estate. That various other persons, some of whom are named in the bill, filed petitions alleging that Sullivan died seised and possessed of real and personal property in King county, that he left no will, and praying the appointment of other persons than McCutcheon as administrator of the estate. That the several petitions came on for hearing before the court, and at such hearing McCutcheon declined to be appointed administrator, and at the request and in behalf of Daussat and Marie Carrau asked the appointment of one B. R. Brierly as such administrator. That upon the hearing of the proofs offered in support of the various petitions the superior court of King county appointed the defendant Terrence O'Brien administrator of the estate, and denied the prayers of all the other petitions. That after the appointment and qualification of O'Brien as such administrator the defendant Marie Carrau and Louis Daussat, and their relatives, Augustine Daussat and Hermance Carrau, combined and confederated together for the purpose of manufacturing a pretended nuncupative will of Sullivan in favor of Marie Carrau, under which pretended nuncupative will Marie Carrau is claiming to be the sole legatee and devisee of all the property of the deceased, Sullivan; and that it is and has been the intention of the said Marie Carrau, Hermance Carrau, Louis Daussat, and Augustine Daussat to carry out such conspiracy, and thereby obtain for themselves all the property of Sullivan by means of false testimony, and by the manufacture of evidence to support the pretended nuncupative will. That Sullivan at the time of his death was a bachelor, of the age of 60 years, and had had only a very short acquaintance with Marie Carrau, Hermance Carrau, Louis Daussat, and Augustine Daussat, but that at the time of his death he was temporarily lodging at the house of Daussat, at which house Marie Carrau also resided, and at which time she was teaching Sullivan French, he then contemplating a trip to France, from which country he had but recently returned with the intention of revisiting it at an early date. That, after failing to procure the appointment of the person whom they had nominated as administrator, the said Louis Daussat and Marie Carrau began to circulate reports that Sullivan had made a nuncupative will at 11 o'clock on the night of the 25th day of September, 1900. That such pretended nuncupative will had been reduced to writing at half past 11 o'clock that night, and had been signed by the said Marie Carrau, Louis Daussat, Augustine Daussat, and Hermance Carrau as witnesses after the death of Sullivan on the 26th day of September, 1900. That on the 8th day of March, 1901, the said Marie Carrau filed in the superior court of King county, Wash., a verified petition, wherein she stated that she had heard the said petition read, knew the contents thereof, and knew the same to be true, which petition alleged: "That said John Sullivan died on the 26th day of September, A. D. 1900, at Seattle, county of King, state of Washington, and was at the time of his death of sound mind and disposing memory. That he left a last will and testament, to wit, a nuncupative will. That six months have not elapsed since the testamentary words were spoken by decedent. That said testamentary words, or the substance thereof, were addressed to Louis Daussat, Augustine Daussat, and Hermance Carrau at about eleven o'clock p. m. of the 25th day of September, 1900, and were as follows: 'I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carrau. I am sick, and we know not what may happen.' That said testamentary words were thereafter reduced to writing, which said writing accompanies this petition. That such testamentary words were spoken and such nuncupative will was made at the time of the last sickness, and at the dwelling house of deceased, wherein deceased had resided for more than ten days immediately preceding his death and the speaking of said words. That said will was made at or about the hour of eleven o'clock p. m. on the 25th day of September,

1900, the night before decedent's death, and at the time of his last sickness, and while decedent was in actual contemplation, expectation, and fear of death, and at the time of pronouncing such testamentary words constituting such nuncupative will as aforesaid the decedent did bid the three following named persons, who were then and there present by and at his request, to bear witness that such was his will, to wit, Louis Daussat, Augustine Daussat, Hermance Carrau. That decedent had been sick for several days immediately preceding the making of said will, and was still sick at said time, and in his last sickness as aforesaid, and died within twelve hours after said will was made, published, and declared. That no one was named in said will as the executor thereof. That decedent was a bachelor, and left no widow, heirs, or next of kin, so far as known to your petitioner. That decedent left personal property of the value of fifty thousand dollars ($50,000), and real estate in said county of King of the probable value of four hundred and fifty thousand dollars ($450,000). Wherefore petitioner prays that said will be admitted to probate. [Signed] Marie Carrau, Proponer and Petitioner."

The bill further alleges that immediately upon the filing of that petition a citation was issued by order of the superior court of King county, Wash., and placed in the hands of the sheriff of that county for service upon the widow and next of kin of the deceased, Sullivan, and that the sheriff immediately returned the citation with his return indorsed thereon to the effect that he was unable to find such persons or any of them in King county, and immediately thereupon the superior court of King county assumed to admit the pretended nuncupative will to probate, and that said pretended nuncupative will now stands as legally probated in the records of the superior court of King county, state of Washington; that the said superior court, in assuming to probate the said nuncupative will, acted wholly without jurisdiction in the premises; that it was without jurisdiction to hear any evidence or to take any steps for the probate of such nuncupative will wherein the estate bequeathed exceeded the value of $200; that the said superior court was also without jurisdiction for the reason that no legal citation had been issued out of the court, and because 10 days had not elapsed between the filing of the pretended will and the hearing of the pretended proof offered in its support; that under the laws of the state of Washington a nuncupative will is invalid where the estate bequeathed exceeds the value of $200, and that a nuncupative will, even if valid, cannot dispose of real estate; that the said Marie Carrau has filed a petition in the superior court of King county, Wash., wherein she prays that the whole of the estate of the deceased, Sullivan, be distributed to her; and it is alleged upon the information and belief of the complainants that the said court will, on the 21st day of June, 1901, make and enter a decree of distribution distributing the whole of the estate to said Marie Carrau upon her executing a bond for the payment of her proportion of the indebtedness of the estate; that the estate is very slightly indebted, except in the sum of $60,000 to the United States Mortgage & Trust Company, secured by mortgage upon the property known as the "Sullivan Block" in Seattle, which, with the land upon which it is erected, is of the value of upwards of $300,000, and that the administrator of the estate, unless restrained by the court below, will surrender to said Marie Carrau all of the property of the said estate, who will appropriate the same to her own use and benefit, including the rents, issues, and profits of the real estate, amounting to $25,000 a year, all of which will be lost to the complainants because of the insolvency of the defendant Marie Carrau.

The prayer of the bill is, among other things, for a decree adjudging the pretended nuncupative will null and void; that the complainants are the only heirs at law of the deceased, Sullivan, and entitled to receive the whole of his estate, and that the defendant Terrence O'Brien, as administrator of the estate, be enjoined from turning over any of the property to the defendant Marie Carrau, or to any other person or persons than the complainants.

The answer of the defendant Terrence O'Brien, administrator of the estate, is to the effect that he has no knowledge concerning any of the matters stated in the bill, and that he has no interest in the controversy except such as he, as administrator, is by law required to have.

The answer of Marie Carrau, among other things, denies any relationship of either of the complainants with the deceased, Sullivan, admits the relation-

ship as alleged of the defendant Marie Carrau, Louis Daussat, Augustine Daussat, and Hermance Carrau, but denies that they or either of them combined or confederated together for the purpose of making a pretended nuncupative will of the deceased Sullivan in favor of the defendant Marie Carrau. The answer of this defendant puts in issue all of the averments of the bill in respect to fraud and conspiracy, and sets up that Sullivan was engaged to be married to her, and that they were to have been married on the 1st day of October, 1900; that Sullivan did make and publish the nuncupative will in question, by which he devised to her all of his property, which will was duly admitted to probate by the probate court of King county, Wash.; denies that either the defendant Marie Carrau or Louis Daussat ever sought the appointment of any one as administrator of the estate of the deceased, or ever circulated the reports alleged in the bill, and alleges that immediately after the death of Sullivan the defendant Marie Carrau informed "her spiritual adviser" that Sullivan did make and publish an oral will devising and granting to her all of his property, and that she never attempted to conceal the fact of the making and publishing of such a will; that she caused to be consulted a regular practicing attorney in Seattle in respect to the validity of such will, and was by him advised that an oral will was not valid under the laws of the state of Washington; that it was not until several weeks thereafter that she was advised of the fact that the law of that state did authorize the making of a verbal will, and that the will so alleged by her to be made by the deceased was valid, and that the same devised his entire estate to her. The answer of the defendant Marie Carrau also denies that the superior court of King county, Wash., acted wholly or at all without jurisdiction in probating the alleged nuncupative will, but, on the contrary, alleges that it had and has the exclusive jurisdiction in the premises. The answer of this defendant also sets up lack of jurisdiction in the court below over the subject-matter of the present suit, and denies that under the laws of the state of Washington a nuncupative will is invalid in respect to its attempted disposition of real property, or is invalid where the estate exceeds the value of $200, but alleges that such a will, duly proved and probated, devises, under the laws of that state, both real and personal property to any amount in value, by virtue of a statute of the state reading as follows: "No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator at the time of pronouncing the same did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return." 1 Ballinger's Ann. Codes & St. § 4605. The answer of the defendant Marie Carrau further sets forth the various steps taken in the superior court of King county, Wash., sitting as a court of probate in the matter of the estate of the deceased, Sullivan, including the averment: "That a large number of persons have filed in re estate of John Sullivan, deceased, in the superior court of the state of Washington for King county their verified claims claiming and alleging each of them to be the sole heir of said John Sullivan, deceased, as follows, to wit: Eugene Timothy Sullivan, residing at Olympia, Washington, in person on his own behalf, on September 3, 1901. Mary Sullivan, Butte, Montana, by Peter Breen, Alexander Mackel, and James A. Bradford, her attorneys, on March 12, 1901. Katherine Riordan, Mary Riordan, and Margaret McGrath née Margaret Riordan, Cork, Ireland, by John B. Ault, June 19, 1901. John Sullivan and Mary Sullivan, residing in Cork, Ireland, by Roberts & Leehey and J. P. Gleason, their attorneys, April 3, 1901. Jeremiah Sullivan, James Sullivan, Margaret Mahoney, Catherine Sweeney (spinster), John Sweeney, Patrick Sweeney, Daniel Sweeney, and Michael Sweeney, residing in Ireland, by Wilshire & Kenaga, their attorneys." The answer of the defendant Marie Carrau also sets up that prior to the commencement of the present suit the complainants herein did "file their verified petition in equity, and appearing by Piles, Donworth & Howe and C. H. Farrell, their attorneys, who are also complainants' solicitors here, contesting the nuncupative will in the complaint and defendant's answer described, and which petition was duly filed in the

superior court of the state of Washington for King county, being No. 32,664, and entitled 'In the matter of the Estate of John Sullivan, Deceased. Johanna Callighan and Edward Corcoran, Petitioners, vs. Terrence O'Brien, as Administrator of the Estate of John Sullivan, Deceased, and Marie Carrau, Respondents,' and caused to be issued a citation therein, under the seal of said superior court for King county, Washington, to the respondents therein, being the defendants herein, and caused said citation to be regularly served on respondents therein and these defendants on the same day; and that this defendant and said administrator have each appeared in said action, resisting said contest; and said action so as aforesaid, contesting the validity of said will, was pending at the time of the bringing of this action, and is still pending, in said superior court of King county, Washington, undetermined. And that the following named persons have also filed petitions in re the estate of John Sullivan, deceased, in the superior court of the state of Washington for King county, to contest the validity of said will, to wit: Catherine Riordan, Mary Riordan, and Margaret McGrath, née Margaret Riordan, filed June 20, 1901, by their attorney, John B. Ault, and which are still pending in said court. The state of Washington, by its attorney general, filed the 20th day of June, 1901, and which is still pending in said court. Mary Sullivan, by James E. Bradford, her attorney, filed July 2, 1901, which is still pending in said court. And that each of said petitioners have caused citations to issue and be served upon said O'Brien, as administrator, and this answering defendant as such legatee, under said will; and that each of said petitions so as aforesaid contesting the validity of said nuncupative will are still pending undetermined in the superior court of the state of Washington for King county; and that this answering defendant in each of said actions contesting the validity of said will is defending said will and her rights thereunder."

The complainants filed a replication to the answer of the defendant Marie Carrau, evidence was taken upon the issues made, the cause was thereafter argued and submitted upon the pleadings and briefs, on consideration of which the court below "adjudged and decreed as follows, to wit:

"(1) That John Sullivan, aged about sixty (60) years, late of the city of Seattle, King county, state of Washington, died in said city on the 26th day of September, 1900, intestate, the owner of personal property and real estate situated in said county, including the property known as the 'Sullivan Building,' and leaving no issue, nor any descendant, nor wife, nor father, nor mother, nor sister, nor brother, nor uncle, nor aunt, nor granduncle, nor grandaunt, nor ancestor, lineal or collateral, nor any person of nearer kin than first cousin, and never having married, but leaving surviving him the complainant Hannah O'Callaghan, otherwise known as Johanna Callaghan, of Cork, Ireland, his first cousin, and one of his next of kin, a lawful child of his mother's deceased sister, Bridget Callaghan; and also leaving surviving him his first cousin and one of his next of kin in equal degree with said Johanna Callaghan, the other complainant, Edward Corcoran, otherwise known as Ned Corcoran, of Dublin, Ireland, a lawful child of Margaret Corcoran, a deceased sister of the mother of said John Sullivan.

"(2) It is further ordered, adjudged, and decreed that on November 19, 1900, the defendant Terrence O'Brien, a citizen of the United States and of the state of Washington, was, by the superior court of the state of Washington for King county, in the matter of the estate of John Sullivan, deceased, numbered in said court 3,664, duly appointed as administrator of the estate of said John Sullivan, deceased, and ever since his said appointment he has been and now is the duly qualified and acting administrator of said estate.

"(3) It is further ordered, adjudged, and decreed that the alleged nuncupative will claimed by the defendant Marie Carrau, a citizen of the United States and of the state of Washington, to have been made by the said John Sullivan on the 25th day of September, 1900, at about eleven o'clock p. m., in the following words, to wit: 'I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carrau. I am sick, and we know not what might happen'—was never made by said John Sullivan, nor did the said John Sullivan speak said words, or any of them, or any words of such import, nor did he make any will whatever.

"(4) It is further ordered, adjudged, and decreed that the superior court of the state of Washington for King county never acquired jurisdiction to probate said alleged nuncupative will. Said court never made any lawful order for the issuance of a citation, nor was any lawful citation ever issued, nor was any notice of any proceeding to probate said alleged will ever given to or had by any one, nor did said court ever acquire jurisdiction to hear any evidence for the probate of said alleged will, but said court acted wholly without jurisdiction in the matter of the probate of said alleged will, and the certificate of probate of said alleged will granted by said court on the 8th day of March, 1901, and the decree of said court purporting to have been rendered and entered on said 8th day of March, 1901, admitting said alleged will to probate as the last will and testament of said John Sullivan, deceased, were made and rendered wholly without jurisdiction, and said proceedings and all proceedings in the matter in said superior court numbered 3,664, entitled 'In the matter of the Estate of John Sullivan, Deceased,' in so far as they relate to the alleged probate of said alleged nuncupative will, are null and void, and of no force and effect.

"(5) It is further ordered, adjudged, and decreed that the complainants Johanna Callaghan and Edward Corcoran were at the time of the commencement of this action and now are aliens, subjects of the King of Great Britain and Ireland, and first cousins and next of kin of said John Sullivan, deceased, and are entitled to share equally in the assets of the estate of said John Sullivan, deceased, as his first cousins and next of kin, and the share of each of said complainants in said estate exceeds, and at the time of the commencement of this suit exceeded, the sum and value of two thousand dollars ($2,000), exclusive of interest and costs, and the value of said estate has at all times exceeded and now exceeds the sum of three hundred thousand dollars ($300,000), exclusive of interest and costs, and the defendant Terrence O'Brien, as administrator of the estate of said John Sullivan, deceased, is directed to recognize the right of each of said complainants to share in said estate as a first cousin of said deceased and as one of the next of kin of said deceased, John Sullivan.

"(6) It is further ordered, adjudged, and decreed that the defendant Marie Carrau, and all persons claiming under her or representing her in any manner whatever, are hereby perpetually restrained and enjoined from setting up or asserting in any manner whatsoever any claim, right, or title to or interest in the estate of said John Sullivan, deceased, or in any part thereof, under said alleged nuncupative will, and under the alleged probate thereof, or under either thereof, and from setting up, asserting, or in any manner whatsoever making any claim whatsoever under said alleged nuncupative will and the alleged probate thereof, or either thereof, in any court or elsewhere, except in a court having appellate jurisdiction to review this decree.

"(7) It is further ordered, adjudged, and decreed that the complainants recover from the defendant Marie Carrau their costs and disbursements in this suit sustained, the same to be taxed by the clerk of this court."

J. P. Houser, J. W. Robinson, and Lorenzo S. B. Sawyer, for appellant.

Samuel H. Piles, George Donworth, James B. Howe, Piles, Donworth & Howe, and C. H. Farrell, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We are of the opinion that the court below was without jurisdiction of the subject-matter of the suit, and, further, that all necessary parties were not before the court, some of whom, if made parties, would have ousted the court of jurisdiction. On both of these grounds we think the court below should have dismissed the bill at the complainants' cost.

In the Case of Broderick's Will, 21 Wall. 503, 509, 22 L. Ed. 599, the Supreme Court declared it to be "undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof." And the court added:

"Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence is that the constitution of a succession to a deceased person's estate partakes in some degree of the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties, and are concluded as upon res judicata by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief."

But wherever, by the law obtaining in a state, customary or statutory, suits in equity may be maintained in the courts of such state to set aside the probate of a will, similar suits may be maintained by original process in a federal court, where the requisite diverse citizenship and other requisite conditions exist. Thus, in the case of Richardson et al. v. Green et al., so much relied upon by counsel for the appellees (61 Fed. 423, 9 C. C. A. 565), decided in this court by Judges Knowles and McKenna, the latter now an associate justice of the Supreme Court, and which was a suit brought in the Circuit Court of the United States for the District of Oregon for the purpose, in part, of obtaining a decree annulling the probate of a certain will that had been theretofore probated in one of the county courts of that state on the ground that the probated will was a forgery, this court affirmed the decree of the lower court which canceled the will; thus sustaining the jurisdiction of the federal courts in the matter. But it did so for the reason, as plainly appears from the opinions of the judges deciding the case, that it was found that while, under the laws of Oregon, the county courts of that state were given exclusive jurisdiction in the first instance to take proof of wills, there was no provision of the Oregon law "to warrant any contest upon the validity of a will at the time the same was being probated," but authority in any one interested in the estate to attack the will by an independent suit at any time after its probate. This court, having found that such a remedy existed in the Oregon courts, very properly held that it could be exercised by the United States Circuit Court for that state, the requisite diverse citizenship and other requisite conditions existing. But the laws of the state of Washington in respect to the probate of wills and their contest are quite

different. By section 6 of article 4 of the Constitution of that state the superior courts of the state are given original jurisdiction "of all matters of probate," as well as of all cases in equity and of all cases at law not specially excepted. And by a statute of the state it is provided that:

"The superior courts in the exercise of their jurisdiction in matters of probate shall have power:

"(1) To take proof of wills and to grant letters testamentary and of administration; * * *

"(2) To settle the estates of deceased persons, and the accounts of executors, administrators, and guardians;

"(3) To allow or reject claims against the estates of deceased persons, as hereinafter provided;

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

"(5) To award process and cause to come before them all persons whom they may deem it necessary to summon, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be entrusted with or in any way accountable for any property belonging to any minor, orphan, or person of unsound mind, or estate of any deceased person;

"(6) To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction." 2 Hill's Ann. St. & Codes of Washington, § 845.

By section 851 of the same statutes it is provided that:

"Wills shall be proved and letters testamentary or of administration shall be granted:

"(1) In the county of which deceased was a resident or had his place of abode at the time of his death.

"(2) In the county in which he may have died, leaving estate therein and not being a resident of the state.

"(3) In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death."

Various provisions follow concerning the production of and petition for the probate of wills, and among them section 861, which provides that:

"Applications for the probate of a will or for letters testamentary, may be made to the judge of the superior court and he may also at any time issue all necessary orders and process to enforce the production of any will."

By section 862 of the same statutes it is provided that:

"When any will is exhibited to be proven the court may immediately receive the proof and grant a certificate of probate, or if such will be rejected, issue a certificate of rejection."

Section 867 is as follows:

"All the testimony adduced in support of the will shall be reduced to writing, signed by the witnesses and certified by the judge of the court."

And the next section provides for the recordation, in a book to be kept for that purpose, of all wills admitted to probate.

Section 872 of the same statutes is as follows:

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will or to the rejection thereof. Issues shall be made up, tried, and determined in said court respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased

of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will."

The next section (873) provides that:

"Upon the filing of the petition referred to in the next preceding section a citation shall be issued to the executors who have taken upon them the execution of the will or to the administrator with the will annexed, and to all legatees named in the will residing in the state or to their guardians if any of them are minors, or to their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted."

By section 874 it is declared that:

"If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States or of unsound mind, a period of one year after their respective disabilities are removed."

By section 876 it is provided that:

"If, upon the trial of said issue, it shall be decided that the will is for any reason invalid or that it is not sufficiently proved to have been the last will of the testator, the will and the probate thereof shall be annulled and revoked."

It is thus seen that by the statutes of the state of Washington provision is expressly made for the contest, within a stated time, of any will theretofore admitted to probate, for any cause affecting the validity of the will, by petition to the superior court having jurisdiction, in which contest issues are required to be made up, tried, and determined in that court, with a provision to the effect that, if no person shall so appear within the time limited, the probate of such will shall be binding. And such we understand to be the effect of the decision of the Supreme Court of Washington in the case of State ex rel. Stratton, Attorney General, v. Tallman, Judge of the Superior Court, 65 Pac. 545, concerning this very estate of Sullivan. It appears from the opinion of the court in that case that the Attorney General of the state filed a motion in the superior court having jurisdiction of the estate in question "praying for the vacation of the order admitting the will to probate, and to set aside all the proceedings leading up to the probate of the will, upon the grounds that the court acquired no jurisdiction to hear any evidence in support of the will; because no citation was issued as required by law, because the citation was issued on the day it bears date and at the time the will was presented to the court, and immediately returned by the sheriff without making any effort to find any of the heirs of deceased, or any person interested in the estate; and because deceased never made or attempted to publish and declare the will." The probate court having declined to consider or decide the motion on the ground that the state could not properly appear in the proceedings, the Attorney General applied to the Supreme Court of the state for a mandate directing the probate court to consider and determine the motion, and in denying the writ that court said:

"The extraordinary writ will not be issued if relator has a plain, speedy, and adequate remedy at law. Relator urges that under subdivision 8, § 4620, 1 Ballinger's Ann. Codes & St., the state is interested in testing the validity of the will, because, in the event of the establishment of intestacy and upon the failure of heirs the estate escheats to the state. The effect of the order

admitting a will to probate, either written or nuncupative, is declared in section 6108, 2 Ballinger's Ann. Codes & St., 'as effectual in all cases as the original would be if produced and proven,' and such effect by section 6112 is declared binding upon all persons if its validity shall not be contested within one year after the probate or rejection of the will. Assuming that the state may have such contingent interest in the estate as to have the real truth of the existence and validity of the will determined, it appears there is a plain procedure, which is speedy and adequate, pointed out in section 6110, Id., by which issues may properly be made up and tried and determined respecting all questions affecting the regularity of the execution or of the validity of the will, and the superior court entertaining such a suit may fully protect such rights in the estate by such stay of proceedings in the procedure in probate as may be necessary or effective. The conclusion, therefore, is that the appropriate procedure is designated in section 6110, supra, and there is no necessity shown for a mandate from this court." 65 Pac. 546.

It is true that the court, in speaking of the contest authorized by section 6110, Ballinger's Ann. Codes & St., uses the word "suit," which was manifestly an inapt expression; but that the court did not thereby mean that such contest should be by an independent suit in a department of the superior court of the state not charged with the administration of the estate is very clearly shown by its express declaration to the effect that the appropriate procedure is designated in section 6110 of the state statutes, which in terms declares that such contest shall be initiated "by petition to the superior court having jurisdiction"—that is to say, to the superior court having jurisdiction of the estate—in which the required issues shall be made up, tried, and determined, and which court, having such jurisdiction, may direct "such stay of proceedings in the procedure in probate as may be necessary." This, we think, is the plain meaning of the decision of the Supreme Court of the state in the case of State ex rel. Stratton, Attorney General, v. Tallman, Judge, supra. That court surely did not mean to hold that one department of the superior court of the state could interfere with the due proceedings of a co-ordinate branch of the same court in the matter of an estate of which it acquired the first, and, indeed, the exclusive, jurisdiction, by the filing therein of a petition for the probate of an instrument alleged to be the will of one dying within its jurisdiction, and alleged to have left real and personal property therein.

Subsequent to the above decision of the Supreme Court of the state of Washington the Attorney General of the state moved the superior court that was administering the estate of the deceased, Sullivan, for an order directing citation to issue as prayed in his petition for the contest of said alleged will, which the probate court denied on the ground "that the state of Washington has no right at this time to make said petition contesting said will and file the same, or appear in said matter, and is not a proper party to appear in said probate proceeding to contest said will, or for any purpose whatever." Thereupon the Attorney General, on behalf of the state, again applied to the Supreme Court of the state for a writ of mandate to compel the issuance of such citation. In denying the writ on the ground that the petitioner had a remedy at law by appeal from the action of the probate court, the Supreme Court of Washington said:

"A number of questions are discussed in the briefs of the respective counsel relating to the power of the Attorney General to appear in behalf of the state

in such a proceeding as that instituted in the superior court, and also as to the right of the state to appear by any one in such a proceeding. It is contended by respondent that the right of the state to assert control of property alleged to have escheated is not an active, but a passive, right, and that while the proper probate court is engaged in determining the legal disposition to be made of the property the state has no right to interfere, but that the assertion of the state's claim becomes active when it has been lawfully determined that there are neither heirs nor legatees. The examination of these questions would involve extended discussion, and it is unnecessary to pass upon them here, for the reason that we think the relator has a remedy at law by appeal." State ex rel. Stratton, Attorney General, v. Tallman, Judge, 69 Pac. 1101.

Here again the Supreme Court of Washington clearly indicates that the proper court, under the statutes of the state, in which to contest the validity of the will in question, is that department of the superior court exercising probate jurisdiction and having control of the estate in question; for it would hardly have held that the relator had a remedy at law by appeal from the ruling of that court if there was no jurisdiction of his contest in the court in which he was proceeding. "The powers of the superior court in respect to its probate jurisdiction," said the same court in Re Alfstad's Estate, 27 Wash. 175, 182, 67 Pac. 593, "are the same as they would be if it were in fact a separate probate court. Proceedings in probate matters, in actions in equity, and at common law are distinct, and should not be intermingled, except in cases specially authorized by law." It is true that in the subsequent cases of Browder v. Phinney, 70 Pac. 264, and In re Murphy's Estate, 70 Pac. 107, the Supreme Court of Washington said:

"In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate' procedure, as distinguished from what is denominated 'civil' or 'criminal' procedure. But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil action. The court may require the proceeding to be separately docketed, if, when the issues are formed, it appears to be such as should be thus docketed. Whether a citation should have issued on the strength of this petition or not, it is nevertheless true that appellant responded to the citation, and appeared generally by demurrer to the petition, and asked its dismissal simply on the ground that the court could not hear it as a probate proceeding. We think it was not necessary to sustain the demurrer and dismiss the proceeding on that ground. But under our liberal practice as to the form of actions the petition could be treated as in the nature of a complaint. The issues could be framed thereunder, and the cause tried without requiring another statement of the same facts under some other form or name. If it developed that it was not properly a probate proceeding, it would not be treated as such."

In the case at bar the contest of the will is strictly a probate proceeding, and the proper forum for its determination is, as we think the Supreme Court of Washington indicated in the two cases above cited relating to this very estate, that department of the superior court having jurisdiction of the estate, and actually engaged in its administration.

We concur in the opinion expressed by the Supreme Court of California in the matter of Joseph's Estate, 50 Pac. 768, that a petition to probate a will is the beginning of a special proceeding, and that "the order admitting the will to probate is not final so long as proceedings may be taken (under the statute) to revoke the probate. In all subsequent stages the contest is but a part of the proceeding to probate the will, and is not a new and distinct proceeding. The subject-matter is the same, and the ultimate issue, to wit, whether the will in question should stand as probated, is the same." In our opinion, there is nothing in the case of Gaines v. Fuentes et al., 92 U. S. 10, 23 L. Ed. 524, to sustain the jurisdiction of the federal court in the present suit. That case came before the Supreme Court of the United States on writ of error to the Supreme Court of the state of Louisiana. The action was brought in the Second District court of the parish of Orleans, which, under the laws of Louisiana, was invested with jurisdiction over the estates of deceased persons, and of appointments necessary in the course of their administration. In form it was an action to annul an alleged will of one Daniel Clark, the father of the plaintiff in error in the case, and to recall the decree of the court by which it was probated. The complaint, or petition, as it was called, set forth that on the 18th of January, 1855, the plaintiff in error applied to the district court of the parish of Orleans for the probate of the alleged will, and that by decree of the Supreme Court of the state the alleged will was recognized as the last will of the deceased, Clark, and was ordered to be recorded as such; that this decree of probate was obtained ex parte, and by its terms authorized any person at any time, should he desire to do so, to contest the will and its probate in a direct action, or as a means of defense by way of answer or exception, whenever the will should be set up as a muniment of title; that the plaintiff in error subsequently commenced several suits against the petitioners in the Circuit Court of the United States to recover sundry tracts of land and properties of great value, situated in the parish of Orleans and elsewhere, in which they were interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator; and that the petitioners were unable to contest the validity of the alleged will so long as the decree of probate remained unrecalled. The petitioners then proceeded to set forth the grounds upon which they asked for a revocation of the will, and the recalling of the decree of probate; these being substantially the falsity and insufficiency of the testimony upon which the will was admitted to probate, and the status of the plaintiff in error, incapacitating her to inherit or take by last will from the decedent. A citation having been issued upon the petition, and served upon the plaintiff in error, she applied, in proper form, with a tender of the necessary bond, for removal of the cause to the Circuit Court of the United States for the District of Louisiana, under section 12 of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 79), on the ground that she was a citizen of New York and the petitioners were citizens of Louisiana. The court denied the application, for the alleged reason that, as she had made herself a party to the proceedings in the court rela-

tive to the settlement of Clark's succession by appearing for the probate of the will, she could not avoid the jurisdiction when the attempt was made to set aside and annul the order of probate which she had obtained. The court, however, proceeded to say, in its opinion, that the federal court could not take jurisdiction of a controversy having for its object the annulment of a decree probating a will. The plaintiff in error then applied for the removal of the action on another ground, which was also denied, on the ground that the federal court could not take jurisdiction of the subject-matter of the controversy. Other parties having intervened, the applications were renewed, and again denied. An answer was then filed by the plaintiff in error, denying generally the allegations of the petition except as to the probate of the will, and interposing a plea of prescription. Subsequently a further plea was filed to the effect that the several matters alleged as to the status of the plaintiff in error had been the subject of judicial inquiry in the federal courts, and had been there adjudged in her favor. Upon the hearing a decree was entered annulling the will and revoking its probate. The judgment of the Supreme Court of the state affirming this decree was reversed on writ of error on the ground that the case should have been transferred from the parish court of Orleans to the Circuit Court of the United States, and in giving that judgment the Supreme Court of the United States held that, while the action was in form to annul the alleged will of Daniel Clark, and to recall the decree by which it was probated, it could not be treated as properly instituted for the revocation of the probate, but should be and was treated as brought against the devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property, for the reason that the petitioners were not heirs of Clark, nor legatees, nor next of kin, and did not ask to be substituted in place of the plaintiff in error. "It is," said the court, "in fact an action between parties; and the question for determination is whether the federal court can take jurisdiction of an action brought for the object mentioned between citizens of different states upon its removal from a state court." The court held (92 U. S. 20, 23 L. Ed. 524) that:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is in all essential particulars a suit for equitable relief—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if, by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are on the one side citizens of Louisiana and on the other citizens of other states."

Not only was there no statute of Louisiana like that of the state of Washington, requiring the contest of a will admitted to probate to be initiated and prosecuted in the court having jurisdiction of the estate and charged with its administration, but it appears from the

statement of the case of Gaines v. Fuentes that the decree of probate there sought to be annulled was not only ex parte, but that by its very terms any person was authorized to contest the will, and its probate in a direct action.

The case of Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, involved the estate of Mary McAuley, deceased, who died seised of real estate in the city of Pittsburg, Pa., leaving also a large amount of personal property. As respects the latter, she died intestate, but she left the following instrument, written and signed by her:

"By request of my dear brother my house on Duquesne Way is to be sold at my death and the proceeds to be divided between 'The Home for the Friendless,' and 'The Home for Protestant Destitute Women.'"

That instrument was admitted to probate on the 12th of January, 1886, by the register of Allegheny county, Pa., as the will of Mary McAuley, and letters of administration cum testamento annexo upon her estate were issued to Alexander M. Byers. Byers proceeded with the administration of the estate, and on January 29, 1887, he filed in the register's office an account showing his receipts and expenditures, and what balance he had in his hands for distribution, amounting to a large sum of money. The account of Byers as administrator with the will annexed was examined and allowed by the register, and was presented for approval to the orphans' court of Allegheny county, and was by that court on March 7, 1887, approved and confirmed, and, no exceptions thereto having been filed, the confirmation became absolute. Thereupon, in pursuance of statutory directions, this confirmed account was put upon the audit list of the orphans' court for distribution of the balance shown to be in the administrator's hands, and the court fixed March 29, 1887, as the day to hear the case. The day before the hearing thus fixed, a bill in equity was filed in the Circuit Court of the United States for the Western District of Pennsylvania, by two citizens of Ohio, against the administrator, Byers, and other parties claiming to be interested in the estate, including the two corporations named in the probated instrument. The bill set forth the death of Mary McAuley; that there were two classes of claimants to the estate, to wit, the first and second cousins of the decedent; that the so-called will was null and void; and that there was a large amount of personal estate in the hands of the administrator, etc. The prayer was that the will and the probate be declared void, and of no effect; that the administrator be enjoined from disposing of the real estate, and from collecting the rents therefrom, and that some suitable person be appointed to take charge of it until partition; that a partition of it be had and made to and among the various parties in interest, and that the defendant Byers be directed to make a full, just, and true account of all assets in his hands; that an account be taken of the decedent's debts and funeral expenses, and the surplus distributed among the plaintiff and other parties entitled thereto; and for general relief. To this bill the administrator, Byers, filed a plea setting up the proceedings in the orphans' court, which plea was overruled by the Circuit Court. The case was then put at issue by answer and replication, and resulted in a final decree by the Circuit Court to the effect

that the real estate left by the decedent be distributed equally between the Home for the Friendless and the Home for Aged Protestant Women, and that the personal estate of the decedent be distributed among the 13 first cousins of the decedent, to the exclusion of her second cousins.

The Supreme Court held that the Circuit Court erred in taking any action or making any decree looking to the mere administration of the estate, or attempting to adjudicate the rights of citizens of the state as between themselves, but that, as it appeared that the debts of the estate had been paid, and the estate was ready for distribution, but that no adjudication had been made as to the distributees, "in that exigency the Circuit Court might entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate. Further than that it was not at liberty to go." 149 U. S. 620, 13 Sup. Ct. 911, 37 L. Ed. 867.

But certainly, in order to make such determination, it is essential that all adverse claimants be made parties. In the case of Byers v. McAuley it does not appear that any one interested in the estate was absent. There is in the case no suggestion of the absence of any necessary or proper party, and no question of that nature was presented or considered. In the case at bar, however, there were persons not made parties to the suit who claimed to be the sole and exclusive heirs of the deceased, and who, if made parties, would, on the ground of citizenship, oust the federal court of any jurisdiction in the premises. If any of those claims be well founded, it would, of course, result that the complainants in the court below are without any right. Those claimants were, therefore, essential parties to the controversy concerning the heirship in question, and we think counsel for the appellees altogether mistaken in saying that there is anything to the contrary in Byers v. McAuley, or in the case of Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260. The latter was a case, as stated by the Supreme Court in Byers v. McAuley, "of a bill filed by one of the distributees of an estate against the administrator and the sureties on his official bond, to obtain her distributive share in the estate of the decedent. Plaintiff was a citizen of Virginia, and the defendant a citizen of Missouri, and an administrator appointed by the probate court of one of its counties. Suit was brought in the Circuit Court of the United States for the District of Missouri. The charge in the bill was gross misconduct on the part of the administrator, and false settlement with the probate court; and that he had, by fraudulent misrepresentations, obtained a settlement with plaintiff for a sum less than she was entitled to. A demurrer to the bill was sustained in the court below, but this court held that the bill was sufficient, and that the demurrer was improperly sustained. In other words, the ruling was that the plaintiff, a citizen of another state, could apply to the federal courts to enforce her claim against an administrator arising out of his wrongful administration of the estate." To the objection that the other distributees were not made parties, the court said (7 Wall. 431, 19 L. Ed. 260):

"It is undoubtedly true that all persons materially interested in the subject-matter of a suit should be made parties to it; but this rule, like all general

rules, being founded in convenience, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree and do justice to the parties before it without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names the other distributees, who have the same common interest, without stating of what particular state they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case, and, should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation."

It is plain that what is there said by the Supreme Court is no justification whatever for dispensing with parties whose asserted interest is directly opposed to that of the complainants, for the establishment of any right in the latter takes just that much from the absent claimants.

Without reference to the merits of the suit, concerning which we cannot properly indicate any views, it results that the judgment must be, and hereby is, reversed, and the cause remanded to the court below, with directions to dismiss the bill at the complainants' cost.

KENNEY et al. v. BLAKE.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 908.

1. SEAMEN—STATUTE REGULATING CONTRACTS—CONSTRUCTION AND SCOPE.
The provision of section 24, Act Dec. 21, 1898 (30 Stat. 763, c. 28 [U. S. Comp. St. 1901, p. 3080]), entitled "An act to amend the laws relating to American seamen for the protection of such seamen and to promote commerce," which expressly makes its requirements as to the shipping of seamen applicable "as well to foreign vessels as to vessels of the United States," provided there is no treaty which conflicts, is within the power of Congress, and is valid and effective; and the requirements of the act apply to contracts made by seamen in ports of the United States for service on foreign vessels.

2. SAME—INVALIDITY OF CONTRACT—VIOLATION OF STATUTE.
Under Rev. St. § 4523 [U. S. Comp. St. 1901, p. 3075], which provides that "all shipments of seamen made contrary to the provisions of any act of Congress shall be void; and any seaman so shipped may leave the service at any time, * * *" a contract for service on a British ship made in an American port, by which the seaman was paid wages in advance, in violation of Act Dec. 21, 1898 (30 Stat. 755, 763, c. 28 [U. S.

¶ 2. See Seamen, vol. 43, Cent Dig. §§ 121, 122.

Comp. St. 1901, p. 3080]), is void, and the seaman may leave the service at any time, and recover full wages for the time served, without deduction on account of the advance.

8. ADMIRALTY—REVIEW ON APPEAL—DENIAL OF REHEARING.
The denial of a motion by respondent for a rehearing in an admiralty suit, to permit the introduction of new evidence, is not ground for reversal of the decree, where respondent did not support his motion with a showing of what the evidence would be, nor present it to the appellate court, as might have been done under the admiralty rules.

Appeal from the District Court of the United States for the Western Division of the District of Washington.

For opinion below, see 117 Fed. 557.

The libelant, Michael Blake, an American citizen, brought this suit in the District Court for the District of Washington against the British ship Troop, her tackle, apparel, and furniture, to recover the sum of $198, alleged to be due the libelant as wages. It was alleged in the libel "that on the 15th day of July, 1901, at Philadelphia, state of Pennsylvania, libelant was duly hired by the said A. F. Kenney, the master of said vessel, as second mate on board of her, at the agreed compensation of thirty dollars per month, and that in pursuance thereof libelant duly entered in the services of said vessel, then and there, in the capacity as second mate on board of her, and duly performed all of his duties as such second mate on board of her until the 10th day of March, 1902, when libelant, with the consent of said master, left said vessel." The appellant A. F. Kenney appeared and claimed the vessel, and in his answer alleged that at the time the libelant joined the vessel he signed the usual and customary shipping articles, a copy of which articles were attached to the answer, marked "Exhibit A," and made a part thereof. The shipping articles described the voyage as "from Philadelphia to Fusan, China, thence if required to any port or places within the limits of 75 degrees north and 65 degrees south latitude, trading three years' voyage to end on the arrival of the vessel at a port of discharge on the east coast of the United States north of Hatteras, United Kingdom, or the continent of Europe between the Elbe and Brest, with liberty to call for orders." It appears that the articles contained the following entry respecting the libelant: "Michael Blake, age 45; nationality, Mass., Fall River; home address, Fall River, Massachusetts, U. S. A.; ship in which he last served. 'Lynfield;' date and place of signing this agreement, Philadelphia, sixteenth day, seventh month, 1901; capacity, second mate; amount of wages per calendar month, $30; amount of advance or monthly allotment, $30, one month's payment." The payment of the advance of $30 to the libelant appears upon the articles as follows: "Michael Blake, Mass., Fall River, Mass., U. S. A. Philadelphia, 2 mate $30. One payment, $30." The answer of the claimant alleged that libelant left the vessel without any good cause or reason therefor, and without the consent of the master and contrary to his wishes; that by reason of the libelant's having so left the vessel, he forfeited whatever wages may have been coming to him at the time he left the vessel. In the course of the testimony in the case the libelant, on cross-examination, was interrogated by proctor for claimant concerning certain deductions from his wages made by the master of the vessel. Among other things he was asked, "Didn't you get an advance of $30?" His answer was, "Yes, sir." The decree of the court below was in favor of the libelant for the sum of $193. The claimant of the vessel and the sureties on the bond for the release of the vessel have appealed.

J. M. Ashton and W. L. Sachse, for appellants.

A. W. Buddress, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The act of Congress entitled "An act to amend the laws relating to Ameri-

can seamen, for the protection of such seamen and to promote commerce," passed December 21, 1898 (30 Stat. 755, 763, c. 28), provides, in section 24 [U. S. Comp. St. 1901, p. 3080], as follows:

"That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. Any person paying such advance wages shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or the owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. * * * That it shall be lawful for any seaman engaged in a vessel bound from a port on the Atlantic to a port on the Pacific or vice versa, or in a vessel engaged in foreign trade, except trade between the United States and the Dominion of Canada or Newfoundland or the West Indies or the Republic of Mexico, to stipulate in his shipping agreement for an allotment of an amount, to be fixed by regulation of the commissioner of navigation, with the approval of the Secretary of the Treasury, not exceeding one month's wages, to an original creditor in liquidation of any just debt for board or clothing which he may have contracted prior to engagement. * * * That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee or agent of any foreign vessel who has violated its provisions, shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation: provided, that treaties in force between the United States and foreign nations do not conflict."

The court below held, under this statute, that the contract under which the libelant shipped on board the vessel was void, by reason of the payment of advance wages to the libelant; that he had the right to leave the vessel at any time, and was entitled to a decree for the full amount of wages earned, without deduction of the amount paid in advance; that other payments made to him, and the fines and subtraction of wages for the days when he was off duty without leave previous to the arrival of the ship at Tacoma, as shown by the ship's log, amounting to the total sum of $41, should be deducted. A decree was accordingly entered in favor of the libelant for the sum of $193, with interest and costs. 117 Fed. 557.

The identical question involved in this case was before the Supreme Court of the United States in the recent case of Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002. It was there held that the act of December 21, 1898, was applicable to seamen shipping in a port of the United States on a foreign vessel, and that the statute was valid. On the authority of that case, the decree of the court below, holding the contract void, must be affirmed.

After the District Court had rendered its decision in favor of the libelant, proctors for claimant moved the court for a rehearing, upon the statement that claimant was taken by surprise in the argument made by proctor for libelant that the contract under which libelant joined the vessel was void on account of the advance payment. It was further stated that the libel presented no issue upon that question, and that, had such an issue been presented, claimant would have produced the allotment note, showing that such an advance was in payment of an original creditor of libelant in liquidation of a just debt

for board or clothing, which libelant had contracted to pay prior to signing the articles when joining the ship. There was also a motion to take testimony in support of the latter statement, but there is nothing in the record to show that the court would have been justified in granting either of these motions. It is unnecessary to discuss the grounds for a rehearing based upon the surprise occasioned by the argument of proctor for libelant on the trial of the case that the contract was void. The fact appears to be that the case was tried in the court below on behalf of the claimant upon the theory that the rights and obligations of the parties under the contract were governed by the provisions of the British merchants shipping act of 1894, and not by the act of Congress of 1898, and this theory has been very strongly urged upon this court by appellant. But as before stated, the Supreme Court has disposed of this question in the Eudora Case, and it is therefore not open to further discussion.

The claim that the libel did not present the issue of a void contract on account of the payment of advance wages cannot be sustained. The libel clearly foreshadowed that issue when it departed from the usual form of libel for wages, and omitted all reference to the signing of shipping articles by the libelant. The claim that, had such an issue been presented, it would have been met by showing that the allotment was an advance under the provisions of the act of Congress, should have been supported by an affidavit showing what the testimony would have been in that behalf. The claimant having omitted to make that showing in the court below, it was still open to him to bring this testimony to the attention of this court, under the admiralty rules relating to new testimony in the appellate court. Having omitted these opportunities to present his defense, he cannot now urge them as a ground for reversing the decree of the District Court. Besides, no exception appears to have been taken to the rulings of the court in this respect, and no proper foundation laid for the review of the action of the court on appeal.

The decree of the District Court is affirmed.

PACEY v. McKINNEY.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 862.

1. CONTINUANCE—ABSENCE OF WITNESSES—WANT OF DUE DILIGENCE.
   Where the complaint, which had been on file for six months, alleged a contract made with defendant through his agents, and at any time thereafter defendant might have obtained a disclosure of the names of such agents, if he did not know them, it was not an abuse of discretion to refuse his application for a continuance to enable him to obtain the testimony of such agents.

2. APPEAL—REVIEW—IMMATERIAL DEFECTS IN PLEADING.
   A judgment will not be reversed by an appellate court for the mere purpose of striking out a portion of the complaint, or correcting some other technical defect in a pleading, when it is not shown that the substance of the pleading in question would be materially changed thereby.

3. EJECTMENT—SUFFICIENCY OF COMPLAINT.
A complaint in ejectment which alleges an oral contract for the sale of the property by plaintiff to defendant, and that, in pursuance thereof, defendant entered into possession, and ousted and ejected the plaintiff from the premises, sufficiently alleges a delivery of possession, under the Alaska statute (Code Civ. Proc. § 75, 31 Stat. 344) requiring pleadings to be liberally construed.

4. EVIDENCE—MEMORANDUM OF CONTRACT.
An unsigned writing, which plaintiff testified was prepared by defendant's agent at the time of the making of an oral contract for a sale of property to defendant, embodying the terms of the contract, is admissible in evidence as a memorandum tending to prove such terms, although not in itself evidence of the contract.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

The defendant in error brought this action in ejectment against the plaintiff in error and others in the District Court of Alaska, Second Division, on June 24, 1901, for the recovery of the possession of a certain lot of land in Nome, Alaska. The lot is described as follows: Commencing at a point in the south line of what is designated as Front street, in the town of Nome, District of Alaska, at the northeast corner of that certain lot or parcel of land now covered and occupied by the grocery store of G. H. McPheron; thence, at right angles to said Front street, and in a southerly direction, 80 feet, to a stake; thence, at right angles, and in an easterly direction, and parallel to said Front street, 44 feet; thence, at right angles, and in a northerly direction, toward said Front street, 56 feet, to a stake; thence, at right angles, and in a westerly direction, and parallel to said Front street, 40 feet, to a stake; thence, at right angles, and toward the said Front street, and in a northerly direction, 24 feet, to the south line of said Front street; thence, at right angles, and in a westerly direction, along the south line of said Front street, 4 feet, to point of beginning. It is alleged in the second amended complaint that on the 18th day of December, 1899, the premises in question were unoccupied, unappropriated, and unsurveyed public lands of the United States, in the town of Nome, Alaska; that on that date the plaintiff (the defendant in error) went upon said public domain and appropriated a certain described portion thereof; that he improved the same, resided thereon, and became the owner in fee of said premises as against all and every person or persons, saving and except the United States of America, and became the owner of the right of possession thereof. In the original complaint it was alleged that thereafter, on the 15th day of June, 1900, and while the plaintiff was the owner of said premises, and the owner of the right of possession of said premises, plaintiff entered into an agreement with the agents and representatives of defendants, whereby and by the terms of which said agreement plaintiff agreed to sell to the defendants, and the defendants agreed to buy the premises from the plaintiff, for a price not mentioned. In the first amended complaint it was alleged that the agreement was oral, and the price is stated. In the second amended complaint the names of the agents and representatives of the defendants are given, and the transaction fully described. It is alleged that, while such owner and in the possession of the said premises, the plaintiff entered into an oral agreement with G. W. Dickenson, George Waller, and Ira Ranke, who were acting as agents and representatives of the defendants (one of whom is the plaintiff in error), whereby these parties agreed to buy the said premises for the defendants, and to pay therefor the sum of $3,325, of which amount $500 was to be paid in cash, and the remaining sum in monthly installments of $400 each; that said oral agreement was reduced to writing, in duplicate; that the said agents of the defendants did not sign the same, but agreed to send a copy thereof to Seattle, to be personally signed by the defendant; that $500 in cash was then and there paid to the plaintiff by the said agents

¶ 4. See Evidence, vol. 20, Cent. Dig. § 1486.

of defendants, and the plaintiff delivered the possession of said premises to the said agents of defendants, in pursuance of the said agreement, except a small tract on the southwesterly portion thereof, about twenty feet square. It is alleged that the defendants have not paid any further sum on account of the purchase price of the said lot, although payment thereof has been often demanded; that defendants have repudiated and denied the agreement entered into between the plaintiff and the representatives and agents of the defendants, in pursuance of which agreement the defendants, their agents and representatives, have entered into the possession thereof, and ousted and ejected the plaintiff therefrom. It is further alleged that the defendants unlawfully and wrongfully withheld the possession of the premises from the plaintiff, and now are unlawfully and wrongfully withholding the possession thereof from the plaintiff, and claiming the same adversely to the plaintiff. The alleged agreement is attached to the complaint as an exhibit, and reads as follows:

"This agreement made and entered into this 20th day of June, A. D. 1900, by and between the United States Mercantile Company, an association, composed of J. G. Pacey and others, doing business at Nome, in the District of Alaska, and David J. McKinney of the same place, witnesseth:

"That subject to the following terms and conditions, the United States Mercantile Company agrees to purchase, and David J. McKinney agrees to sell to said Company all his interest, right and title to the following described parcel of land situated and being in the town of Nome, in the said District, to wit:

"A lot bounded on the east by the lot of Clark and Berkman, and on the west by the lot of Stauf and King, and running forty-four (44) feet along the south side of Front street and eighty feet deep.

"The said United States Mercantile Company is to pay to said McKinney for said described lot the sum of three thousand three hundred and twenty-five dollars ($3,325) in the following manner: Five hundred dollars ($500) in cash at or before the execution of this instrument, the receipt whereof is hereby acknowledged by said McKinney and the further sum of four hundred ($400) dollars monthly upon the ——— day of each and every month until the balance is fully paid.

"It is duly agreed and understood between the parties hereto that the lot herein bargained to be sold shall remain and be in the possession of said McKinney and the title shall not be passed to said United States Mercantile Company until the purchase price of three thousand three hundred and twenty-five dollars, $3,325, is fully paid as hereinbefore set forth and in the case of the default in any of the deferred payments herein agreed to be paid, then and in that event, at the option of the said McKinney, this contract may be declared canceled, null and void, and the payments made upon same may be forfeited to said McKinney as liquidated damages.

"All rents of tenants upon the said lot are to be paid to said McKinney until the full amount of the purchase price is paid.

"Upon the completion of the payment of the $3,325.00 herein agreed to be paid, the said McKinney will convey to said United States Mercantile Company, by bill of sale, deed or other proper conveyance, the property herein described and contracted to be sold.

"Time is the essence of this contract and all the terms are binding upon the heirs, executors, administrators and assigns of the parties hereto.

"Witness our hands and seal this ——— day of ———, 1900, A. D."

The defendant Pacey (plaintiff in error) denied generally the allegations of the complaint, and, affirmatively answering, alleged that the entire right to title and possession of the premises in dispute was in him, by reason of the location, staking, and continued occupancy of the same by him and his grantors, and the erection of valuable improvements thereon.

It appears from the testimony that in 1899 one Cowells staked a lot in the town of Nome, Alaska, having a frontage of 40 feet on Front street, with a depth of 24 feet, and started to build a cabin on the lot, but, being disabled, was obliged to get the assistance of McKinney, the defendant in error. McKinney completed the cabin and built a fence around the lot, and agreed with Cowells that, when the latter returned to the States, he (McKinney) would

hold the property for Cowells, understanding that it had been located for some one else—presumably the United States Mercantile Company. Later, McKinney staked the adjoining land described in the complaint; thus making, with the original lot, a lot having total dimensions of 44 by 80 feet. It was shown that Pacey was the sole person constituting the firm of United States Mercantile Company; that in the spring of 1900 he sent three employés to Nome, namely, Dickenson, Ranke, and Waller, to represent him in different capacities, but principally in conducting a store to be built upon the lot in question. McKinney was in possession of the entire lot when these employés arrived at Nome with lumber, etc., for the purpose of putting up a store building. McKinney demanded payment for his services in holding the lot of Cowells, and for his possessory right to the adjoining property, before any building should be erected. Ranke, one of the employés of the plaintiff in error, paid McKinney $500, and, according to his testimony, represented that any further claim must be submitted to his principal, Pacey. McKinney claims that at this time a verbal agreement was made between the three employés of Pacey and himself that he was to be paid $3,325 for the portion of the lot which he had personally staked, and that the $500 received was on account of such sale; that the terms of this agreement were embodied in a written memorandum prepared by Waller, which was to be transmitted to Pacey for his signature. Pacey's agents then entered and erected a building upon both portions of the land. Pacey and Ranke were present at the trial, and testify that they knew nothing of the written memorandum in question until this action was brought. Ranke testified that the $500 was paid in order that they might not be delayed in the erection of the building, and that any further claim was to be submitted to Pacey.

The trial of the case resulted in a verdict for the defendant in error, and judgment was entered thereon, granting to him the possession of the premises described in the complaint, and $100 as damages. From this judgment an appeal has been taken to this court.

Page, McCutchen, Harding & Knight, Chas. S. Johnson, P. C. Sullivan, Alfred J. Daly, and Samuel Knight, for plaintiff in error.

Campbell, Metson & Campbell and Thomas H. Breeze, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The first two assignments of error relate to the refusal of the court to grant continuances of the cause. The first continuance was asked on the 10th day of December, 1901, when the cause was set for hearing, upon the ground that material and necessary witnesses were absent, whose testimony could not be procured before the following July term of court. An affidavit was filed by the plaintiff in error, stating the facts to which the absent witnesses would testify. The defendant in error admitted that the witnesses would so testify, and the court then refused the motion for a continuance. The plaintiff in error was not prejudiced by this action of the court. The second or supplementary motion for a continuance was made on the 12th day of December, 1902, and was also based on the absence of material and necessary witnesses, other than those mentioned in the first affidavit on motion for continuance. In the affidavit of the plaintiff in error in support of this supplementary motion, it was stated that G. W. Dickenson and George Waller "are persons with whom, together with Ira Ranke, the plaintiff herein claims to have made an oral agreement for the sale of the premises" in question; that affiant did not know of the materiality or necessity of the testimony of said

witnesses, or either of them, until he was served with plaintiff's second amended complaint on the preceding day; that as the witnesses resided, respectively, in Seattle and Tacoma, Washington, and as there were no means of communication with them at that season, their testimony could not be obtained. It was alleged that by said witnesses the affiant expected to prove that neither of said witnesses had authority to enter into the oral agreement set up in the complaint, on behalf of the plaintiff in error, and that neither of them did make such an agreement with the defendant in error. It was further alleged that the plaintiff in error was unable to prove the facts by any other witnesses. The original complaint had alleged that the agreement for the sale of the premises was between the defendant in error and the agents and representatives of the plaintiff in error. If the latter did not know who these alleged agents and representatives were, he should have taken proper steps to find out. The complaint had been filed nearly six months when the case was called for trial. The summons was served upon the plaintiff in error June 24, 1901. At any time after his appearance he might have obtained the deposition of the defendant in error (Code Civ. Proc. Alaska, § 644 [Act June 6, 1900, c. 786, 31 Stat. 434]), and have ascertained the names of the alleged agents and representatives of the plaintiff in error, and all the facts necessary to prepare for the defense, or he might have demurred to the complaint within the time provided by law, and secured, as he afterwards did, the information contained in the amended complaint, and, so being informed, have secured the evidence of the absent witnesses in time for the trial. Failing to use due diligence in obtaining information as to the names of the parties alleged in the complaint to be his agents and representatives, he was not entitled to a continuance of the case to obtain their evidence. Moreover, it appears that the testimony of the absent witnesses was merely corroborative of the witness Ranke, who was present and testified, and that of the plaintiff in error, who was a witness in his own behalf. The refusal of a continuance upon this showing, and under the circumstances, does not appear to have been an abuse of discretion on the part of the court. Cox v. Hart, 145 U. S. 376, 380, 12 Sup. Ct. 962, 36 L. Ed. 741; Isaacs v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229.

With respect to the objections made to certain portions of the pleadings and the court's rulings thereon, this court will not reverse a judgment for the mere purpose of striking out some portion of the complaint, or correcting some other technical defect in a pleading, when it is not shown that the substance of the pleading in question would have been materially altered thereby.

It is contended by the plaintiff in error that the second amended complaint does not state facts sufficient to constitute a cause of action, and that the demurrer should have been sustained for the reason, among others, that there is no allegation in the complaint that possession of the premises was ever delivered to the plaintiff in error, or to his authorized representatives or agents. It is alleged that there was an agreement to sell the premises described in the complaint to the plaintiff in error, and that he agreed to buy for a speci-

fied sum, and that in pursuance of this agreement the "defendants, their agents and representatives, had entered into the possession thereof, and ousted and ejected the plaintiff from said premises." This would seem to be a sufficiently direct allegation that the possession of the premises was delivered to the plaintiff in error, or to his authorized representative or agent. In any event, the defect of form is cured by section 75 of the Alaska Code of Civil Procedure (31 Stat. 344), which provides that "pleadings must be liberally construed. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with the view of substantial justice between the parties."

The action of the court in allowing the memorandum of the oral agreement, alleged by the defendant in error to have been made, to be introduced in evidence, is assigned as error. This memorandum was attached to the complaint as an exhibit, and was introduced in evidence during the course of the trial, in connection with the testimony of the defendant in error, as showing the oral agreement which he claimed was made between himself and the agents of the plaintiff in error. The court ruled that the writing might be received in evidence, as one of the circumstances tending to connect the parties in their possession, or change of possession, of the lot in question, and for that purpose only. It was but a part of the evidence introduced in support of the claim of the defendant in error that an oral agreement existed, and was subject to be disproved in the same manner as the oral testimony of the defendant in error. The court instructed the jury that the writing, never having been signed, was not evidence itself of an agreement, and the jury was correctly instructed as to its legal effect; that it was introduced only as a memorandum tending to show the terms of an oral agreement, but, the writing never having been signed, it was not evidence itself of any contract.

With respect to some of the objections raised by the plaintiff in error to the proceedings in the court below, it is sufficient to say that they are not assigned as error, and they are not sufficiently plain and prejudicial to justify this court in reversing the judgment.

The judgment of the District Court is affirmed.

EBNER et al. v. HEID.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 888.

1. ATTACHMENTS—REDELIVERY BOND—VALIDITY.

Hill's Ann. Laws Or. 1892, § 159, provides that, whenever the defendant in attachment has appeared in the action, he may apply for an order to discharge the attachment on the execution of an undertaking mentioned in section 160, which authorizes such discharge on the execution of a bond "to the effect that the sureties will pay to plaintiff the amount of the judgment that may be recovered against the defendant in the action." *Held*, that a bond by which the sureties undertook and promised, in case plaintiff recovered a judgment in the action, that the defendant would, on demand, pay to plaintiffs the amount of said judgment,

together with the costs and disbursements of the action, was a substantial compliance with the statute, and was enforceable as a statutory bond.

2. SAME—CONSIDERATION.
Where a bond to release an attachment was under seal, and recited as a consideration the release of all the property attached, and the discharge of the attachment, it was based on a sufficient consideration to render it enforceable as a common-law obligation.

3. SAME—DELIVERY.
Where the bond for the release of an attachment was approved by the United States district judge, and was filed with the papers in the case in the office of the clerk of the court, and the order discharging the attachment recited that it was based on the notice of motion and motion, on all the records filed in the cause, and on the execution of a good and sufficient undertaking, such order was conclusive evidence of the delivery of the undertaking to the court, and its acceptance by the court as a delivery bond.

4. SAME—DEMAND.
Where, in an action on a redelivery bond in attachment, after judgment for plaintiff, it appeared that all of the defendant's property had been sold on execution under the judgment, and had been purchased by plaintiff, and that the defendant was insolvent, and had no property within the district under the jurisdiction of the court, and that he had resisted plaintiff's collection of the judgment, and had obtained an injunction restraining further proceedings by plaintiff, such proceedings amounted to a demand for the payment of the judgment, and defendant's insolvency rendered a further demand unnecessary.

5. REDELIVERY BOND—SUPERSEDEAS—MERGER OF LIABILITY.
Where a supersedeas bond was given pending a writ of error in an action in which a redelivery bond had been given, and it was subsequently determined that the appellate court had no jurisdiction of the writ of error, the liability of the sureties on the attachment bond was not merged in the supersedeas bond.

In Error to the District Court of the United States for the First Division of the District of Alaska.

This was an action brought by the defendant in error against the plaintiffs in error and certain other persons in the District Court of Alaska, Division No. 1, on the 23d day of April, 1901, to recover the sum of $1,416.18, with interest and costs, on an undertaking given upon the discharge of an attachment of the property of the principal therein named in an action commenced in the District Court of Alaska in April, 1895. A jury was expressly waived by the parties, and the court entered a judgment in favor of the defendant in error for the full amount claimed, upon which judgment a writ of error was sued out to this court. The trial court found as facts that on June 10, 1895, an attachment issued out of the United States District Court for the District of Alaska against the property of one Willis Thorp, in an action commenced by one Bonnifield and John G. Heid, the defendant in error herein, to recover the sum of $7,231.25 from Thorp; that Thorp applied to the court for a discharge of the attachment, offering a written undertaking executed by the plaintiffs in error herein, which undertaking was approved and accepted by the court, and the property released from the attachment; that thereafter judgment was recovered in said action by Bonnifield and Heid for $7,264.80; that thereafter, on August 30, 1900, on the mandate of the United States Supreme Court against said Thorp, the District Court entered its further judgment, adjudging that the former judgment be carried into full force and effect against Thorp, together with costs and charges; that Heid (defendant in error) owned and was entitled to two-ninths of said judgment, namely, the sum of $1,616.18; that $200 has been paid on account of said sum by reason of a purchase by Heid at an execution sale under said judgment of all the property of Thorp within the jurisdiction of the court; that Bonnifield was not, and had not been for more than three years prior to the commencement of this action, a resident of the District of

Alaska; that Bonnifield, though at one time a cojudgment creditor with Heid, took a position inimical to Heid, and satisfied his part of the judgment obtained by himself and Heid against Thorp, without the consent of Heid; that Thorp and the other defendants (plaintiffs in error herein) had not paid to Heid his share of said judgment; that at and before the entry of the final judgment on August 30, 1900, Thorp was insolvent, and had no property in the District of Alaska out of which Heid's part of the judgment could be satisfied; that at one time Thorp and some of the defendants sued out an injunction enjoining Heid from collecting his part of said judgment, but that on December 10, 1900, the injunction was vacated, and the cause wherein the same was sued out was dismissed; that in April, 1901, Heid demanded of the defendants (plaintiffs in error) payment of his part of said judgment; that they refused to pay the same, and there was then due and owing to Heid from such defendants the sum of $1,416.18, with interest and costs. As conclusions of law from these facts, the court found that Heid was excused from making a further demand upon Thorp to pay his part of the judgment, other than the levy of execution made on the property of Thorp, by reason of the insolvency of Thorp, and by reason of his having sued out the injunction against Heid, thus showing a determination not to pay, had a demand been made, and that Heid was entitled to a judgment against Ebner, Valentine, Young, Olds, and Behrends for the amount of the former judgment recovered, with interest and costs.

Robert A. Friedrich, John R. Winn, and R. W. Jennings, for plaintiffs in error.

Alfred Sutro, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The act of Congress entitled "An act providing a civil government for Alaska," approved May 17, 1884 (23 Stat. 24, 25, c. 53), provides in section 7 "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." The civil laws of Oregon were in force in Alaska under this act until the passage of the act of Congress approved June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes." 31 Stat. 321, c. 786. The Code of Civil Procedure of the State of Oregon provides, in title 15 of chapter 1 (Hill's Ann. Laws 1892, §§ 144–172), for attachment proceedings under which the plaintiff in an action upon a contract may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment. Section 157 of the Code (Hill's Ann. Laws 1892, § 159) provides that whenever the defendant has appeared in the action he may apply, upon notice to the plaintiff, to the court or judge where the action is pending, or to the clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in section 158 (Hill's Ann. Laws 1892, § 160). That section provides:

"Upon such application, the defendant shall deliver to the court or judge to whom the application is made an undertaking executed by one or more sureties * * * to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action."

It is contended by the plaintiffs in error that the undertaking does not conform to the language of the statute, and is therefore not a statutory obligation; that it was not sealed and delivered, and is not, therefore, a common-law obligation. The undertaking does not follow strictly the language of the statute, but it was plainly intended to be in compliance with its terms. No form of undertaking is prescribed, but it is required to be "to the effect" that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. The undertaking recites that:

"We, the undersigned, * * * in consideration of the premises and in consideration of the release from attachment of all the property attached as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake and promise that in case said plaintiffs recover judgment in said action, the defendant will, on demand, pay to the said plaintiffs the amount of said judgment, together with the costs and disbursements of this action."

This was a substantial compliance with the statute, and, "in effect," assumed the obligation therein provided. It is true, the agreement was that the defendant would, on demand, pay the judgment, if one was recovered in the action, but that is the equivalent of an agreement to pay the judgment if one was recovered against the defendant.

The undertaking appears also to be valid as a common-law obligation. As set forth in the record now before the court, it is under seal, and recites as a consideration the release from attachment of all the property attached, and the discharge of the attachment. This was a sufficient consideration for the undertaking. Palmer v. Vance, 13 Cal. 553; Bunneman v. Wagner, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306. The undertaking was approved by the United States district judge, and was filed with the papers in the case in the office of the clerk of the court. The discharge of the attachment was by the order of the court, in which it was recited that the order was "upon the notice of motion and motion filed and served by defendant, and upon all the records filed in this cause," and upon execution of a good and sufficient undertaking. This is the conclusive evidence of the delivery of the undertaking to the court, and its acceptance by the court as a delivery bond for the release of the attached property.

The objection that no demand has been made upon Thorp, the defendant in the attachment suit, for the payment of the judgment, is answered by the finding of the court, sustained by evidence in the record, that an execution was issued upon the judgment, and a levy made upon the property of the defendant Thorp to satisfy the share of the judgment belonging to the defendant Heid, amounting to $1,616.18; that upon the execution sale under this judgment, and pursuant to the levy, all the property of Thorp in the District of Alaska was sold and purchased by the plaintiff Heid for $200, leaving the sum of $1,416.18 due on the judgment; that before the commencement of this action, and at or before the entry of the final judgment on August 30, 1900, the defendant Thorp was insolvent, and had no property in the District of Alaska; that at the date of

the finding Thorp was still insolvent, and had no property in the District of Alaska, and under the jurisdiction of the court, out of which the plaintiff's part of the judgment could be satisfied; that Thorp resisted Heid in the collection of the judgment, and obtained an injunction from the court enjoining Heid from further proceeding in the action, and from suing out execution against the sureties of Thorp. These proceedings amounted to a demand upon Thorp for the payment of the judgment, and his insolvency rendered any further or other demand useless.

The claim that the liability of the sureties on the attachment bond was superseded and became merged in the supersedeas bond upon writ of error to the Circuit Court of Appeals cannot be sustained. The question of the jurisdiction of the Court of Appeals in that case was raised and certified to the Supreme Court of the United States, and that court answered the question in the negative. Thorp v. Bonnifield, 168 U. S. 703, 18 Sup. Ct. 947, 42 L. Ed. 1211. Thereupon this court dismissed the writ of error. Thorp v. Bonnifield, 83 Fed. 1022, 27 C. C. A. 686. The Circuit Court of Appeals being without jurisdiction in the case, the supersedeas bond upon writ of error could not take the place of an undertaking upon attachment, and there is nothing in the statute giving a bond on writ of error the force and effect of an undertaking upon the discharge of an attachment. Collins v. Burns, 16 Colo. 7, 26 Pac. 145.

The judgment of the District Court is affirmed.

FARRELL v. SECURITY MUT. LIFE INS. CO.

(Circuit Court of Appeals, Second Circuit. August 11, 1903.)

No. 167.

1. INSURANCE—APPLICATION—STATEMENTS—WARRANTIES.
   Where an application for life insurance stipulated that the answers to the questions in the application should be warranties, and that, if the answers were untrue in any respect, the policy should be void, the insured warranted the literal truth of his answers, and a false statement purporting to be a complete answer to a question authorized the forfeiture of a policy issued on the faith thereof.
2. SAME—DUTY OF INSURED.
   Where there was doubt as to the meaning of a question asked in an application for life insurance as to whether insured had been an "inmate" of a hospital, and the application provided that his answers should be treated as warranties, it was insured's duty to make a full, true, and complete statement of the facts, or to state that he did not know whether he had been such an inmate or not.
3. SAME—INMATE OF HOSPITAL.
   Where insured stated that he had never been an "inmate" of a hospital in an application for life insurance providing that his answers should be treated as warranties, and his physician testified that prior to the application he had sent insured to a hospital simply to "get good bed and board," and that the physician could give him better care and under more satisfactory circumstances at the hospital than he could receive at another house, and that he made the entry of deceased's malady

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 560, 562, 565.

as rheumatism merely to qualify him to be entered at the hospital, such facts showed that insured had been an "inmate" of a hospital, and therefore constituted a breach of warranty.

In Error to the Circuit Court of the United States for the District of Connecticut.

This cause comes to this court upon a writ of error by plaintiff in the court below to review a judgment entered for defendant in the United States Circuit Court for the District of Connecticut upon a verdict rendered by direction of the court.

W. F. Kenney and Theo. M. Maltbie, for plaintiff in error.

F. W. Jenkins and Chas. E. Gross, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The plaintiff herein is the assignee of, and beneficiary designated under, a policy of insurance for $5,000 issued by defendant to William H. Taylor on October 21, 1899. The portions of the application for insurance signed by the insured which are material to the questions involved herein are as follows:

"I agree, that I will abstain from the habitual use of opium or other narcotics, and that this agreement, together with the answers and explanations given to the above various questions, inclusive of those propounded by the medical examiner, and the written and printed statements to him made, shall form the exclusive and only basis of the agreement between me and the Security Mutual Life Insurance Company. That each and every statement and answer made by me, as aforesaid, is material to the risk, and I warrant each and every of said statements and answers, whether written by my own hand or not, to be full, complete and true, and if any statement or answer made as aforesaid is not full and complete, or is untrue in any respect, then the Policy of Insurance issued hereon shall be null and void. That should I fail to pay any of the premiums on or before the day on which the same shall fall due, or fail to comply with any of the terms of this agreement, or of any Policy issued hereon, in that event said Policy shall become null and void, and all moneys which shall have been paid shall be forfeited to the said Company for its sole use and benefit. That the proofs of death required shall be made upon the blank forms furnished by the Company, and shall include all information required thereby. That all provisions of law forbidding any physician who has or shall have attended me from disclosing any and all information which he acquired by such attendance together with any such provisions affecting the uses which shall be made of this application or any part thereof, and all provisions of law in conflict with or varying the terms of this agreement and the policy applied for, are hereby expressly waived. That the Policy hereby applied for shall not be in force unless actually delivered to and accepted by me during my lifetime and while in good health, and the first premium due thereon actually received by said Company. No answer or statement made to, or information possessed by any agent, medical examiner or other person, shall be admissible in evidence against this Company, or binding upon it, unless actually written in this application over the signature of the applicant.

"Dated at Hartford, this 16th day of Oct., 1899.

"William H. Taylor."

"Part II.

"B. Give the name and residence of your medical adviser, or family physician. Ans. Dr. Miller, Jacksonville, Fla.

"C. How long since were you last attended by a physician, or consulted one? Ans. Not since childhood, if at all.

"D. For what difficulty or disease? Ans. None that he has any remembrance of. * * *

"3. Occupation and Environment.

"E. Have you ever changed residence or traveled on account of your health? Ans. No. * * *

"6. Health Record.

"Have you ever been affected with any of the following named diseases or conditions? (Answer 'Yes' or 'No' to each question.)

"Malaria. No. How many attacks. ———. Disorder of liver. No. Rheumatism. No. Gout. No. Syphilis. No. Disease of Brain or Spine. No. Severe Headache. No. Vertigo. No. Loss of Consciousness. No. Convulsions. No. Paralysis. No. Nervous Exhaustion. No. Apoplexy. No. Asthma. No. Spitting of Blood. No. Bronchitis. No. Chronic Hoarseness. No. Chronic Cough. No. Shortness of Breath. No. Fainting Spells. No. Pleurisy, or any chest or lung disease. No. Pain in Region of Heart. No. Dyspepsia or Indigestion. No. Chronic Diarrhea. No. Biliary Colic. No. Jaundice. No. Diabetes. No. Renal Colic. No. Gravel or Calculus. No. Immoderate flow of Urine. No. Difficult or tedious Urination. No. Sunstroke. No. Fistula, Anal. No. Bleeding Piles. No. Varicose Veins. No. Appendicitis. No. Palpitation of Heart. No. Dropsy. No. Swelling of Feet or Face. No. Swelling of Glands. No. Cancer or Tumor. No. Chronic Ulcer or Abscess. No. Discharges from the Ear. No. Difficulty in Swallowing. No. Yellow Fever. No.

"The date, duration and severity of each disease answered affirmatively must be fully described. (See Note III. Medical Report.) * * *

"7. Clinical History.

"(Detail in brief upon the following form, the clinical history of any affection experienced by the subject, as per his answers foregoing.)

"Never has had a physician to care for him that he remembered. * * *

"E. Have you ever been an inmate of any Infirmary, Sanitarium, Institution, Asylum or Hospital? Ans. No. * * *

"9. Habits.

"A. What is your practice as regards the use of spirits, wines, malt, liquors or other alcoholic beverage? (See Note IV. Medical Report.) Ans. Kind: Beer. Amount: About 4 glasses. How often: Per week. * * *

"I hereby declare: That I have reviewed and understand all of the above questions and answers thereto, and they are hereby made part of my application for insurance in the Security Mutual Life Insurance Company, and I hereby warrant said answers, and each of them, as written, to be full, complete and true; that I am the person described above and in part I of this application signed by me, and that each of the questions in Part I and II of my application was answered in writing before I signed the same. Also, that I am free from any and all diseases, sicknesses, ailments and complaints, except as above stated. That I will conform to and be governed by the existing By-Laws of the Company, and the same as they may be hereafter amended.

"Dated at Hartford, this 14th day of Oct., 1899.

"William H. Taylor."

On May 14, 1900, the insured died. The remote cause of death, as stated by his attending physician, was "phthisis pulmonalis, cough, expectoration, fever, pleuritic pains, cold perspiration, rapid respiration," etc.

This action was brought to recover said sum of $5,000 in the superior court for Hartford county, in the state of Connecticut, and was duly removed by defendant to the Circuit Court of the United States for the District of Connecticut. On the trial of the cause there was much evidence tending to show that several of the answers contained in the application were untrue, in that deceased had for years been in the habit of drinking various intoxicating beverages, had had malaria, had been crippled by rheumatism, had spent his winters in the south on account of his health, and that in 1895 he

was dangerously ill with double pneumonia, pleurisy, and bronchitis, and was then attended by a physician, and that subsequently he was attended at intervals during a period of four years by another physician. There was also uncontradicted evidence that in July, 1899, the deceased was admitted to a hospital, where he remained for from one to two weeks. At the close of the testimony, counsel for defendant requested the court to direct a verdict in its favor, on the ground that the statements in the application for the policy were warranties; that the testimony showed that certain of said statements, which were specifically called to the attention of the court, were false; and that, therefore, by the terms of said contract, said policy was null and void. The court, in its charge, declined to discuss the evidence as to the various grounds stated in said motion, but ruled that the statements in said application were warranties, and instructed the jury as follows:

"It is my opinion, after carefully considering the matter, that the evidence does show that Mr. Taylor was for some little time, just shortly prior to the issue of this policy, an inmate of the St. Francis' Hospital; and it seems to me, under my view of the law with reference to that matter, that it is my duty to instruct you to return your verdict for the defendant."

In the view which we take as to the correctness of the charge of the court on this ground, it is unnecessary to consider the other defenses, which, when analyzed, lead to the same conclusion. The exceptions challenge the rulings that the answers in said application were warranties, and that the evidence showed that deceased was an inmate of the hospital, and the direction of a verdict for defendant. That under such a contract of insurance the answers to the questions in the application are warranties, upon the literal truth of which the validity of the policy depends, was decided by this court in Brady v. United Life Insurance Association, 60 Fed. 727, 9 C. C. A. 252. And where, as in this case, the answer of the applicant purports to be a complete answer to the question, a policy issued on the faith of such application is avoided by any substantial misstatement or omission in said answer. But the burden of plaintiff's contention appears to be that the word "inmate" is equivocal or ambiguous, and that, therefore, the question whether deceased was an "inmate" of a hospital was a mixed question of law and fact, and should have been submitted to the jury in the light of the surrounding circumstances, in order that they might determine the intent of the parties and the construction to be put upon the contract in view thereof. The pertinent reply to this contention is that, if there was any doubt as to the meaning of this question, it was open to the insured either to leave it unanswered or to answer it by a "full, true, and complete" statement of the facts, or by a statement that he did not know whether he had been such an inmate or not. But, irrespective of this suggestion, an examination of the record dispels all uncertainty as to the falsity of the answer in any view of the meaning of the question. It appears from the testimony of the plaintiff himself that he took deceased to St. Francis' Hospital at the suggestion of a physician, and from the uncontradicted testimony of said physician, Dr. Sullivan, who was plaintiff's witness, that at the request of plaintiff he visited

deceased professionally, and suggested his removal to the hospital; that he went to the hospital, and examined deceased for 20 minutes to half an hour very carefully; that deceased was accepted at the hospital as his private patient, and was a patient at and inmate of the hospital during one or two weeks. It was proved that the hospital was a chartered institution, with wards and nurses, was under the charge of a physician, and was maintained by public contributions. The hospital record was produced and showed that deceased was admitted in the medical class, that his physician was the said Dr. Sullivan, that his disease was diagnosed as rheumatism, and that the charge for his treatment was $7, which was paid. The only evidence relied on to modify the conclusions necessarily drawn from the foregoing uncontradicted facts consists in the testimony of Dr. Sullivan. On his direct examination he stated as follows:

"Q. What was done with Mr. Taylor after your visit? A. I think, at my suggestion to Mr. Farrell— I told him that, under the conditions the Brower House was in, that it would improve his environments, and be much more comfortable and pleasantly situated, if he would go out to St. Francis' Hospital, with which I was allied. Q. You told him that you would give him more convenience, and he would be under better environment at the hospital than he would get in the Brower House? A. Yes. St. Francis' Hospital had not been opened long; there were but few patients there; and it would be quite inexpensive for him to stay there a short time."

He further testified on direct examination that he found nothing the matter with deceased, and that he made the entry of rheumatism in order to qualify the patient to be entered at the hospital. On cross-examination he testified that he ordered the removal of deceased to the hospital because "I could give him better care, and under more satisfactory circumstances, at St. Francis' Hospital, than he would receive at the Brower House." He explained that by better care he meant "better environment"—under better conditions—and that by "better conditions" he meant: "Well, if he touched a button, he could have a servant come to his room any time day or night; or if he wanted a change of blankets, or a hot drink—any want could be attended to at once," and that he sent deceased there "simply to put him where he could get good bed and board."

"Inmate" is defined as follows:

"One who lives in the same house or apartment with another; a fellow lodger; esp. one of the occupants of an asylum, hospital, or prison; by extension, one who occupies or lodges in any place or dwelling." Webster.

"One who is a mate or associate in the occupancy of a place; hence, an indweller; an associated lodger or inhabitant; as the inmate of a dwelling house, factory, hospital, or prison." Century.

There is nothing to show that the word "inmate" was used or understood in said application in any sense other than its ordinary sense as thus defined. The presumption therefore is against any different or technical use.

But, even if the question could be considered, as contended by plaintiff, as an inquiry whether plaintiff had been admitted to the hospital for medical treatment for disease, the uncontradicted evidence as to the circumstances under which the deceased was taken there under advice of a physician as his patient, and the character

of his occupancy, satisfies this requirement. And in view of the positive statements of the physician as to said facts the court would not have been justified in submitting the case to the jury on the theory of ambiguity or uncertainty because the witness said he sent deceased there simply "to get good bed and board." If this statement be not rejected as either palpably untrue or an unjustifiable conclusion of the witness, it must be so interpreted as to apply to the case of a patient who required the sort of treatment implied by better conditions, environment, and service. In the modern treatment of disease, especially of such a character as that from which the life insured died some eight months after he left said hospital, nothing further would have been necessarily helpful toward improvement even in the case of an inmate for a long period. Therefore there was not even a scintilla of evidence of ambiguity or contradiction to justify the court in submitting the case to the jury.

The cases cited by plaintiff on this point do not support his contention. In Chinnery v. Industrial Company, 15 App. Div. 515, 44 N. Y. Supp. 581, the inquiry was, "Has said life ever been under treatment in any hospital, asylum, or other institution?" The answer was "No." This does not appear to have been a warranty, but a representation, and the court held that the removal of a cinder from the eye of the insured at a hospital was not "being under treatment," within the meaning of the policy, at least so as to be material to her general health.

In Mutual Benefit Life Insurance Company v. Wise, 34 Md. 583, there was this inquiry and answer in the application: "Q. Has the party been, or is he now, employed in any military or naval service? A. No." The fact was that he had been a chaplain in the Confederate Army. The court held that it should have been left to the jury to determine whether a chaplain in the army is in the military service, and, if so, whether insured was ever employed in such service. The appellate court, therefore sustained the refusal of the court to charge that the jury should find for the defendant if it should find that Mr. Wise was a chaplain in the Confederate Army in the year 1862. But there was no evidence that a chaplain is or is not in the military service, and none to show that Mr. Wise was ever actually employed in said service.

The other cases cited by plaintiff merely state the general rule of construction in cases of ambiguity. But, as we have already seen, there was no uncertainty in the terms of this contract. The question and answer were direct, the facts were fully within the knowledge of deceased, and were positively and untruly stated by him.

The judgment is affirmed, with costs.

GRAVES v. SANDERS et al.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 904.

1. ATTORNEY AND CLIENT—CHARACTER OF SERVICES—MEASURE OF COMPENSATION—AMOUNT INVOLVED—EVIDENCE.

Where attorneys were employed by defendant, who was a prospective purchaser of a mine, to render services, both professional and nonprofessional, in examining the articles of incorporation of the corporate owner of the mine, and also to pass on the value of the mine, etc., the admission of evidence in an action for the reasonable value of such services as to the value of the mine, the value of its production, and the value of the capital stock of the corporation, was not error, especially in view of a charge that it could be considered only for the purpose of determining the amount involved in the transaction, and the results obtained to determine the nature of the responsibility assumed by plaintiffs, and the reasonable value of their services.

2. SAME—NEW TRIAL—REVIEW.

The denial of a motion for a new trial by the Circuit Court cannot be reviewed by the Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the District of Montana.

For opinion below, see 105 Fed. 849.

This is an action to recover the sum of $25,000 for and on account of advice given and professional services rendered by the defendants in error as attorneys at law, and for other services by them rendered, at the alleged special instance and request of the plaintiff in error, in and about examining, ascertaining, and reporting the title to, and the quality, character, and value of a quartz mine in Montana. The action was commenced in the District Court of the First Judicial District of the state of Montana, in and for the county of Lewis and Clarke, but, upon petition of the plaintiff in error (defendant below), was removed to the Circuit Court of the United States, Ninth Circuit, District of Montana, by reason of the diverse citizenship of the parties. The plaintiff in error entered a general denial of the allegations of the complaint. Evidence was introduced on behalf of the defendants in error (plaintiffs below), but none in behalf of the plaintiff in error. The trial resulted in a verdict in favor of the defendants in error in the sum of $4,000, and judgment was entered accordingly. To reverse this judgment, a writ of error was sued out to this court.

E. B. Howell and Clayberg & Gunn, for plaintiff in error.

J. A. Walsh and W. F. Sanders, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The assignments of error relate to the admission of certain testimony, the refusal to give certain requested instructions to the jury, and the refusal to grant a new trial. The testimony in question related to the value of the services rendered by the defendants in error, consisting of professional services as attorneys and counselors at law, and other services rendered in and about examining, ascertaining, and reporting the title to, and the quality, character, and value of, a certain quartz mine situated in Jefferson county, Mont., known as the "Ruby Mine," and mill connected therewith, and the condition of the property, and its value,

production, contents, and promise, with a view to the loaning of money on, and the purchase by the plaintiff in error of, the stock of the Gold Mountain Mining Company, the owner of the mine and mill.

It is contended by the plaintiff in error that the services upon which recovery is sought were not legal or professional in their nature, and that the principles of law applicable to the determination of the reasonableness of attorneys' compensation do not govern here; that no consideration should be given to the value of the property involved, or the profit realized or loss suffered by the plaintiff in error, but merely to the worth of the services rendered, independent of other considerations. The testimony on behalf of the defendants in error tended to show that the services rendered by them were worth $5,000, but it was not claimed that all the services rendered were strictly of a professional character.

It appears further from the testimony on behalf of the defendants in error that on July 30, 1897, the plaintiff in error, without any previous arrangements with or notice to the defendants in error, telegraphed from New York to the defendants in error, at Helena, Mont., where they were engaged in business as attorneys at law, asking information about one Hewitt and his mines at a certain locality in Montana. This information was sent by telegram and letter, and, in accordance with telegraphic directions from the plaintiff in error, the defendants in error selected one James E. Sites, described as a "practical, honest miner," to visit the mining property in question and examine it, and they thereafter transmitted his report to the plaintiff in error. It appears that the plaintiff in error became financially interested in the property, and in August and September of the same year telegraphed the defendants in error for further information, and asking that the same man who had previously examined the property should make further reports of its then condition; that such reports were made to the defendants in error, and by them put into shape and transmitted to the plaintiff in error. It does not appear that any further services were rendered after September. In the correspondence and telegrams which passed between the parties, and are introduced in evidence, no mention is made of fees or compensation for services. The bills of Sites, who examined the property, are in evidence; and it is testified that they were paid by the defendants in error, and the amounts collected by them from the plaintiff in error. One of the defendants in error, at least, appears to have been a friend of the plaintiff in error, but it is not apparent from the correspondence whether the services requested were because of the friendship existing, or because professional services were required. It is testified that one of the defendants in error went to the office of the Secretary of State and examined the articles of incorporation of the mining company whose stock the plaintiff in error was purchasing, but, other than this, the services rendered seem to have consisted of the obtaining of information from persons familiar with the mine, the sending of a man to examine the mine, and in preparing and transmitting his reports. The plaintiff in error invested some $15,000 in the mine, according to the testimony, for which he received 150,000 shares,

and there is some testimony to the effect that he afterwards purchased 50,000 shares in addition; making 200,000 shares of the 300,000 shares of the capital stock of the company. The reports sent to him by the defendants in error were favorable in character, and it is apparent from the correspondence that the plaintiff in error relied upon the information received from the defendants in error, and expected them to look out for his interests in the matter. Testimony was introduced to the effect that at one time, after the plaintiff in error had purchased this stock, offers were made for it of from $1 to $1.50 per share. Whether he sold any of his stock or not, or whether he made or lost on the entire transaction, is not shown, although, according to the testimony, the stock had little, if any, value at the time of the trial. The plaintiff in error does not deny that the defendants in error rendered the services stated, but he contends that they are entitled to merely the reasonable worth of the services, independent of any consideration of the value of the property involved, or the benefit resulting to the principal or employer. The rule governing cases of this character is stated very clearly by Mr. Justice Field in Forsyth v. Doolittle, 120 U. S. 73, 74, 7 Sup. Ct. 408, 30 L. Ed. 586. In that case an attorney sued to recover compensation for his services, not only as an attorney in defending a foreclosure suit, but for his services in negotiating a sale of property. The court held that evidence of the value of the property involved was admissible, and, with regard to compensation for the services rendered, said:

"The services for which compensation is sought were not only those required of attorneys and counselors at law, but were also those of negotiators seeking to accomplish the result desired, by consultation with proposed purchasers, and presentation to them of the advantages to be derived from the property, present and prospective. Varied as were the legal services of the plaintiffs, it is plain from the testimony that those rendered by negotiation and consultation, and presentation of the uses to which the property could be applied, were far more effective and important. This fact necessarily had a controlling weight in estimating the value of the services. It is difficult to apply to such services any fixed standard by which they can be measured, and their value determined, as can be done with reference to services purely professional. There is a tact and skill and a happy manner with some persons, which render them successful as negotiators, while others, of equal learning, attainments, and intellectual ability, fail for the want of those qualities. The compensation to be made in such cases is, by the ordinary judgment of business men, measured by the results obtained. It is not limited by the time occupied or the labor bestowed. It is from overlooking the difference in the rule by which compensation is measured in such cases, and that in cases where the services are strictly of a professional nature, that several objections are urged for reversal of the judgment recovered."

The court below in the present case instructed the jury that testimony relative to the value of the mine, the value of its production, and the value of the capital stock of the mining company, could be considered only for the purpose of determining the amount involved in the transaction, and the results obtained, to determine the nature of responsibility assumed by the defendants in error, and the reasonable value of their services. Under the rule above announced by the Supreme Court, there was no error in admitting the testimony

objected to, especially with the explanation as to its weight contained in the instruction.

Further error is specified in the refusal of the court to give certain instructions requested by the plaintiff in error. Without going into detail, we are of the opinion that the instructions given covered the matter of the refused instructions, and in quite as favorable a form to the plaintiff in error as to the defendants in error.

With regard to the error assigned in the refusal of the court to grant a new trial "because the damages are excessive, and the verdict appears to have been rendered under the influence of passion and prejudice," it is sufficient to say that a motion for a new trial cannot be reviewed by this court. N. P. Ry. Co. v. Charless, 51 Fed. 562, 2 C. C. A. 380; G. N. Ry. Co. v. McLaughlin, 70 Fed. 669, 676, 677, 17 C. C. A. 330; Sun Printing & Publishing Ass'n v. Schenck, 98 Fed. 925, 40 C. C. A. 163; Laber v. Cooper, 7 Wall. 565, 19 L. Ed. 151; Railroad Co. v. Winter's Adm'r, 143 U. S. 60, 70, 12 Sup. Ct. 356, 36 L. Ed. 71; City of Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.

There being no error apparent in the action of the court upon the trial, and no showing that the procedure was not in every respect regular, whatever may be the opinion of the appellate court as to the amount of the verdict, it must affirm the judgment.

LAVIN, Immigrant Inspector, et al. v. LE FEVRE et al.

(Circuit Court of Appeals, Ninth Circuit. November 2, 1903.)

No. 948.

1. ALIENS—DEPORTATION—QUESTION FOR COURT.
   Whether the executive officers of the government, in deporting an alien emigrant, are proceeding according to law, is a judicial question, which may be inquired into on habeas corpus.
2. SAME—TO WHAT COUNTRY DEPORTED.
   Under Act March 3, 1891, c. 551, §§ 10, 11, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], providing that all aliens unlawfully coming into the country shall, if practicable, be immediately sent back on the vessel by which they were brought in, and that any alien unlawfully coming into the country may be returned as provided by law at any time within a year thereafter, where alien emigrants unlawfully came into the country from France, are then temporarily absent in British Columbia, and return within a year from their arrival from France, they are properly deported to France.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Habeas corpus proceedings were instituted by counsel on behalf of the appellees in the superior court of the state of Washington for King county, alleging their illegal detention at Seattle by the appellant Sister Superior M. Angelique, of the House of the Good Shepherd; said detention being by authority and request of the appellant James P. Lavin, United States immigrant inspector. After the service of the writ of habeas corpus upon the sister superior, the appellants petitioned the United States Circuit Court for the District of Washington, Northern Division, for the removal of the proceedings to

the Circuit Court. Thereupon a writ of certiorari was issued to the state court, and the proceedings removed to the federal court. Thereafter the appellants made a return and answer to the petition for habeas corpus, showing: That the appellant James P. Lavin was a revenue officer and immigrant inspector for the collection district of Puget Sound. That the appellees were natives of the Republic of France. That the appellant Lavin had theretofore, in the discharge of his duties as such officer, removed the appellees from the steamship Rosalie upon its arrival at Seattle from Victoria, British Columbia, from which port they had been brought to Seattle. That said removal was for the purpose of investigating whether they were immigrants properly entitled to enter the United States. That a board of special inquiry was convened, consisting of the Treasury and revenue officers, in accordance with the law and the regulations of the Treasury Department, to determine the eligibility of the appellees to land in the United States. That upon such investigation it had been found and determined that appellees had, within one year prior thereto, been imported into the United States at the port of New York from France for the purpose of prostitution. That it had been further found and determined that each of them was a pauper, and likely to become a public charge. That it had been further found that, immediately prior to their having been taken from such vessel for such purpose by the appellant Lavin, they had left the United States and gone to Victoria, British Columbia, from which place they were returning to the United States when so taken and removed from said vessel. That upon such findings it had been determined and concluded by said board that the appellees were not lawfully entitled to be in or enter the United States, and that they should be deported and returned to the country to which they belonged, and from whence they came. Thereafter the facts and findings of said board of special inquiry were forwarded to the Secretary of the Treasury for the purpose of having the question of the country and port to which the appellees should be deported and returned determined by said Secretary. That while said question was pending before the Secretary of the Treasury the court made an order and judgment finding the facts and causes of detention of the appellees by the appellants as set forth in the return, and finding further that the only action warranted by the government and its officers, upon the facts found, was the deportation and return of the appellees to Victoria, British Columbia, at the expense of the steamer bringing them to this country, and thereupon the court entered an order and judgment accordingly. Thereafter the Secretary of the Treasury issued his warrant directing the appellant James P. Lavin, immigrant inspector, to arrest the appellees and remove them to the port of New York for deportation to France. Upon the receipt of said warrant the appellants made a supplemental return showing the fact of the issuance of such warrant, and petitioned the court to modify its order and judgment by striking out so much thereof as required the appellant to return the appellees to the steamship that brought them to Seattle, "to be by said vessel at its own expense returned to Victoria, British Columbia," leaving the appellant Lavin free to carry into effect the warrant of the Secretary of the Treasury. Upon a hearing upon this supplemental return and petition, the court found that the appellees had only been temporarily removed from the steamer bringing them to Victoria, for the purpose of examination as to their fitness as immigrants by the Treasury officials, and that the only action warranted under the law was the refusal to the appellees of the right to land in this country, and the only country to which they could be lawfully returned upon the refusal of the right to land was the country from which they had come immediately prior to such rejection, to wit, to British Columbia. The court found that the appellees, not having landed in this country, and not having been found here, were not subject to deportation by warrant of the Secretary of the Treasury to the country to which they belonged, and from which they originally came, to wit, France. The court thereupon denied the petition for a rehearing and modification of the judgment, and ordered and directed the appellant James P. Lavin, immigrant inspector, to carry into effect the original order and judgment of this court. From these orders and judgments the present appeal is prosecuted by the United States attorney for and in behalf of the immigrant inspector and the sister superior of the House of the Good Shepherd.

Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty., for appellants.

H. C. Gill, H. B. Hoyt, and H. S. Frye, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The errors relied upon by the appellants are, first, that the question of the deportation of the appellees was within the judgment and the jurisdiction of the Secretary of the Treasury, and not within the jurisdiction of the Circuit Court; second, that after assuming jurisdiction the court erred in determining, contrary to the determination of the Secretary of the Treasury, that the appellees should be returned to British Columbia, and not to France.

The court below found the cause of the detention of the appellees to be as set forth in the return of the appellants to the writ of habeas corpus. This return showed that the executive officers of the government had, upon investigation, determined that the appellees were alien immigrants, and belonged to a class of persons excluded by law from coming to the United States; that upon such investigation it was found and determined that said immigrants had within one year prior thereto been imported into the United States at the port of New York from France for the purposes of prostitution; that each of them was liable to become a public charge; that immediately prior to being taken from the vessel that brought them to Seattle they had left the United States and gone to Victoria, from which place they were returning to the United States.

The deportation of alien immigrants of the class to which appellees belong is provided for in sections 10 and 11 of the act of March 3, 1891 (26 Stat. 1086, c. 551 [U. S. Comp. St. 1901, p. 1299]), as follows:

"That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came."

"That any alien who shall come into the United States in violation of law may be returned as by law provided, at any time within one year thereafter, at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien into the United States, and if that cannot be done, then at the expense of the United States."

The supplemental return of the immigrant inspector shows that the Secretary of the Treasury had issued his warrant directing the immigrant inspector to arrest the appellees and remove them to the port of New York for deportation to France. It has been repeatedly held that the executive officers of the government have exclusive jurisdiction to determine the right of an alien immigrant to land and come into the United States. Nishimura Ekiu v. United States, 142 U. S. 651, 660, 12 Sup. Ct. 336, 35 L. Ed. 1146; Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Fok Yung Yo v. United States, 185 U. S. 296, 305, 22 Sup. Ct. 686, 46 L. Ed. 917; The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. It is equally clear that these officers

have jurisdiction to carry their judgment into execution in the manner provided by law. United States v. Yamasaka, 100 Fed. 404, 40 C. C. A. 454. But whether, in deporting an alien immigrant, they are proceeding according to law, is a judicial question, and may be inquired into by the court upon writ of habeas corpus. The court below had jurisdiction, therefore, upon the supplemental return of the immigrant inspector, to inquire into the legality of the warrant of deportation; but we think the finding of the court, that the facts and causes of detention of the appellees were as set forth in the return, disposed of the question. If the appellees were alien immigrants who had been imported into the port of New York from France within one year, and their absence from the United States just prior to their arrival at Seattle was only temporary, as the finding of facts indicates, then their deportation to France would appear to be, under the circumstances, according to law.

The judgment of the Circuit Court is modified, with instructions to vacate its order of deportation, discharge the writ of habeas corpus, and remand the appellees to the custody of the immigrant inspector.

CAMPBELL v. H. HACKFELD & CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. October 26, 1903.)

No. 942.

1. ADMIRALTY JURISDICTION—ACTION FOR TORT—LOCALITY OF INJURY.
   The fact of locality alone does not give a court of admiralty jurisdiction of an action for a tort committed on the high seas or navigable waters, but it must further appear that the tort was maritime in character, having some relation to a vessel or its owners.
2. SAME—ACTION AGAINST STEVEDORE BY EMPLOYÉ.
   An action against a contracting stevedore by an employé to recover for personal injuries sustained while discharging a vessel, through the alleged negligence of defendant or his other employés, is not within the admiralty jurisdiction, where no fault is charged against the vessel, her owners, officers, or crew.

Appeal from the District Court of the United States for the District of Hawaii.

J. J. Dunne and Gill & Farley (R. W. Breckone, of counsel), for appellant.

Kinney, McClanahan & Bigelow, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This cause comes here on appeal from a decree of the District Court for the District of Hawaii sustaining an exception of the appellee to the jurisdiction of the court over the parties or the cause of action stated in the libel, and dismissing the libel, without prejudice, for want of jurisdiction.

The libelant was a stevedore, and the libelee a corporation engaged in the business of loading and unloading vessels at Honolulu. The libel shows that in pursuance of its business the libelee on the 26th

day of July, 1902, undertook to unload a cargo of coal from the Norwegian bark Aeolus, then anchored in navigable waters of the port of Honolulu, and that the libelant was one of the libelee's employés engaged in that work; that while so engaged in the hold of the vessel the libelant was, by reason of the carelessness of the libelee and of other of its employés, severely injured, for which injury he asked damages. Not only does the libel fail to allege anything against the ship, its owner, officers, or crew, but it affirmatively alleges "that the persons who were engaged in the unloading of said bark Aeolus were all employés of said defendant, and not members of the crew, or employés of said bark Aeolus, and not fellow servants of any capacity with any of the employés of said bark Aeolus."

Instances are numerous in which stevedores have maintained libels for injuries sustained by reason of defective machinery or appliances of the ship, or by reason of the negligence of its owner or of some of its officers or crew. Many of such cases are referred to in The Anaces, 93 Fed. 240, 34 C. C. A. 558, and in the briefs of counsel in the present case. But no case has been cited, and it is asserted by counsel that no case can be found, where a stevedore was allowed to maintain in a court of admiralty an action for damages, against the stevedore who employed him, for injuries sustained by reason of the negligence of the head stevedore, or of one or more of his other employés. The mere fact that no such case can be found in the books tends strongly to show that they are outside the acknowledged limit of admiralty cognizance over marine torts, for it would be little short of absurd to suppose that there have not been hundreds and hundreds of instances where stevedores have been injured in their work through the negligence of the contracting stevedore or of some of his employés. The Plymouth, 3 Wall. 20, 37, 18 L. Ed. 125; The Queen v. Judge of the City of London Court, Q. B. Div. vol. 28, 1892, pp. 273–298.

The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs. In concluding his great opinion in the case of De Lovio v. Boit et al., 2 Gall. 398, 474, Fed. Cas. No. 3,776, Judge Story said:

"On the whole, I am, without the slightest hesitation, ready to pronounce that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality. The former extends over all contracts, wheresoever they may be made or executed, or whatsoever may be the form of the stipulations, which relate to the navigation, business, or commerce of the sea."

Torts, as well as contracts, not maritime, are outside of admiralty cognizance.

It is quite true that in many of the decisions of the Supreme Court, as well as of the Circuit Courts of Appeals and of the Circuit and District Courts, the broad statement is made that in cases of tort the sole test of jurisdiction is locality; and that fact is made the

basis of a criticism of the decision of the court below in the present case, found in the Harvard Law Review for January, 1903 (16 Harv. Law Rev. 210, 211), in which it is said that that decision—

"Infringes a rule which originated in the very nature of admiralty jurisdiction, and which has been satisfactory in its practical operation. This test has been all but universally regarded as the sole one. See The Plymouth, supra. The single authority to the contrary is the somewhat obscurely stated dictum of a text-writer. Benedict, supra, 308. The principal case seems, then, at variance with the spirit of the previous cases, even though reconcilable with the points actually decided. Not only would the adoption of its doctrine unsettle a rule which has long been assumed to be law, but it would make the question of jurisdiction over torts subject to the difficulty which so often perplexes cases of contract, namely, the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems, therefore, unfortunate, as increasing complication and uncertainty in the law, without, apparently, securing any practical gain to compensate for these disadvantages."

It is expressly admitted in this article that "in every instance which has been found, however, a maritime relation such as is required by the court" below, has in fact existed.

It is a cardinal rule that the language of every court must be construed with reference to the case made for decision, and should not be extended so as to embrace cases that could hardly have been within its contemplation when using the language. Take, for instance, the expression of the Supreme Court in the case of The Plymouth, supra, in respect to the point in question, where it is said, "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." That language is quite as broad as, if not broader than, that used by any other court in any of the cases upon the subject, and, taken literally, would include within the jurisdiction of the admiralty court a very celebrated case that arose on the Bay of San Francisco in the year 1870, when A. P. Crittenden, a distinguished lawyer of California, was shot by Laura D. Fair on board the ferry steamer El Capitan, while making one of her trips from the Oakland Mole to her slip at San Francisco. But we think it would surprise the Supreme Court to be told that by saying, as it did in the Plymouth Case, that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance," it in effect decided that such a tort as Mrs. Fair committed on Crittenden fell within admiralty cognizance. If the language of the courts to the effect that locality is the sole test of admiralty jurisdiction in cases of tort is to be given the broad interpretation contended for by the appellant and by the Law Review referred to, then every case of battery committed by one passenger on another on board any ship anchored in navigable waters at any port or wharf is within the jurisdiction of the court having admiralty jurisdiction over the place. Such an interpretation is, in our opinion, wholly inadmissible, and such consequences very clearly show the danger of losing sight, in construing the language of a court, of the case about which it is speaking. In The Plymouth, for example, the case the court had for decision was one for damage done wholly on land, but in which

the cause of damage originated on water within the admiralty jurisdiction of the trial court. There flames from a steam propeller anchored in the Chicago river set fire to some packing houses on land, and for the damage thus done it was sought to maintain a suit in the admiralty court. One of the arguments in favor of the jurisdiction was that the vessel which communicated the fire to the buildings was a maritime instrument or agent, and hence characterized the nature of the tort, and made of it a maritime tort. The court held that to be a misapprehension, and it was in answer to that contention that it said, "The jurisdiction of the admiralty over maritime torts does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters—where it occurred," and immediately added the clause heretofore quoted: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

In this connection, we quote a few paragraphs from the opinion of Lord Esher, Master of the Rolls, delivered in a late case in England (hereinafter further referred to), where it was sought to maintain in a court of admiralty an action in personam against a pilot in respect of a collision between two ships on the high seas, caused by his negligence:

"It is said that there is a decision of Dr. Lushington in favor of the jurisdiction, and (merely to show the danger of taking words from a judgment without looking further) I will at once grapple with it. In The Sarah, Lush. 549, Dr. Lushington said at page 550: 'The court has original jurisdiction, because the matter complained of is a tort committed on the high seas.' There, it is said, is a declaration by Dr. Lushington that he had jurisdiction over all torts committed on the high seas. That case was decided in 1862; but if we turn to the earlier case of The Ida, Lush. 6, in which the subject-matter was the willful cutting of a bark adrift, whereby she capsized a barge which contained cargo, Dr. Lushington says at page 9: 'The court, however, is still further indisposed to exercise jurisdiction on account of the peculiar nature of the act for which the plaintiffs are now trying to render the defendant's ship liable. The court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only.' Therefore, by what he said in The Sarah, Lush. 549, he really did not mean every tort committed on the high seas, but only wrongful collisions; and he limited himself in The Ida, Lush. 6, by saying, in effect, that the jurisdiction of the admiralty had never extended to all torts on the high seas." The Queen v. The Judge of the City of London Court, Queen's Bench Division, vol. 28, 1892, pp. 273, 292.

In the case of Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90, the Supreme Court pointed out that it had frequently been decided by that court—

"That the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England."

And as to contracts (the case then before the court) said:

"The English rule, which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea, and to be executed thereon (making locality the test), is entirely inadmissible, and that the true criterion is the

nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions."

The locality test was there discarded as to contracts, because, as the jurisdiction conferred on the United States courts "comprehends all maritime contracts, torts, and injuries," the true criterion in the case then before the court was, not the place where the contract was made, but the nature and subject-matter of the contract—that is to say, whether it had reference to maritime service or maritime transactions.

In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction. These views are not in conflict with any decision brought to our notice, or that we have been able to find. They are not only, in our opinion, based on sound reason, but also find support in Benedict's Admiralty (3d Ed.) § 308, where that learned writer says:

"Cases of torts on the high seas, superaltum mare, have always been held, even in England, to be within the jurisdiction of admiralty. And the jurisdiction in such cases has usually been held to depend upon locality, embracing only civil torts and injuries done on the sea, or on waters of the sea where the tide ebbs and flows. It depends upon the place where the cause of action arises, and that place must be the waters which are subject to the admiralty jurisdiction. It may, however, be doubted whether the civil jurisdiction, in such cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen bathing in the sea should assault or imprison or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort."

In the case of The Queen v. The Judge of the City of London Court, supra, which is a very much stronger case in favor of the jurisdiction claimed than is the case at bar, Lord Esher, M. R., in considering on what, under the English law, does the jurisdiction of the admiralty court depend, said:

"It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespective of statute, a necessary condition for the jurisdiction of the admiralty court; but there is the further question, what is the subject-matter of that which has happened on the high seas? It is not everything which takes place on the high seas which is within the jurisdiction of the admiralty court. A third consideration is, with regard to whom is the jurisdiction asserted? You have to consider three things—the locality, the subject-matter of complaint, and the person with regard to whom the complaint is made. You must consider all these things in determining whether the admiralty court has jurisdiction."

The opinion of his lordship in the case cited is a very lucid and instructive one, and will well repay perusal.

We are of opinion that the ruling of the court below was right, that it is not in conflict with any previous decision of which we are aware, and that it in no way tends to unsettle any rule of admiralty, or to introduce into that branch of the law any complication or uncertainty.

The judgment is affirmed.

SALING v. BOLANDER.

(Circuit Court of Appeals, Ninth Circuit. September 21, 1903.)

No. 937.

1. LIFE INSURANCE—APPLICATION FOR CHANGE OF BENEFICIARIES.
An application for change of beneficiaries in a life policy, merely signed by part of the beneficiaries before death of insured, can have no effect.

2. SAME—RELINQUISHMENT OF RIGHTS—WANT OF CONSIDERATION.
Though it is the intention of beneficiaries in a life policy by delivery of an instrument to the administrator after death of insured to evidence relinquishment of their rights, it being without consideration, they may revoke it.

3. PLEADING—ALLEGING INTENTION OF INSTRUMENT.
It will not avail one setting out an instrument, which is plainly an application by beneficiaries to change the beneficiaries, to allege that it was intended as an assignment, though such allegation is not denied.

4. BILL OF EXCEPTIONS—EVIDENCE—PRESUMPTION ON APPEAL.
In the absence of proof in the bill of exceptions that it contained all the evidence, it will be presumed on appeal that there was evidence to sustain the ruling below that execution of an assignment was authorized, the bill purporting to contain only the evidence to which any objection was taken by defendant.

5. REPLEVIN—DAMAGES FOR DETENTION.
Plaintiff in replevin for life policies may recover damages for their detention after they are delivered to the marshal under the writ, defendant's continued maintenance of his defense and insistence of his right thereto preventing plaintiff from recovering of the insurance company till the end of the litigation.

6. SAME—RATE OF INTEREST.
The rate of interest being lowered by statute pending a replevin suit, the successful plaintiff will recover as damages interest measured by the old rate up to the time of the change, and by the lower rate thereafter.

In Error to the Circuit Court of the United States for the District of Oregon.

This is an action in replevin, brought by the defendant in error against the plaintiff in error to recover the possession of two insurance policies issued by the Mutual Life Insurance Company of New York upon the life of Henry N. Bolander. The policies were issued in September, 1884, for $2,040 and $2,170, respectively. By their terms, upon the death of the insured the policies were payable to his wife, Anna M. Bolander, for her sole use, if living, and, if not living, to such of the children of her body as should be living at the time of her death. She died July 28, 1897, leaving surviving her eight children, who became the beneficiaries under the policies. The insured survived her death one month, and died intestate August 28, 1897. In the interval between the death of Anna M. Bolander and the death of the insured, for the purpose of surrendering the policies and obtaining

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¶ 4. Exclusion of evidence from bill of exceptions, see note to Ladd v. Mining Co., 14 C. C. A. 248.

instead thereof new policies payable to Henry N. Bolander, the insured, "his executors, administrators, or assigns," a written application to the insurance company was prepared for the signatures of the children, containing a request for such change, and a covenant that all the statements made in the original application and declaration for the policies of insurance were full, complete, and true, and were to be made the basis of the contract between them and the company for the new policies solicited. Seven of the children signed this application before the death of Henry N. Bolander, but one of them did not sign it until September 16, 1897, and Henry N. Bolander never signed it. The application was not presented by the beneficiaries to the insurance company, and it was never acted upon by the company. No new policies were issued. In October, 1897, the county court of Multnomah county, Or., a court of probate, appointed the plaintiff in error administrator of the estate of Henry N. Bolander, deceased. He obtained from some of the children of Anna M. Bolander and the intestate possession of the policies, together with other papers and personal effects of the deceased, and, in opposition to the wishes of the beneficiaries, included them in his inventory of the property of the estate which he filed in the probate court, and he caused the policies to be appraised as a part of the estate. On August 28, 1898, the defendant in error, having obtained from all the other beneficiaries a transfer of their rights and interests under the policies, demanded of the plaintiff in error the possession of the policies; but the latter refused to surrender the same, contending that as administrator he was entitled to their possession and the proceeds thereof as property of the estate. The defendant in error then presented to the probate court his petition, praying for an order requiring the administrator to show cause why his inventory should not be corrected by eliminating the policies therefrom. In answer to that petition the administrator set forth the defenses that are pleaded in his answer to the action of replevin which is now before the court, and alleged the execution by the beneficiaries of the application and request to the insurance company to change the policies, and averred that the same was made with the knowledge and consent of the insurance company, and was intended for and was an assignment of all the interest of the persons who signed the same to the said Henry N. Bolander, his executors, administrators, and assigns; and that after the death of the insured the said application and request was delivered by the beneficiaries to the administrator, and that he, as such administrator, had delivered the same to the insurance company; and that after the death of the insured three of the beneficiaries, at the request of the administrator, had, by an instrument in writing, confirmed the said application so made to said insurance company, and in said instrument had directed the insurance company to pay all moneys due under said policies to the administrator. The plaintiff in error further alleged that the policies of insurance which were so originally issued on the life of Henry N. Bolander were found among his personal effects after his death, and were delivered to said administrator by some of the beneficiaries, and that the administrator had received the same in good faith as property belonging to the estate, and had listed the same in the inventory of property of said estate, and that a large number of claims had been filed against the estate, for the payment of which there was not sufficient property outside of the policies of insurance. After a hearing upon the issues so made, the probate court made an order in accordance with the prayer of the petition. The administrator appealed therefrom to the state circuit court, and that court affirmed the decree of the probate court. The defendant in error having in the meantime begun the present action in replevin, the plaintiff in error interposed thereto a plea in abatement, alleging the pendency of the said proceedings in the state courts, and alleging that the said policies were in the custody of said state courts for the purpose of administration, which purpose could not be interfered with by the said action of replevin. A demurrer to the plea was overruled, and thereupon the action in replevin was held in abeyance until the determination of the litigation in the state courts. The plaintiff in error appealed from the decree of the state circuit court to the Supreme Court of Oregon. That court reversed the decree of the lower court, and remanded the cause,

with instruction to dismiss the petition of the defendant in error in the probate court on the ground that that court was concluded by the inventory of the administrator, and had no power to order that the policies be eliminated therefrom, or to adjudicate the title thereto as between diverse claimants; the court holding that, as against the administrator, the defendant in error must litigate his right to the policies in a court of general jurisdiction. Re Bolander's Estate, 38 Or. 490, 63 Pac. 689. After that decision was rendered, issue was joined on the plea in abatement in the present action, and the plea was overruled. Thereupon the plaintiff in error answered, setting up in defense of the action the matters which constituted his defense to the petition in the probate court. A demurrer was sustained to those portions of the answer which pleaded as an affirmative defense the execution of the written application for a change of the policies, and averred that it was intended as an assignment, and that it was delivered by the beneficiaries to the plaintiff in error as administrator, and was by him delivered to the insurance company; that four of the eight heirs named were not children of the insured, but were children of Anna M. Bolander by a former husband; that claims had been filed against the estate for the payment of which there was no property outside of the policies of insurance. The ruling of the court sustaining the demurrer, and its rulings concerning the admission of testimony taken for and in behalf of the defendant in error, and the denial of the motion of plaintiff in error that the jury be instructed to return a verdict for the defendant in the action are assigned as error.

Milton W. Smith, for plaintiff in error.

Bauer & Greene, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended that the court erred in sustaining the demurrer to that portion of the answer which alleged that the written application for the change of the policies was intended as an assignment of the interests of the beneficiaries to Henry N. Bolander, his executors, administrators, and assigns, and was delivered after the death of the insured to the administrator, and was by him delivered to the insurance company. It is not alleged or claimed that the insured himself joined in the application, or that it was ever delivered to him, or that all the beneficiaries signed the same before his death. The instrument on its face is not ambiguous, and it requires no interpretation and no extraneous evidence as to its intent. It is a simple request and application for a change in beneficiaries of the policies. After the death of Bolander, the application could have no efficacy for the purpose for which it was originally intended, or for any purpose. If, indeed, it was the intention of the beneficiaries, by subsequently delivering this instrument to the administrator, to evidence their relinquishment of their rights as beneficiaries, it was an act done without consideration of any kind, and it was subject to their revocation at any time thereafter. The plaintiff in error insists that because he has pleaded, and it is not denied by the defendant in error, that the instrument was intended as an assignment, it must necessarily operate as such. But the plaintiff in error cannot impute to the instrument an intention which is not fairly deducible from its terms, and he cannot assert that an instrument which on its face is not as assignment was intended as such. The intention is found in the instrument. It is true that the intention of an instrument may, as between the

parties thereto, by virtue of an accompanying agreement, be shown to be other than its terms import. Thus a deed absolute on its face may be shown to have been intended as a mortgage. But it would not be enough in such a case for the grantor to allege that he intended that the deed should operate as a mortgage. So in this case it is of no avail for the plaintiff in error to say that this instrument, the meaning whereof is plain upon its face, was intended by those who signed it to have a meaning different from what its plain words import. It is unimportant that the defendant in error took no issue upon the averment of the answer that the written application was intended as an assignment. By failing to reply to the answer, he admitted only the facts which were well pleaded. To set forth the written instrument in the answer, and then to plead that it was intended to have a meaning different from what it purports to be, is to proffer averments which the instrument itself contradicts, and which the court will disregard. Dillon v. Barnard, 21 Wall. 437, 22 L. Ed. 673.

It is contended that the defendant in error failed to show that at the commencement of the action the interests of all the beneficiaries in both the policies had been assigned to him, and that the court erred in admitting in evidence the assignment from one of the beneficiaries, which purported to have been executed on her behalf by her attorney in fact. The power of attorney which appears in the bill of exceptions describes the policies and recites the death of the insured, and gives power to the agent and attorney in fact in these words: "For me and in my name and for my use and benefit to ask, demand, sue for, and receive of and from the said insurance company all moneys to which I am or may be entitled as one of the surviving children of said Anna M. Bolander under the policies of insurance above described, and upon receipt thereof by, or the payment thereof to, my said attorney, to make, execute, and deliver a general release or discharge for the same." We need not discuss the question whether the power thus given is sufficiently broad to sustain an assignment to the defendant in error for the purpose of collecting the amounts due under the policies, for the reason that the bill of exceptions does not purport to contain all of the evidence. It contains only the evidence offered at the trial "concerning the assignment to the plaintiff or his ownership of the insurance policies in controversy to which any objection was taken by the defendant." For aught that appears to the contrary in the bill of exceptions, other evidence may have been offered to which no objection was taken by the defendant showing the authority of the attorney in fact to execute the assignment, or showing that before the commencement of the action the beneficiary ratified the action of her attorney in fact, and that both the policies were duly assigned to the defendant in error. In the absence from the bill of exceptions of proof to the contrary, it will be presumed that such was the fact. The burden is upon the plaintiff in error to show affirmatively that the trial court erred in its ruling. City of Milwaukee v. Shailer & Schniglau Co., 91 Fed. 726, 34 C. C. A. 66; Collier v. United States, 173 U. S. 79, 82, 19 Sup. Ct. 330, 43 L. Ed. 621; United States v. Patrick, 73 Fed. 800, 20 C. C. A. 11, 18;

Lincoln Savings Bank v. Allen, 82 Fed. 148, 27 C. C. A. 87; Yates v. United States, 90 Fed. 57, 32 C. C. A. 507; Union Pacific Ry. Co. v. Harris, 63 Fed. 800, 12 C. C. A. 599.

It is assigned as error that the court entered judgment in favor of the defendant in error for the recovery of damages measured by the interest on the amount of the policies from August 28, 1898, at the rate of 8 per cent. per annum. The assignment does not specify wherein the error of the judgment entry consisted, but it is now said that it was error, first, for the reason that the policies were delivered to the marshal under the writ of replevin on July 2, 1901, and there could be no damages for their detention after that date; and, second, that the rate of interest on such demands, in the absence of an agreement between the parties, was changed by the statute of Oregon on October 14, 1898, from 8 per cent. to 6 per cent. Laws 1898, p. 15. The attention of the trial court was not directed to this alleged error.

We find no merit in the contention that there could be no damages after the date of the surrender of the policies to the marshal. The conduct of the plaintiff in error in continuing to maintain his defense and in insisting on his right, as administrator, to possess the policies, and to receive the amounts payable thereunder, operated as a barrier to the payment of the policies by the insurance company to the defendant in error until the end of the litigation.

We think, however, that the judgment should be modified by reducing the interest to 6 per cent. from the date of the change in the interest law. With that modification, the judgment of the Circuit Court is affirmed, with costs to the defendant in error.

MURRAY v. BENDER.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 836.

1 FIXTURES—THEATER FURNISHINGS—ATTACHMENT TO BUILDING BY STOCKHOLDER OF CORPORATION OWNER.

Where the owner of a majority of the stock of an opera house company which owned the land on which an opera house was situated, for his own benefit as a stockholder and without any agreement with the company, placed certain personal property in the building, consisting of chairs, stage appliances, drop curtain, etc., all of which were annexed to the building and were essential to its use for the purpose for which it was built and adapted, such articles became fixtures, which passed to an execution purchaser of the realty as a part thereof.

Appeal from the Circuit Court of the United States for the District of Montana.

See 109 Fed. 585, 48 C. C. A. 555; 116 Fed. 813, 54 C. C. A. 317.

In Murray v. Bender, 109 Fed. 585, 48 C. C. A. 555, this court had before it nearly all of the facts involved in this case. The decree of the lower court in this case was also before this court in King v. Bender, 116 Fed. 813, 54 C. C. A. 317, and the judgment of this court on that appeal has disposed of one of the questions involved in the present appeal. A statement of the facts in this case appears to be necessary to a clear understanding of the law of

the case, as established by the previous judgment of this court, and the remaining questions to be determined on this appeal.

In the year 1888 the Grand Opera House Company, a corporation, was the owner of certain real property in the city of Butte, in the then territory of Montana. On September 29, 1888, the corporation conveyed the premises to one John Maguire, taking from him a note secured by a mortgage for the purchase price, amounting to $17,000. After the execution, delivery, and recording of this mortgage, Maguire undertook the erection of an opera house upon the mortgaged premises. In the construction of this building Maguire incurred considerable indebtedness for labor performed and materials furnished for the building, resulting in the creation of liens upon the property under the statute of the state. These liens were in due course of proceedings foreclosed by a decree dated January 27, 1890, and the property sold thereunder on the 19th day of May, 1890. On April 10, 1891, the appellant, Murray, who was the last of several redemptioners from such foreclosure sale, became invested with the title to the property by sheriff's deed. On May 29, 1891, the Opera House Company commenced an action for the foreclosure of its mortgage upon the property, executed by Maguire in 1888. In this action Murray was made a party defendant, and in a decree entered on March 12, 1895, it was adjudged that the mortgage lien upon the land was superior to the title of Murray, but, as to the building, Murray's title was adjudged to have priority over the mortgage lien. It was further adjudged and decreed that Murray might at any time after the sale of the premises, and before the expiration of the period for redemption as provided by law, remove from the said premises the building and improvements thereon; but, if he should fail to do so within the time prescribed, then the building and improvements should become a part and portion of said lots, and, after the time for removal specified in the decree, Murray should have no right to remove said improvements, or any of them. This decree was affirmed by the Supreme Court of the state on appeal. Opera-House Co. v. Maguire, 14 Mont. 558, 37 Pac. 607. The premises were sold, pursuant to the decree, on April 18, 1896, and were purchased by the Grand Opera House Company. The right to redeem from this sale expired under the law of the state on October 18, 1896, but prior to that time negotiations were had between Murray and the Grand Opera House Company for either a purchase or sale that would vest the ownership of the entire property in one of the parties. But the negotiations failed, and Murray proceeded to remove the chairs, scenery, and other furniture from the building, and the building from the lot. The chairs, scenery, and other furniture were removed to a warehouse, and when Murray had torn down the front end of the building it was suggested to him that he could buy a controlling interest in the stock of the Opera House Company, which would be much better than removing the building, as the building was of brick. Murray thereupon bought 1,000 or 1,100 shares of the stock of the corporation, which gave him the controlling interest in it. He then suspended the removal of the building, and proceeded to reconstruct it. When the building was reconstructed, Murray had the chairs, scenery, and other furniture removed to the opera house. This removal was completed by December 3, 1896, and on December 10, 1896, the opera house was opened to the public.

On December 3, 1896, John O'Rourke commenced an action against the Grand Opera House Company, joining in his complaint two causes of action, one upon the promissory note of the corporation for $762, the other for $585, claimed by O'Rourke to have been paid out by him for the corporation. On the same day, under writ of attachment issued in said cause for both causes of action, the property of the Opera House Company was attached. The corporation appeared and answered the complaint, not controverting the first cause of action, but denying the facts alleged as to the second. On September 16, 1897, judgment was rendered for O'Rourke on the first cause of action, and the case continued pending as to the other. Upon the judgment so made and entered an execution was issued, and upon December 27, 1897, the attached property was sold by the sheriff to Silas F. King. On December 3, 1896, the same day on which O'Rourke's action was begun, John O. Bender, the appellee in the present case, began an action against the corporation upon three causes of action, aggregating $700, and on the same day attach-

ment was issued upon his complaint, and thereupon the property of the Opera House Company was attached, subject to the attachment of O'Rourke. The appellee obtained judgment in his action on May 21, 1898. On December 3, 1896, John F. Forbis also began an action against the corporation to recover $500. On the same day he also caused a writ of attachment to issue and the same property to be attached. His attachment was subsequent to those of O'Rourke and the appellee. On May 21, 1898, Forbis obtained a judgment against the Opera House Company in his action. On December 27, 1898, 12 months after the sale to King, O'Rourke, claiming to have a right of redemption upon his attachment still subsisting for his controverted cause of action, which continued pending after judgment had been entered upon his first cause of action, tendered to King the amount of the purchase money which the latter had paid, together with the statutory interest thereon, for the purpose of redeeming the property. On the same day the appellee served upon the sheriff of the proper county his notice of redemption, and under his said notice paid to the sheriff, for O'Rourke, the amount of money which O'Rourke had tendered to King, together with the amount which O'Rourke claimed to have been secured by his attachment. The appellee, then, as agent and attorney for O'Rourke, receipted to the sheriff for the money which he had tendered for O'Rourke, and as the agent for O'Rourke received the same. These redemptions were made within one year from the date of the sale under execution, that being the time allowed by the Montana law for redemption from execution sales. On January 10, 1899, and within the 60 days allowed by law to redeem from a redemptioner, Forbis, upon his judgment, redeemed from the redemption made by O'Rourke and the appellee. On January 19, 1899, notwithstanding these redemptions, the sheriff executed to the appellant, as purchaser under the O'Rourke judgment, a deed to the premises in controversy. On February 25, 1899, Forbis conveyed back to the appellee all rights which he acquired under his redemption. On April 4, 1899, J. O. Bender instituted a suit against King and McFarland in the Circuit Court of the United States for the District of Montana, praying that the latter be declared trustees for him as to all rights acquired under the sheriff's deed. The answer of the defendants denied that O'Rourke, at the time when he attempted to redeem said property, was a creditor of the corporation having a lien against the property subsequent to that upon which the same was sold, or that under said attachment lien he redeemed the property from sale, and denied that the attachment lien of the appellee was subsequent to the judgment and attachment of O'Rourke, and denied that the appellee, under his judgment, redeemed said property from the sale to King, or from the redemption attempted to be made by O'Rourke, and denied that the attachment of Forbis was subsequent to the lien on which the property was sold on execution, and denied that Forbis redeemed from said sale or from said attempted redemption. The defendant McFarland alleged that he was in possession of the property under a lease from, and that he was paying rent to, the Grand Opera House Company. The decree of the lower court was in favor of Bender, and King appealed. On appeal, this court affirmed the judgment of the lower court, and found all the facts in favor of Bender, decreeing him to be the owner of the real property, and that King held the same in trust for him. King v. Bender, 116 Fed. 813, 54 C. C. A. 317.

In this suit the lower court appointed a receiver, who took possession of the property and collected the rents from February 1, 1900. Murray had received these rents up to this time, and insisted that he should still collect them, and also claimed to be the owner of the seats, fixtures, scenery, etc., in the opera house, claiming this property as personalty and not a part of the realty; whereupon the court ordered that Murray be made a party to this suit. On September 23, 1899, the complainant, Bender, filed an amended bill, making James A. Murray and the Grand Opera House Company defendants. In this bill Bender alleged the facts hereinbefore recited, and further alleged that the defendant Murray claimed the chairs, stage scenery, and other fixtures in the opera house, but that the same were annexed to the realty and necessary for the use of the property, and that the same were devoted to such use when the attachments were made on December 3, 1896. The bill recited that McFarland, one of the defendants, obtained his possession of the property under a written lease executed by the Opera House

Company on November 1, 1898, through and from the defendant James A. Murray, and that the property which Murray then claimed as his individual property was leased and described as the property of the Opera House Company; that since Bender notified McFarland that he (Bender) was the owner of such property, McFarland had paid of the rents to the Grand Opera House Company a sum in excess of $6,000, and that Murray, through and from the Opera House Company, had received the whole of said sum, and unjustly held the same from complainant; that Murray and the Opera House Company held the rents, issues, and profits in trust for complainant.

In the answer to the amended bill Murray admitted the material matters of record set up in the bill, but alleged that certain property in the opera house, consisting of chairs, scenery, lamps, etc., was personal in its character, and belonged to him; alleged that McFarland was the tenant in possession of the opera house, and denied that the chairs and scenery were fixtures or annexed to the realty or necessary to its use, and denied that the Grand Opera House Company ever was the owner of such chairs, scenery, etc.; denied that McFarland procured the lease on the property through him, but admitted that McFarland had paid certain rents under said lease to the Opera House Company, the exact amount being at the time unknown to the defendant; denied that he had received from the Opera House Company the whole of said sums so paid, or that he unjustly or at all held the same from the complainant, or that he knew that the Opera House Company was not entitled to said rents from said property. He then alleged that since 1896 he had been the owner and in possession of the personal property in the opera house, consisting of chairs, scenery, etc., saving and excepting a few certain pieces of scenery; that McFarland never had any possession of such property except as the lessee of Murray; and that McFarland agreed to pay him rent therefor.

The decree of the court below, entered on the 4th day of September, 1901, adjudged that the complainant, John O. Bender, was the rightful owner and entitled to have and possess certain premises described in the bill of complaint as the property of the Grand Opera House Company, together with the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining thereto, including the stage fixtures and appliances attached to the stage, the drop curtain attached thereto, and the chairs attached and fastened to the floor by screws and nails, but not including the scenery in the said house, nor the pianos therein, nor the loose and unattached chairs. It was also adjudged that the complainant was entitled to the rents, issues, and profits of the said property from and after the 11th day of March, 1899, the day that Bender was entitled to the sheriff's deed, to the 1st day of February, 1900, when the receiver took possession of the property, and that the defendant James A. Murray account for and pay over to the complainant the rents, issues, and profits of the said premises, with legal interest thereon from the time the same were withheld, and that said account be referred to the master in chancery, who should take evidence thereon and state said account, and report to the court said evidence and his conclusions thereon. In pursuance of this reference the master in chancery took evidence upon the question of rents, issues, and profits due from the defendant James A. Murray to the complainant, John O. Bender, and thereupon found that the defendant James A. Murray had received, from the 11th day of March, 1899, to the 1st day of February, 1900, $480 for each month of said period of 10 months and 18 days, to wit, the sum of $5,120, and that the complainant, John O. Bender, was entitled to receive from the defendant James A. Murray, under the decree, the said sum of $5,120, and interest, as particularly specified in the findings, from the time therein mentioned to the day of judgment therein. The report of the master and his findings were returned and filed and entered in the office of the clerk of the court on the 9th day of December, 1901, and, no exceptions having been filed thereto by either party within one month thereafter, the report stood confirmed on the next rule day, as provided in equity rule No. 83. Upon this confirmed report of the master, the court entered a further decree on the 20th day of March, 1902, adjudging that the complainant, John O. Bender, have and recover of the defendant James A. Murray the sum of $6,191.80, being the amount found due by the said master in chancery, together with legal interest at the

rate of 8 per cent. per annum upon the several amounts and for the several dates set forth in said report, as ascertained and computed to the date of the entry of the decree.

From these two decrees the defendant James A. Murray has appealed to this court, assigning as error: First, the action of the court in adjudging that the complainant, J. O. Bender, was the rightful owner and entitled to the possession of the premises described in the complaint as the property of the Grand Opera House Company, including the stage fixtures and appliances attached to the stage, the drop curtain, and the chairs mentioned in the decree, and in not determining that they belonged to the defendant; second, the action of the court in determining and adjudging that the complainant was entitled to the rents, issues, and profits of the property described therein, from and after the 11th day of March, 1899, and until the time when the receiver received the rents, issues, and profits, to wit, the 1st day of February, 1900.

J. C. Campbell, W. H. Metson, L. S. B. Sawyer, T. H. Breeze, John J. McHatton, and John W. Cotter, for appellant.

Crittenden Thornton, L. O. Evans, and John F. Forbis, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

It is again contended on this appeal that the court below was in error in holding that Bender was entitled to redeem from the execution sale to King, and from the redemption made by O'Rourke. This part of the decree of the Circuit Court was before this court in King v. Bender, 116 Fed. 813, 54 C. C. A. 317, and the decree was there affirmed. This affirmance has become the law of the case, not only by the final judgment of this court, but by the decision of the Supreme Court of the United States, refusing to grant a writ of certiorari to review that judgment. 187 U. S. 643, 23 Sup. Ct. 843, 47 L. Ed. 346. This question is therefore not open to review on this appeal.

Whether the property awarded to Bender by the decree of the court below included personal property owned by the appellant, depends upon the question whether the articles in controversy, consisting of stage fixtures, appliances adapted to the stage, drop curtain, and chairs, had, by being annexed or affixed to the property, become accessory to and part and parcel of it. This is mainly a question of fact, depending upon the character of the articles, and the use and purpose for which they were placed in position; and, this fact having been determined by the court below, its finding will receive careful consideration, and will not be disturbed unless it clearly appears that the finding was not justified by the evidence.

The court found, in its opinion, that the building erected upon the land redeemed by Bender was erected, constructed, and used as an opera house from the very beginning, and that it was being used for that purpose at the time of the decree; that it was suitable for and adapted to such purpose, and could not well be used for other purposes without considerable changes and alterations in its interior arrangement and condition as it then stood and was being used; that it contained a stage and stage fixtures and appliances to facilitate the expeditious handling of scenery during theatrical perform-

ances; that it contained a large amount of theatrical scenery, a drop curtain, also a number of opera chairs and seats attached to the floor by means of screws and nails. The court also found that the scenery in controversy was attached to the stage only as needed, and was capable of being moved without injury to the stage and stage fixtures or to itself, and for the most part was lodged and stored in certain storerooms in the basement of the building. This scenery, together with the pianos in the building, and the loose, unattached chairs, were found not to be fixtures, and by the decree were awarded to the appellant, and are therefore not involved in this appeal. The court also found that Murray's claim to title to the articles in controversy was derived from his redemption from the decree entered in the proceedings instituted for the purpose of foreclosing the mechanics' liens upon the property; that this redemption was made for the purpose of protecting a small judgment which had been assigned to him. The court found further that there was a disclaimer of ownership of the chairs on the part of the Opera House Company, and a declaration by the company that Murray was the owner thereof, and that a resolution of the board of trustees or directors of the company allowed Murray a monthly rental for the chairs. But the court also found that this was all done at a time when Murray, by purchase or otherwise, had obtained control of a majority of the stock of the company; that he elected a majority of the trustees or directors of the company; that the trustees, acting at the time the resolution was adopted, were all of them in some way identified with Murray's interest, and subject to his control; that none of the minority stockholders of the corporation were present or represented in the transaction, and that their rights did not appear to have been considered or deemed worthy of consideration. The court found further that a lease of this property was executed by and in the name of the Opera House Company to one MacFarland; that this lease was executed by Murray, who was cognizant of the fact that the Opera House Company was being held out to MacFarland as the owner of the property; that Murray stood by and helped to clothe the Opera House Company with the apparent ownership and title of this property to a stranger to the title. The court also found that the opera house would have been incomplete as an opera house without chairs, and that those chairs, or similar chairs, were absolutely necessary in its use and occupation for theatrical performances, and that said chairs, affixed as they were, were a part of the building itself, and passed to King under his deed to the premises; that the stage and stage fixtures and drop curtain attached thereto were also fixtures.

The findings of the court are supported by the evidence. Upon the examination of Murray with regard to the agreement or understanding under which he was to be repaid for his expenditures, he testified that he was to be repaid from the net proceeds of the business of the building; that the account was carried on in the name of the Opera House Company; that he controlled the whole thing, and, when there was enough money on hand to pay him, he had it placed to his credit; that with respect to the property in controversy, after it was removed from the opera house building he had it hauled back,

and at that time there was no agreement or understanding between himself and the Opera House Company, or its officers, with reference to the future use of the property, but that afterwards he did have such an understanding; that, being the principal owner of the stock of the Opera House Company, he had the property put back to benefit himself, and to get back the money he had expended in the construction of the building; that without that or some other furniture the house would have been valueless; it could not have been run as a playhouse without furniture; that when he replaced the furniture in the opera house, he had no agreement with the managers of the Opera House Company until the first meeting of the new board in January, 1897, when he had a tacit understanding that he was to be paid after he got his money back; that prior to that time it was all under his own control, and there was nobody to consult; he managed the opera house, and owned the house and furniture.

Maguire, who was familiar with the transaction, testified that the agreement with Murray was that he should furnish the money and fix up the house again, and repay himself from the receipts; and, when that money was paid, the furniture was to be paid for at so much a month. But it appears from the evidence that it was not until June 28, 1899, that the board of trustees of the Opera House Company adopted a resolution declaring Murray the owner of the furniture, scenery, etc., and allowing him a rental therefor.

From this testimony it appears that Murray detached the furniture from the opera house as personal property, and afterwards, becoming the owner of the majority of the stock of the corporation owning the realty, he replaced the furniture in the opera house for his own benefit, and completed the building for the purpose for which it was to be devoted, but without any agreement with the corporation itself at that time that the furniture was to remain as personal property. There can be no doubt that, upon general principles of law, such an annexation of personal property is to be treated as of a permanent nature. New York Life Ins. Co. v. Allison, 107 Fed. 179, 182, 46 C. C. A. 229. In Ewell on Fixtures, p. 57, the law is stated as follows:

"It has been often held that a building or other annexation placed upon the land of another without his previous consent, and without any contract with him, express or implied, that it may remain the property of the builder as a personal chattel, becomes a part of the realty, and may not be removed by the party erecting it, or his vendee, as against the owner of the soil; and the doctrine holds as well with respect to joint owners as to strangers. One joint tenant or tenant in common cannot erect buildings or make improvements on the common property without the consent of the rest, and then claim to hold until reimbursed the proportion of the money expended."

This principle is clearly applicable by analogy to a case where the owner of a majority of the shares of stock of a corporation, for his own benefit and advantage as a stockholder, annexes personal chattels to real property owned by such corporation. The absence of a previous agreement in such a case that the property was to remain the personal chattel of the party making the annexation is evidence of a legal intention that the property was to be regarded as a fixture,

which must prevail over the secret intention that the property was to remain separate and removable.

The resolution of the trustees of the Opera House Company on June 28, 1899, declaring that the property belonged to Murray, and allowing him a rental therefor, cannot be considered as evidence of any great value in favor of Murray. That evidence shows that the trustees of the corporation were acting in the interest of Murray, who held a majority of the stock. The resolution was therefore nothing more, practically, than a declaration by his representatives in interest. Moreover, the adoption of the resolution was more than a year after title to the property had become vested in Bender, and more than two months after the commencement of this suit. It is therefore open to the suspicion that it was passed by the trustees for the purpose of supporting Murray's claim to title.

The court below found that Murray had received the rents, issues, and profits of the property from March 11, 1899, to February 1, 1900, with full knowledge and notice of Bender's rights in the premises, and by the decree Murray was required to make restitution thereof and pay the same, with legal interest. There is no question but that Murray received the rent of the premises from McFarland, the trustee, during the time mentioned, and, upon the evidence establishing this fact, the decree of September 4, 1901, was entered, and the matter referred to the master to state an account. Upon this reference evidence was offered for the purpose of showing that the rent so received by Murray was paid over to the Opera House Company. But, objection being made to the evidence, it was excluded by the master, and exception taken; but the exception was not brought to the attention of the court below, as provided by the rules of the court, and the final decree of March 20, 1902, was entered, following the decree of September 4, 1901, and adjudging Murray liable therefor. We are of opinion that, having determined that Bender's title to the property is valid, it follows, upon the record before the court, that he is entitled to the rents, issues, and profits derived therefrom, as determined by the decree of the court below.

The decree of the Circuit Court is therefore affirmed.

THE CHICAGO.
THE CITY OF AUGUSTA.

(Circuit Court of Appeals, Second Circuit. July 25, 1903.)

No. 165.

1 COLLISION—STEAM VESSELS CROSSING—DUTY OF PRIVILEGED VESSEL.

The privileged one of two crossing steam vessels has a right to rely on the performance by the other of her duty to keep out of the way so long as it is possible for her to do so, at least in the absence of some distinct indication that she is about to fail in such duty; and, so long as such right continues, it is the duty of the privileged vessel to maintain her course and speed, unless in extremis.

2. SAME—CONTRIBUTORY FAULT.

A collision occurred at night, on the Hudson river, about 200 feet off the New York piers, between the steamship Augusta, passing up from

the sea, and the ferryboat Chicago, crossing from Jersey City. The Chicago was clearly and grossly in fault, for failing to see the Augusta until the latter was within 500 feet of the point of collision, and for then attempting to cross ahead in violation of the rules, when she might have kept out of the way by starboarding and reversing. *Held*, that under the settled rule that, in such cases, contributory fault on the part of the privileged vessel must be clearly shown, the Augusta could not be held in fault for going at a speed of 8 miles an hour, which she kept until within 500 feet of the point of collision, when she stopped her engines, it being her duty, as the privileged vessel, to maintain her speed; nor for not reversing until immediately before collision, which, if an error, was one in extremis; nor because of her nearness to the piers, which did not prevent the Chicago from keeping out of the way, nor in any way contribute to the collision.

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

For opinion below, see 102 Fed. 991.

This cause comes here upon an appeal by the Ocean Steamship Company from a final decree of the District Court, Southern District of New York, which held both vessels in fault for a collision between the steam ferryboat Chicago and the steamship City of Augusta.

Herbert Barry and Julian T. Davies, for appellant.

Henry G. Ward, Le Roy S. Gove, Henry E. Datter, and Amos H. Stevens, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. On October 31, 1899, the ferryboat Chicago left her slip at Jersey City at 12:47 a. m., bound for the upper slip at the foot of Cortland street, New York. The night was dark and overcast, the atmosphere free from fog or haze, the wind was from the northeast, and the tide at the last of the ebb, but still running strong. She followed her usual course, heading across the river for Starin's Pier, just above her slip, intending when near the pier to head down and pass in close to the lower corner. The Fanwood, a ferryboat of the Central Railroad of New Jersey, was at the same time crossing the river below the Chicago. She started two or three minutes earlier, but had further to run. Her slip adjoined the Chicago's slip on the south. The Chicago proceeded on her course at her usual speed; her captain hearing no signals from anybody, and seeing no vessel to be avoided, until he perceived the Fanwood stopping about abreast of him and swinging to port. Thereafter, for the first time, he perceived the city of Augusta—her hull, masthead light, and red light—coming straight up the river at a speed which he estimated at about 12 miles an hour. He testified that the City of Augusta at that time was 400 feet below him, was about 150 feet off the line of the piers, and her course 250 feet east of the Chicago. She was on his starboard hand, and was the privileged vessel. The statutory provisions applicable at the time are found in Act Cong. June 7, 1897, c. 4, 30 Stat. 101, 102 [U. S. Comp. St. 1901, pp. 2883, 2884]:

"Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Art. 21. When by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel, shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, slacken her speed or stop or reverse."

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

"Art. 29. Nothing in these rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

The inspectors' rules in force were:

"Rule 2. When steamers are approaching each other in an oblique direction, as shown in the diagram of the fourth and fifth situations, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, which latter shall keep her course and speed; the steam vessel having the other on her starboard side indicating by one blast of her whistle her intention to direct her course to starboard, and two blasts if directing her course to port, to which the other shall promptly respond; but the giving and answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels.

"Rule 3. If when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and, if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

"Rule 6. The signals, by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting head and head, or nearly so, but at all times when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port."

It will be noted that rule 2 had not at the time been modified, as it subsequently was, by requiring the burdened vessel to direct her course to starboard. In the situation in which he found himself, the duty of the master of the Chicago was plain. If too close to swing to starboard when the ebb might set him down upon the Augusta, he should at once have sounded one blast, have put his helm hard to starboard, stopped, and reversed. Had he done so, with a boat which swings as sharply and checks herself as quickly as the ordinary paddle-wheel ferryboat, he would have laid the Chicago, as the master of the Fanwood laid that vessel, in safety alongside the course of the City of Augusta, and, as the latter moved on, he could have passed under her stern. Instead of that, as soon as he saw the Augusta he sounded a two-blast signal, gave a jingle bell to his engine room to increase speed, and dashed straight ahead in an effort to pass in front of the bow of the rapidly approaching steamer. Such navigation was not only contrary to the articles, but was utterly reckless. When

he actually sighted the steamer, the master of the Chicago had not yet passed beyond the point at which it was possible for him to swing off to port; and, if he was so close to it that the nervousness induced by apprehension of danger obscured his judgment, his own vessel's navigation was the direct cause thereof. A careful lookout would have seen the City of Augusta much earlier—probably before the Chicago was halfway across the river—and would have thus revealed the fact that a privileged vessel was moving northward across her course. Moreover, irrespective of any lookout's report, the attention of the master of the Chicago was challenged by the stopping and the swing up river of the Fanwood, which warned him that the latter boat had encountered something in her navigation which called for maneuvers as of a burdened vessel by one crossing from west to east. Clearly the Chicago was in fault—grossly in fault—for the collision. Her counsel conceded her fault in the District Court, and concedes it here. The only question presented by the appeal is as to the navigation of the City of Augusta. Some of the findings of fact of the District Court—e. g., speed of Augusta, distance from pier line, etc., are disputed by appellant—but her navigation will be considered on the basis of the narrative given in the following excerpts from the opinion of the District Judge:

"The City of Augusta * * * was a single-screw propeller, about 302 feet long by 40 feet beam. The ferryboat was 203 feet by 65 feet beam. * * * The City of Augusta, after a detention of 11 minutes at quarantine, left there at 12:14 a. m., and was abreast of Castle Garden at 12:45. * * * Above Castle Garden her speed was probably about 10 knots. Her master estimates her distance from shore at Castle Garden at about 900 feet. It is his practice, as he testifies, to give the order to slow on reaching Castle Garden; but on this occasion, observing the Central ferryboat Fanwood coming across from her Jersey slip, * * * and approaching her slip at Liberty street, he continued on without slowing in order to pass ahead of her, giving to the Fanwood several signals of one whistle, indicating that he would pass ahead. The Fanwood, he says, answered his third signal * * * [The master of the Fanwood did not hear the earlier signals, and the testimony from all sides indicates that the wind probably interfered with the transmission of signals], * * * turned up the river, and allowed him to pass her about 200 feet distant, off Pier 8, whereupon he gave the order to slow. About a minute afterwards, as he says, he observed the Chicago approaching her slip, and gave her successively, as he testifies, at least three separate signals of one whistle, and kept on, intending to pass ahead of her as he had passed the Fanwood. He heard no signal or answer, as he testifies, from the Chicago, though the Chicago gave him two whistles at about the same time. The pilot of the Fanwood testifies that he heard only one of these signals from the Augusta, followed by an immediate alarm, to which the Chicago within one or two seconds replied with a signal of two blasts. * * * [Whether or not the master of the Fanwood understood a rapid succession of the Augusta's single whistles to be an alarm, his testimony indicates that the Augusta saw the Chicago, and signaled her more than once, before the latter blew the two whistle signal which her master says he gave immediately on sighting the Augusta.] * * * The master of the Augusta says that after his signals to the Chicago he gave the order to stop his engine, but no order to reverse until his stem was within about 25 feet of her. * * * The Augusta, when she signaled and slowed, was not over 500 feet below the place of collision. * * * When the Chicago was two-thirds past the Augusta, she was struck at about right angles by the latter's stem."

This court has repeatedly held, following the Supreme Court, that a vessel which is primarily in fault for a collision cannot shift its con-

sequences in part upon the other vessel without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster. The reckless navigation of the burdened vessel in this case calls for the application of our comments in The Transfer No. 8, 96 Fed. 253, 37 C. C. A. 462:

"The fault of the Waterman is so glaring, and its consequences precipitated a situation involving such difficulties, that we are not inclined to be severely critical of the maneuvers by which the Transfer undertook to escape from it."

The District Court held the Augusta in fault (a) for running at unduly high speed; (b) for navigating too close to the pier line; (c) for not keeping a proper lookout; (d) for not sooner reversing. The first three of these assignments may be considered together. It is argued by the appellant that 10 knots an hour was not excessive at Castle Garden, and that, at that moment becoming involved in navigation with the Fanwood, the rules forbade the Augusta to reduce speed; that the Chicago was sighted by the Augusta long before the District Court finds that she was; and advances other propositions which need not be discussed. The steamer's speed, her proximity to the piers, and the circumstance that she evidenced her observation of the Chicago by a signal only after the Fanwood had checked and swung, were not such contributing faults as will relieve the vessel primarily in fault. When the Augusta started up from Castle Garden, her master carefully scanned the east shore with his glasses, and saw that every ferry slip was free from boats whose exit his approach might interfere with. The boats eastward-bound, and as to which the Augusta was privileged, could with perfect ease, and without interfering with making their slips, have checked their course and let her pass, whether she was 200 feet or 600 feet from the pier line; and her speed being observed, as well as her course, and the rules giving assurance that both would be kept, such boats would have had no difficulty whatever in avoiding her. If it be said that a speed of 8 knots would have failed to bring her to the point of intersection before the Chicago cleared it, it may be replied that a speed of 12 knots would have carried her beyond that point before the Chicago reached it. While the Fanwood was the nearest boat, while signals were being interchanged with her, and efforts made to secure such navigation as would not result in a collision, the navigator of the Augusta could not be expected to do more than observe the Chicago, and see that she did not get so close to the danger line as to be unable to conform her navigation to the rules, and thus leave him the clear course he was entitled to receive from her as a burdened vessel, so soon as he should be disengaged from the Fanwood. If from the time the Chicago left her Jersey slip until the moment her master sighted the Augusta passing the Fanwood, she had been constantly under the most careful scrutiny of the navigators of the Augusta, it is not apparent that under the rules the latter could properly have done otherwise than they did. The Chicago was a burdened vessel on an intersecting course, drawing constantly nearer to the course of the privileged vessel. She was approaching, it is true, without giving notice by signal of what she proposed to do; but, while the

Fanwood and Augusta were exchanging notifications of intent, it might well be expected that the Chicago would refrain from interjecting her own blasts. And she had not yet approached so close to the course of the Augusta as to warrant the latter in disobeying the twenty-first article. It was pointed out in The Britannia, 153 U. S. 138, 14 Sup. Ct. 795, 38 L. Ed. 660, that the navigators of privileged vessels should not be too quick in assuming that burdened vessels are not going to yield to them, although their behavior may be erratic. The case at bar is closely parallel to that of The Delaware, 161 U. S. 466, 16 Sup. Ct. 516, 40 L. Ed. 771, where the Talisman was held free from fault, although she twice sounded signal blasts, and then an alarm, none of which were answered, "but did not change her helm or reduce her speed before collision." "Special circumstances" will sometimes render a departure from the rules necessary, but unless the navigator of a privileged vessel acts on the assumption that both vessels are going to obey the rules, until he is advised to the contrary, his nervous vacillation will often precipitate the catastrophe the rules were devised to avoid. In the case last cited the court, after pointing out that the vessels were on crossing courses, and not meeting end on, or nearly so, when a change of course by both might be required, most forcibly indicates what should be done:

"That the primary duty of the privileged vessel is to keep her course is beyond all controversy. [As the rule has been amended since, she is under an equal duty to keep her speed.] The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and perhaps of American, authority, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance' rendering a departure from the rules necessary to avoid immediate danger. Some even go so far as to hold it the duty of the preferred vessel to stop and reverse when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be in extremis, he is bound to hold to his course and speed. The cases of The Britannia, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, and The Northfield, 154 U. S. 629, 14 Sup. Ct. 1184, 24 L. Ed. 680, must be regarded as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility or even the probability of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness on the part of both which would bring about more collisions than it would prevent."

We do not understand that this clear exposition of the duty of a privileged steamer has since been qualified by the Supreme Court. The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, is cited; but that steamer was advised by signals, which the court held she was conspicuously in fault for not hearing, that the Conemaugh was about to navigate so as to involve risk of collision, should the

New York keep her course and speed. In The Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, the vessels were meeting end on, or nearly so; and a change of course of the Dumois, evidenced by the shifting of lights, was observable to the Argo, and notice to her that the former was not going to starboard, but, on the contrary, was swinging to port across her bows.

The Chicago was seen from the Augusta when leaving her Jersey slip, and again when halfway across the river. Assuming that she was not observed from the Chicago while the latter was engaged with the Fanwood, we are unable to find in that circumstance a contributing fault, because the navigation of the Augusta was the same as it should have been had the Chicago been observed. As was said before, as soon as the Fanwood swung to one side the Augusta slowed, and almost immediately afterwards again sighted the Chicago, and blew her signals (although under no obligation to do so), which were not answered. The distance between the Chicago and the course of the Augusta had then grown short, but still it was possible for the burdened vessel to have done as the Fanwood did. There is evidence that, under reversed engines and a hard astarboard wheel, such a boat could change direction almost eight points without forereaching more than a length and a half. We are of the opinion that it was not fault on the part of the Augusta to hold her course and speed so long as that possibility existed, in the absence of some definite intimation by signal or action that the Chicago was going to fail in her duty. That notification came in the two-blast whistle and the increase of speed. The Augusta did not hear the signal, but, apparently at the same time it was blown, stopped her engines. The District Court found her in fault because she did not reverse—found that, had she done so, the Chicago would have cleared her by a few feet. This may or may not be so. It is close calculation after the event, and we are to deal with the situation as it confronted the master of the Augusta at the time. He says that he did not reverse because, the Augusta having a single, right-handed screw, the action of the screw in reversing would tend to throw her to starboard, and the reduction in speed would aid the Chicago less than the change in course would imperil her. If this were an error in judgment, we think it was an error in extremis, when the navigator was called upon to deal in a few seconds with a perilous situation suddenly produced by the glaring fault of a vessel which had theretofore given no notification that she was about to violate an express rule of navigation, and that the case is on all fours with The Delaware, supra.

For these reasons, the decree is reversed, and cause remitted, with instructions to decree in conformity with this opinion.

LOUISVILLE & N. R. CO. v. SUMMERS.

(Circuit Court of Appeals, Sixth Circuit. November 3, 1903.)

No. 1,195.

1 ACTIONS—CONSOLIDATION—WRITS OF ERROR.
Where two separate actions depending on the same facts were consolidated and tried together for convenience only, but the verdicts and judgments were separate, it was improper to include both in a single writ of error.

2. RAILROADS—INJURIES AT CROSSING—LOOKING AND LISTENING—QUESTION FOR JURY.
In an action for death at a railway highway crossing, whether decedents were guilty of contributory negligence in failing to stop and look a second time before crossing the track *held* a question for the jury.

3. SAME—CONTRIBUTORY NEGLIGENCE—EFFECT—STATUTES—DIRECTION OF VERDICT.
Where a state statute provided that the contributory negligence of a person injured while crossing a railroad track should not preclude a recovery, but should be taken in mitigation of damages, and the jury might have found under the evidence that defendant railroad company in such case was at fault, it was not error for the court to refuse to direct a general verdict for defendant.

4. DEATH—PECUNIARY BENEFIT—DECLARATION.
In an action for wrongful death it was not necessary that the declaration should allege that decedents' beneficiaries, for whom the action was brought, had theretofore received any pecuniary benefit from deceased, since they were entitled to recover if they would have been likely to have received benefit from his continued existence.

5. SAME—TRIAL—INSTRUCTIONS — REFERENCE TO DECIDED CASES — ESTOPPEL TO OBJECT.
Where counsel for both parties read decided cases to the jury for the purpose of showing how courts had applied the law to similar cases, they could not object that the court, as a part of its charge, referred to a case he had previously tried merely as an illustration of the rules and principles he was enunciating.

6. SAME—EVIDENCE.
Where, in an action for injuries at a railroad crossing, it was clearly proven and admitted by counsel for defendant that decedents stopped to look and listen at a certain place before attempting to cross the tracks, the erroneous admission of evidence that decedents had made previous trips across the track on the day of the accident, and on such previous trips had stopped, looked, and listened, was harmless.

7. SAME—NEW TRIAL—GROUNDS—REVIEW.
Where, in an action for negligence, the trial court entertained a motion for a new trial on the ground that the damages awarded by the jury were excessive, and considered the reasons urged in support thereof, his estimate of the weight and sufficiency of such reasons is not reviewable.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This is a consolidated cause which includes two actions brought by the defendant in error as the administrator of the estates, respectively, of his two brothers, Thomas J. Summers and Robert H. Summers, against the railroad company, to recover damages resulting from an accident which caused the death of both of them, and which, it was alleged, was occasioned by the negligence of the railroad company. The pleadings and the facts in the two actions being identical, they were, by order of the court, consolidated, and

¶ 2. See Railroads, vol. 41, Cent. Dig. § 1173.

tried as one. Separate verdicts and judgments for the plaintiff were rendered. The writ of error is single, and brings up both judgments under the titles of each, and the assignments of error reach both the judgments.

John B. Keeble, for plaintiff in error.
Jordan Stokes, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. At the hearing of this cause our attention was attracted to the circumstance that, although it was proposed to review two separate judgments, only one writ of error was sued out and one assignment of errors filed. Technically this was irregular, as the consolidation of the causes in the court below was only for convenience in trying them. The verdict and judgments were separate, as they should have been, and had no dependence upon one another, and no relation, except that they rested upon a similar, and to some extent a common, record. But the defendant in error makes no objection on that account, and we conclude we may waive the irregularity, as was done by the Supreme Court in similar circumstances in Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508.

The accident in which the deceased brothers lost their lives occurred at a crossing of the railroad by a highway in the village or "town" of Hendersonville, Tenn.; the railroad running from northeast to southwest, and the highway almost due north and south. It happened on an afternoon in January, 1902. The decedents were riding south on the highway on a wagon drawn by two horses driven by one of the brothers; the other, riding on the side of the bed of the wagon, faced the west. At a point 50 or 60 yards north of the track, they stopped, and seemed to be looking and listening for trains which might be passing on the railroad. They then resumed their course, and did not again stop before the accident. They first crossed a side track lying 10 or 12 feet north of the main track and parallel therewith, and then, as their wagon was moving over the main track, they were struck by an engine bringing a caboose in train from the northeast at the speed of 35 miles an hour, and were instantly killed. The engine was an extra, not running on the regular time schedule. On the side track east of the crossing was standing a long train of cars, which, with the depot buildings, obscured to some extent trains moving on the main track for a distance of about 600 feet, at which point the track turns to the left, and runs through a cut, further obscuring the track and trains upon it, from the place where the decedents stopped, as above mentioned. But there was testimony tending to show that the tops of cars moving on the main track could be seen over those standing on the side track from where the brothers stopped and looked and listened for approaching trains, and, by inference, the smokestack of the engine also.

There is a statute in Tennessee which alters the common-law rule in respect to the effect of contributory negligence of the plaintiff by prescribing that it shall not absolutely preclude recovery, but shall be taken in mitigation of damages. It was contended for the railroad company that the decedents were so clearly negligent in not

again stopping to look and listen before attempting to cross the main track that the court ought to have taken that question from the jury, and not to have assumed it to have been fairly open in instructing them. A long and very thorough analysis of the testimony and comparison thereof with the facts of many adjudged cases is made by learned counsel for the plaintiff in error in support of this contention. But we think that, conceding the general rule of the duty to stop and look and listen, it is not, as an entirety, applicable to all circumstances; nor is there any more definite statement of the measure of time, or the intensity and particularity of the attention which must be given, than that the caution a reasonably prudent man would give, in the circumstances, must be exercised. Nor can the distance from the track at which the precaution is to be taken be fixed by any more definite test. It might have been thought by the jury that the decedents took such reasonable precaution in stopping when they did to look and listen, and were justified in being satisfied, by what they observed, that the passage was clear of danger. There was evidence that the place where the deceased parties stopped was better than any other, unless, perhaps, very close to the track, for observing the condition of things on the railroad in the direction from which danger might be apprehended, and that their means of observation there were sufficient to excuse them from again stopping for the same purpose. And the jury might also have thought that the degree of caution which they were bound to exercise was in some measure affected by their supposition that the railroad company would observe its duty, in that locality, of blowing the whistle or ringing the bell of the engine in running through the town. We do not mean to say that such a supposition may be absolutely relied upon as an excuse for not taking due precaution, but it would seem to be an element to be taken into account in considering the reasonableness of the conduct of the decedents, and that the railroad company ought not to complain thereof.

There was a request that the court should direct a general verdict for the defendant, which the court denied. The defendant excepted. But, as we shall hereafter indicate, it cannot be successfully contended that the jury might not have found the defendant at fault, and the controversy was reduced, under the statute above referred to upon the effect of contributory negligence, to a question of damages, and the court could not have charged that the plaintiff was not entitled to a verdict for any amount.

At the close of the judge's charge to the jury the record states that the defendant's counsel requested the court to give the jury certain special instructions, which the court refused, to which action of the court in refusing the said instructions counsel for defendant then and there severally excepted. The exceptions taken by the plaintiff in error to the refusal of requests for instructions and to instructions given furnish the ground for 25 assignments of error. Some of these assignments have been dropped in the brief and argument. We have given attentive consideration to those which are still insisted upon, but shall discuss only those which seem to us to materially concern

the merits of the case. The following direction was requested by the defendant:

"In regard to the case of J. M. Summers, administrator of Robert Summers, you are instructed that, in view of the fact that the declaration in this case does not allege any pecuniary damage to the plaintiff, and does not set forth that the beneficiaries for whose benefit this suit was brought, had ever received any pecuniary benefit from the deceased, the plaintiff can recover only nominal damages in this case in case you should find for the plaintiff."

The request was refused, and, as we think, properly. It was not necessary to allege in the declaration that the beneficiaries had theretofore received any pecuniary benefit from the deceased. The material question was whether they would have been likely to have received any if his life had not been cut short. The accident happened, as above stated, in the town of Hendersonville. A statute of Tennessee (Shannon's Code, § 1574, subsecs. 3, 4) prescribed the duty of the railroad company in running its trains in such places as follows:

"(3) On approaching a city or town the bell or whistle shall be sounded when the train is at a distance of one mile, and at short intervals until it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals until it has left the corporate limits.

"(4) Every railroad company shall keep the engineer, fireman or some other person upon the locomotive, always upon the lookout ahead, and when any person, animal or obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

And section 1575 declared that:

"Every railroad company that fails to observe these precautions or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur."

And the question of fault on the part of the defendant was tried by the test as to whether it had complied with these provisions of the law. There was evidence tending to prove that there was no sounding of the whistle or bell, such as required by subsection 3, especially the requirement that it shall be at short intervals, and there was also evidence tending to prove that no proper lookout ahead was kept on the engine as required by subsection 4. We are not, of course, to be understood as deciding that the facts were so. But we are constrained to think that the evidence was such as that the court could not properly take the question from the jury. It would serve no useful purpose to detail the testimony. The circumstances of cases differ so much that precedents are about as likely to embarrass as to aid the solution of such questions. The court charged the jury in clear and unmistakable language that, if the defendant complied with those requirements, the plaintiff could not recover, thus eliminating from the case all question of the right of plaintiff to recover upon common law grounds.

The assignment of error which has exercised us most is one which is directed to a part of the judge's charge in which he referred to a case which he had tried in another jurisdiction (the case of Grand Trunk R. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed.

485, as we suppose), the details of which he recited, as well as the verdict of the jury, and his ruling thereon, which was affirmed by the Supreme Court of the United States. This was done in a way which possibly indicated a precedent for them, although the judge stated to the jury that it was an illustration merely of the rules and principles he was laying down for them. If this were all, we should be disposed to say there was error in thus, perhaps, leading the jury away from their own duty to the acceptance of a wholly irrelevant precedent. But we discover in the bill of exceptions that the counsel for the respective parties had paved the way for such a practice by themselves reading decided cases to the jury to show how the courts applied the law to such cases, and counsel for defendant had read in particular a case which showed how the court had dealt with certain facts involving the duty "to stop and listen" in coming upon a railroad, and held that upon the facts the plaintiff was not entitled to recover. Northern Pac. R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. And the judge referring to that and the case he had himself instanced, said:

"The two cases are not all in conflict with each other, but the circumstances were different. And it is the circumstances of a particular case, and of this case that is before you, by which you are to judge. I have given you the two cases so that you can see how the courts deal with them."

In these circumstances, we are inclined to overrule the exception.

Another thing which seems somewhat serious is this: The decedents were that day drawing sand from the south over the railroad to the north, and had made previous trips. The plaintiff was allowed, against objection, to prove that on the previous trips the decedents had stopped and looked and listened before crossing the railroad. It was offered and admitted as corroborating the evidence of witnesses who testified to the stopping just before the accident by showing that the deceased brothers were accustomed to use care. We have no doubt this testimony was irrelevant, and improperly received. But we think the error was harmless. The fact that the decedents did stop to look and listen, and at the place above mentioned, before crossing the track at the time of the accident, was clearly proven, and not disputed, as counsel for plaintiff in error conceded upon the argument. The only question raised here upon this subject is whether the decedents should have stopped after they got by the obstructions to their sight, and just before coming upon the track, when they got in range, to look up the track to the northeastward.

It is also assigned as error that the judge refused to "set aside the verdicts because they were contrary to the preponderance of the evidence." It has been often said by this court that it will not review the action of the lower court in its disposition of a motion for a new trial or other matters addressed to its discretion. But we have held that for a refusal to exercise its discretion upon a motion of which it should take cognizance, a writ of error will lie. The ground on which this assignment of error is supported in argument is that the court would not consider, for instance, the reasons urged for mitigation of damages. But the fact remains that the court did entertain

the motion, and did consider the question whether the damages were excessive. There is nothing to show that it did not consider the reasons urged for thinking the jury had not done its duty in respect of mitigating them. In denying the motion the learned judge said, upon this subject, that he could not say whether the jury had given due attention to his instruction that the damages should be mitigated, if they found the decedents had been guilty of contributory negligence; and in respect to the measure of damages he said that he would not allow a recovery so excessive as to shock the intelligence, the conscience, of the court. We cannot enter upon an estimate of the weight which the trial judge should have given to the reasons urged for or against the motion. To do so would be to say, in effect, that the decision of such motions is open to review—a proposition directly contrary to what we have repeatedly held and is everywhere the rule in federal courts.

There are some minor questions involved in the larger ones which we have considered. We have looked into them, but have not found them grave enough to require independent discussion. What we have said covers all that are material.

The court correctly charged the jury upon all the pertinent questions of law with much fullness and particularity, and many of the requests of the defendant for instructions, the refusal of which is complained of, were in substance given to the jury. Others we have already considered.

Perceiving no serious error, we conclude that the judgment should be affirmed.

ANVIL GOLD MIN. CO. v. HOXSIE et al.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1903.)

No. 900.

1. ATTACHMENT—ACTION ON BOND—CONCLUSIVENESS OF JUDGMENT IN ORIGINAL ACTION.

In an action on an attachment bond given under Alaska Code, § 137, conditioned, as therein provided, for the payment of "all costs that may be adjudged to the defendant and all damages he may sustain by reason of the attachment if the same be wrongful or without sufficient cause," a judgment in favor of the defendant in the attachment suit is conclusive that the attachment was without sufficient cause, and of the liability of the obligors upon the bond.

2. SAME—EFFECT OF GIVING BOND TO RELEASE ATTACHMENT—ESTOPPEL.

A defendant in an attachment suit under the Alaska Code, who gives the undertaking provided for by section 150 for the release of the attachment, is not thereby estopped to maintain an action on the attachment bond to recover his costs and the damages he may have sustained by reason of the attachment, if it is finally determined that plaintiff had no cause of action, although he may be held to have waived irregularities or defects in the attachment proceedings.

3. SAME—ACTION ON BOND—DEFENSES.

Where the complaint in an action to recover damages for wrongful attachment alleges that plaintiff lost the use of the attached property for a stated time, allegations in the answer setting up the proceedings in the attachment suit, showing that plaintiff procured the release of the

property shortly after it was seized, while not stating a complete defense, are relevant and material on the question of damages, and not subject to demurrer.

4. SAME.

In an action on an attachment bond to recover costs and actual damages for the payment of which the bond is conditioned, the good faith of the plaintiff in the attachment suit and the sureties on the bond is immaterial, and constitutes no defense.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

On the 18th day of September, 1900, one Carrie B. Lee brought suit in the District Court for the District of Alaska, Second Division, against the Anvil Gold Mining Company, a corporation, upon an alleged implied contract for the direct payment of money, to recover the sum of $923, together with costs. Plaintiff applied to the clerk of the court for a writ of attachment against the property of the defendant, and thereupon, and on the same day, C. E. Hoxsie and Robert Lyng executed, and on the 19th day of September, 1900, filed with the clerk of the court in that action, an undertaking for writ of attachment, under the provisions of section 137 of the Alaska Code of Civil Procedure (Act June 6, 1900, c. 786, 30 Stat. 354). The undertaking provided that if the defendant should recover judgment in said action the plaintiff would pay all costs awarded to the defendant, and all damages which it might sustain by reason of the attachment, not exceeding the sum of $1,200. Upon the application and undertaking being filed, the clerk of the court issued a writ of attachment directed to the marshal of the district and division, requiring the marshal to attach and safely keep sufficient property of the defendant to satisfy the demand of the plaintiff. In pursuance of the writ of attachment the marshal, on the 19th day of September, 1900, executed said writ by attaching the schooner Seven Sisters, her sails, tackle, apparel, and furniture. On the 11th day of October, 1900, the Anvil Gold Mining Company, the defendant in the action, made application to the court, under section 149 of the Code of Civil Procedure, for an order releasing the writ of attachment, and for that purpose filed with the clerk of the court an undertaking, under section 150 of the same Code, for the release of the attached property. Thereupon the court made an order that the attachment be discharged, and pursuant to such order the attachment was released and discharged, and such further proceedings were had that on the 16th day of May, 1901, the defendant recovered a judgment against the plaintiff for the sum of $39 and the costs in said action. Thereupon the Anvil Gold Mining Company, the defendant in that action, brought the present suit against C. E. Hoxsie and Robert Lyng, the sureties on the attachment bond given by the plaintiff in the former action, to recover the sum of $1,200, the penal amount of the bond.

It is alleged in the amended complaint that at the time of the issuing of the attachment the plaintiff was the owner of the schooner Seven Sisters, her tackle, sails, apparel, and furniture, then lying at Port Safety, in said district; that the marshal, pursuant to the said writ of attachment, levied upon, attached, and took possession of the said schooner, her sails, tackle, apparel, and furniture, and thereby the plaintiff lost the use, earnings, and profits of the same from the said 19th day of September, 1900, to the ——— day of June, 1901, and the said schooner was compelled to remain in the ice during the winter of 1900–1901, being thereby greatly injured, all to plaintiff's damage in the sum of $2,000. It is alleged that the attachment was wrongful and without sufficient cause. It is also alleged that the plaintiff, on the 16th day of May, 1901, recovered judgment against Carrie B. Lee, in the attachment suit, in the sum of $39 and costs of suit.

The defendants, answering the amended complaint, deny that the attachment was wrongful or without sufficient cause; deny any knowledge or information as to whether the plaintiff was the owner of the schooner Seven Sisters, her tackle, sails, apparel, and furniture; and deny that the

¶ 4. See Attachment, vol. 5, Cent. Dig. § 1241.

plaintiff suffered damage in the sum of $2,000, or any other sum. And for a further and separate answer and defense the defendants recite the commencement of an action against the Anvil Gold Mining Company by Carrie B. Lee; the issuing of an attachment therein on the 18th day of September, 1900; and the levy of the attachment upon the said schooner, the property of the Anvil Gold Mining Company, on the 19th day of September, 1900. It is also alleged that upon a sufficient undertaking being filed by the company on the 11th day of October, 1900, the attached property was turned over to the company, and the attachment discharged. It is alleged, as a further and separate defense to the action, that Carrie B. Lee, the plaintiff in the attachment suit, and the defendants in this action, were advised by counsel that the plaintiff in the attachment suit had a good, sufficient, and meritorious cause of action, and, being so advised, the defendants signed the undertaking set forth in the complaint, acting in good faith, and in an honest belief that the plaintiff in the attachment suit had a good, sufficient, and meritorious cause of action against the Anvil Gold Mining Company, and not for the purpose of harassing, annoying, and damaging the said mining company in any wise. It is also alleged, for a further and separate defense to the action, that the said Anvil Gold Mining Company, the defendant in the attachment suit, filed an undertaking with the clerk of the court for the release of said attachment, the sureties in said undertaking obligating themselves that in consideration of the release of said attachment they would pay to the plaintiff in that action the amount of whatever judgment might be recovered by her in said action, together with costs and disbursements, and thereupon the attachment was discharged, and it is alleged that thereby the defendant mining company (plaintiff herein) waived all rights of action on the undertaking set forth in the amended complaint herein. To each of these several, further, and separate defenses plaintiff herein demurred, on the ground that they did not constitute a defense to the action. The court overruled the demurrer to these further and separate defenses, holding that they were sufficient, and the plaintiff electing not to reply to the answer, but to stand on the demurrer, judgment was entered against the plaintiff. The plaintiff thereupon brought the case to this court upon writ of error.

Keller & Fuller, F. E. Fuller, and George D. Campbell, for plaintiff in error.

W. T. Hume, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts in the foregoing language, delivered the opinion of the court.

The Alaska Code of Civil Procedure provides, in chapter 14 (Act June 6, 1900, c. 786, 30 Stat. 353), for an attachment proceeding. Section 135 provides when plaintiff may have defendant's property attached. Section 136 provides that the writ of attachment shall be issued by the clerk of the court in which the action is pending whenever the plaintiff, or any one in his behalf, shall make and file an affidavit showing certain particulars concerning defendant's indebtedness, the absence of security, and that the attachment is not sought nor the action prosecuted to hinder, delay, or defraud any creditor of the defendant. Section 137 provides as follows:

"Upon filing the affidavit with the clerk, the plaintiff shall be entitled to have the writ issued as soon thereafter as he shall file with the clerk his undertaking, with one or more sureties, in a sum not less than one hundred dollars, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages that he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking. With the undertaking the plaintiff

shall also file the affidavits of the sureties, from which affidavits it must appear that such sureties are qualified, and that taken together they are worth double the amount of the sum specified in the undertaking, over all debts and liabilities and property exempt from execution."

The complaint in the present case alleged that the attachment in the suit of Carrie B. Lee v. The Anvil Gold Mining Company was wrongful and without sufficient cause. This allegation was denied in defendants' answer. The judgment in the attachment suit set forth in the complaint determined that the plaintiff had no cause of action against the defendant upon the facts stated in the complaint in that action. What effect did this judgment have upon the attachment? Did it not determine that the attachment was wrongful and without sufficient cause? In other words, can an attachment of the defendant's property be right and for a sufficient cause when the plaintiff has no cause of action against the defendant? Can an attachment issued to secure the satisfaction of a judgment be right and sufficient where there is no debt upon which a judgment can be entered? We think not. If the attachment suit terminates by a finding in favor of the defendant on an issue as to the truth of the facts alleged as the ground for the attachment, then the judgment conclusively establishes that the attachment was wrongfully obtained; and the same result follows if, when the attachment was obtained, there was no debt due from the defendant to the plaintiff. Drake on Attachment (7th Ed.) § 173; Lockhart v. Woods, 38 Ala. 631; Tucker v. Adams, 52 Ala. 254; Steen v. Ross, 22 Fla. 480; Young v. Broadbent, 23 Iowa, 539; Wetherell v. Sprigley, 43 Iowa, 41; Harger v. Spofford, 46 Iowa, 11; Farrar v. Talley, 68 Tex. 349, 4 S. W. 558.

The basis of the attachment proceeding is a cause of action upon a contract, express or implied, for the direct payment of money. When the cause of action fails the attachment fails, and for the reason that it is without sufficient cause. The obligation of the undertaking upon attachment is not that the plaintiff will pay all costs that the defendant may incur, and all damages he may sustain by reason of the attachment having been allowed wrongfully, or allowed without sufficient cause, but it is that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages that he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause. The liability of the undertaking is determined, not upon a separate issue relating to irregular or defective attachment proceedings, but upon the issues of the case relating to the cause of action. This interpretation of the statute is made clearer by considering other sections of the chapter of the Code relating to attachments. Section 151 provides that "the defendant may at any time before judgment, except where the cause of attachment and the cause of action are the same, apply to the court or judge thereof where the action is pending to discharge the attachment in the manner and with the effect as provided in sections one hundred and twenty-one and one hundred and twenty-two for the discharge of a defendant from arrest." Section 121 (chapter 12) provides that "a defendant arrested may, at any time before judgment, apply on motion to the court or judge thereof in which the action is pending, upon notice to the plaintiff, to vacate the writ of ar-

rest." Section 122 provides: "If a motion be made upon affidavits or other proofs on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those upon which the writ was issued. If upon the hearing of such motion it shall satisfactorily appear that there was not sufficient cause to allow the writ, or that there is other good cause which would entitle him to be discharged on habeas corpus, the same shall be vacated, or in case he has given bail the court may discharge the same or reduce the amount thereof on good cause shown." Under these sections of the Code, the question to be determined upon a motion to vacate the attachment prior to the judgment in the case is whether there was "sufficient cause to allow the writ" or "other good cause" shown entitling the defendant to the discharge of the writ. These "causes" necessarily relate to defects and irregularities apparent on the face of the proceedings, and not to any question involved in the cause of action. Bank of Winnemucca v. Mullaney, 29 Or. 268, 45 Pac. 796. It was further held in that case that the statute of Oregon, as it then stood, providing that the writ of attachment might issue in all actions for the payment of money without specifying any other cause, rendered it unavailable for the discharge of the writ of attachment in that case, as the cause of attachment and the cause of action were the same, and within the exception contained in section 145 of Hill's Code (section 151, Alaska Code). We now see the significance of the language of section 137 of the Alaska Code, requiring that the undertaking on attachment shall be security for "all costs that may be adjudged to the defendant, and all damages he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause." It is the final judgment in the case that is to determine the liability of the obligors upon the attachment undertaking. But the appellees contend that the appellant, the defendant in the attachment suit, having given an undertaking for the release of the attachment under section 150 of the Alaska Code, has waived the right to raise the question whether the attachment was wrongful or without sufficient cause, or, as stated by the court below, the defendant waives all irregularities and defects in the original attachment proceedings, and admits an estoppel in the attachment suit against the attachment sureties by giving the bail required by the statute. It may be admitted, for the purposes of this case, that when the defendant in an attachment suit under the Alaska Code gives the undertaking provided in section 150, he waives his right to question mere irregularities and defects apparent upon the face of the original attachment proceedings; but it does not follow that he admits an estoppel as against a judgment in the attachment suit, where the cause of the attachment and the cause of action are the same. The reason why the defendant in an attachment suit who gives an undertaking for the release of the attachment may be deemed to have waived his right to question the regularity and correctness of the attachment proceedings is because there is no practical method provided for afterwards determining in the progress of that case the question whether there were irregularities or defects in such proceedings or not. The only issues left to be determined, after the release of the attachment, are

those relating to the cause of action; and where, as in this case and under the statute under consideration, these issues are the same as the cause of attachment, they are necessarily determined by the judgment, and all other questions may be deemed to have been waived. But this waiver extends no further, and there is no implied estoppel beyond that which appears upon the face of the attachment proceedings, and relating to such proceedings, that will deprive the defendant of the right to recover all costs he may have incurred and all damages he may have sustained by reason of the attachment, if it is finally determined that the plaintiff had no cause of action.

The court below was of the opinion that the Supreme Court of Oregon, in Drake v. Sworts, 24 Or. 201, 33 Pac. 563, construing provisions of the Code of Civil Procedure of Oregon which were copied into the Alaska Code, had practically decided that an undertaking on release of attachment was a waiver of a right of action on the undertaking given on procuring the attachment. One of the questions before the court in that case was whether the execution and delivery by the plaintiff (the defendant in the attachment suit) of a redelivery bond, as provided in section 154 of Hill's Code of Oregon (section 145, Alaska Code), operated as a discharge of the attachment and a waiver of the right of action on the undertaking on attachment. The court was of the opinion that there was a distinction between the effect of the bail bond and a redelivery bond; that the former, being given as security for the payment of such judgment as might be recovered in the action, operated to discharge the attachment, and was probably a waiver of the right of action on the undertaking, but that the latter, being an engagement to redeliver the attached property or pay the value thereof, did not dissolve the attachment or withdraw the property from the operation of the lien thereon, and did not therefore operate as a waiver of the right of action on the undertaking for the attachment. The latter question was before the court, the former was not, and the statement made concerning the former question was not essential to the decision of the main question. The court, however, referred to the case of Rachelman v. Skinner, 46 Minn. 196, 48 N. W. 776, as supporting its views upon the collateral question. In that case suit was brought by the defendant in the attachment proceedings, not against the plaintiffs and their sureties on the attachment bond, but against the plaintiffs alone, to recover damages for the issuance of the attachment against the property of the defendant alleged to have been maliciously sued out by the plaintiffs. After the attachment had been issued the defendant executed the bond provided for by the statute, and procured an order for the discharge of the attachment. Afterwards the defendant moved to set aside the attachment, upon affidavit and notice, and this motion the court granted, and also set aside the bond previously given by the defendant for the release of the attachment. Upon the trial of the action to recover damages for the issuance of the attachment, the court held that the defendant in the attachment proceedings had waived his objections to the validity of the attachment by giving the bond and procuring the discharge of the attachment. The case was accordingly dismissed. On appeal to the Supreme Court of the state

the judgment of the lower court was affirmed, the appellate court holding that where an attachment is dissolved by the action of the defendant without an opportunity to the opposite party in the same proceeding to test the validity of the writ of attachment an action for wrongfully procuring the writ to issue could not ordinarily be maintained. That decision has no application to a case where the original judgment in the attachment suit determines the validity of the writ and the action for damages is upon the undertaking.

The case of Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. 711, is also cited as sustaining the dictum of the Oregon court in Drake v. Sworts. That case was a suit against the surety upon the bond given by the defendant in the attachment proceedings for the release of an attachment. When the bond had been given the property was released. Afterwards the surety on the bond for the release of the attachment filed an affidavit denying the statements contained in the affidavit of the plaintiff upon which the attachment was issued, and the attachment was discharged. The bond upon release of attachment was conditioned that the defendant would perform the judgment of the court. The plaintiff obtained a judgment, and then brought suit upon the bond given by the defendant to recover the amount of the judgment. The surety undertook to defend the action upon the ground that the attachment had been discharged. The Supreme Court held that the surety was absolutely liable on the undertaking, without reference to the question whether the attachment was rightfully or wrongfully issued, and that the attachment defendant was precluded by such an undertaking from controverting the grounds of the attachment. If this decision is authority upon any question before the court in the present case, it is that the defendants, as sureties on the attachment bond, are made absolutely liable on their undertaking by the judgment in the case. It is certainly not authority for the proposition that the sureties on the attachment bond are released by the discharge of the attachment. Fox v. Mackenzie (N. D.) 47 N. W. 386, and McLaughlin v. Wheeler (S. D.) 47 N. W. 816, simply hold that the defendants in the attachment suit, having given the statutory undertaking to discharge the attachment under which the property has been seized, could not afterwards have the attachment dissolved because improvidently issued. The last case was, however, before the Supreme Court upon a rehearing. McLaughlin v. Wheeler (S. D.) 50 N. W. 834. It appeared that the motion to discharge the attachment in that case was based upon the ground that the summons had not been served or published as required by law, and, this fact having been found by the court, its previous opinion was so far modified as to hold that, upon failure to serve or publish summons as provided by the statute, defendants were entitled as of right to the release of the attached property, and that therefore there was no consideration for the undertaking. In other words, while the surety on a bond for the release of an attachment may not, after giving such a bond and securing the release of the attachment, have the attachment dissolved because of a mere irregularity in the attachment proceedings, he may nevertheless show that the attachment proceedings were void. There is no principle of

waiver or law of estoppel in this case, or in any of these cases, that deprives the defendant in the attachment suit of his right of action against the plaintiff and the sureties on the attachment bond to recover damages sustained while the attachment is in force, and this we believe to be the law upon the subject. Cases apparently holding otherwise will be found, upon examination, to turn upon some differences in the statutes upon which they are based. The general rule, and the one applicable to the present case, is that the liability of the sureties on the attachment undertaking is measured by the conditions contained in that obligation. As said by the Supreme Court of Alabama in Tucker v. Adams, 52 Ala. 254, 256:

"An attachment is an extraordinary remedy, prescribed by the statute for extreme cases, and harsh in its operation. Its levy deprives the party against whom it issues as completely of the possession of his property as the levy of final process founded on a final judgment. The nature of the remedy required that the party against whom it issues should have a more ample remedy against its misuse or abuse than that which the common law afforded. The injury resulting from such misuse or abuse is more direct, and greater in degree, than that which follows the misuse or abuse of common-law process or of ordinary remedies. These do not authorize the seizure of property, nor do they involve imputations affecting more or less reputation and credit. Hence the statutes of this state have always required, as a condition precedent to the suing out of an attachment, bond with sufficient security, in a penalty of double the amount of the demand sued for, conditioned for the payment to the defendant of all such damages as he may sustain from the wrongful or vexatious suing out of the attachment; * * * the action on the bond for the recovery of damages being a plenary remedy for all the injury which could result if the cause did not exist."

The amended complaint alleges that by reason of the attachment the plaintiff lost the use, earnings, and profits of the property attached from the 19th day of September, 1900, to the ——— day of June, 1901. In the first further and separate answer and defense the defendants set up the entire attachment proceedings, and among other things allege that on the 11th day of October, 1900, in pursuance of an order of court, the marshal released and discharged the attachment, and turned over and delivered to the plaintiff the property attached in the action, and that since that time the property has not been in the possession of the plaintiff in the attachment suit or in the possession of the marshal. While these proceedings do not constitute a complete defense to the action, they are relevant and material to the question of damages, and present an issue as to the period of time the property was under attachment. The allegations of this defense are therefore proper for that purpose. The demurrer to this defense was therefore properly overruled.

The second further and separate answer and defense alleges facts tending to show that the plaintiff in the attachment suit and the sureties on the attachment bond acted in good faith upon the advice of attorneys in the attachment proceedings, having an honest belief that the plaintiff in that action had a good and meritorious action against the defendant in the suit, and that the bond was not given to harass, annoy, or damage the defendant. If the present action had been brought for the misuse or abuse of process, and it had been alleged that the attachment proceedings had been prosecuted mali-

ciously and without probable cause, the facts alleged in this defense would have been relevant and material upon the question of exemplary damages. But the action is upon the undertaking, to recover the costs awarded to the defendant in the attachment suit and the damages which the defendant sustained by reason of the attachment, limited by the undertaking to the sum of $1,200. The good faith of the parties in prosecuting the attachment proceedings is therefore irrelevant and immaterial upon this question. Drake on Attachments, § 174. The demurrer to this defense should have been sustained.

The third further and separate defense and answer alleges the giving of the bond for release of the attachment on October 11, 1900, in the attachment suit, and alleges that by reason of the filing of such undertaking and the release of the attachment the defendant in that suit (plaintiff in the present action) waived all rights on the undertaking set forth in the amended complaint. We have sufficiently discussed this defense, and have determined that it cannot be sustained.

It follows that the judgment of the Circuit Court must be reversed, with directions to the court below to sustain the demurrer to the second and third further and separate defenses, with leave to the plaintiff to file a reply to the answer.

ELDER DEMPSTER SHIPPING CO., Limited, v. POUPPIRT.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1903.)

No. 495.

1. ADMIRALTY JURISDICTION—TORTS COMMITTED ON HIGH SEAS—FOREIGN SHIPS.

   A court of admiralty of the United States has jurisdiction of an action in personam against the owner of a foreign ship to recover for injuries sustained by an American passenger on the high seas, irrespective of the law of the ship's flag, the case being governed by the general maritime law as administered in this country.

2. SHIPPING—CARRIERS OF PASSENGERS—LIABILITY FOR INJURIES.

   A ship is not bound to the same strict responsibility for the safety of passengers as in the case of goods, but is bound to exercise a high degree of care, while the passenger is also required to exercise reasonable care for his own safety.

3. SAME—ASSUMPTION OF RISK BY PASSENGER—UNNECESSARY EXPOSURE TO DANGER.

   A passenger who voluntarily leaves a place of safety on a ship without necessity, and goes to a part of the ship where there is danger, of which he has knowledge, or which is obvious, assumes the increased risk therefrom, and he cannot recover from the ship or its owners for an injury so received because he was not given warning, which, under such circumstances, was unnecessary.

4. SAME—EVIDENCE CONSIDERED.

   Libelant was one of three passengers on a freight vessel on which he had been for some three months. Before making port on the return voyage, the crew were engaged in tearing down a temporary structure built on the deck for the housing of cattle on the outward voyage and throwing the timbers over the side. After being on the bridge with the other passengers watching the work for the greater part of a day,

libelant toward evening went upon the deck and stood near the rail where the men were at work, and while there he was struck and injured by a long timber which had been shoved over the rail endwise in the usual manner until it overbalanced, the motion of the ship causing the upper end to swing forward when the other end struck the water. *Held*, that the proximate cause of the injury was the act of libelant himself in going without necessity to a place of danger, and that the officers of the ship were guilty of no negligence which rendered the owners liable therefor.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

For opinion below, see 122 Fed. 983.

H. H. Little (Robert M. Hughes, on the brief), for appellant.

Floyd Hughes (F. M. Whitehurst, on the brief), for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and KELLER, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the District Court of the United States for the Eastern District of Virginia, sitting in admiralty. Frank A. Pouppirt filed his libel in personam in the court below against the Elder Dempster Shipping Company, Limited, of African House, a corporation created under the laws of Great Britain and Ireland, on the 21st February, 1902. The defendant, being a foreign corporation, could not be found nor served with process within the district. An attachment was issued out of the said court on the same day, under which the British steamship Montenegro was attached and taken into custody by the marshal as the property of said respondent. The vessel was released on bond. Prior to this a libel in rem had been filed against the steamship Montenegro by the same libelant for the same cause of action, and the steamship released on a similar bond, under a stipulation that, if the defendant and its sureties are held liable on the bond taken in attachment, they will not be held liable on the bond taken upon the libel in rem. The respondent has answered the libel in personam, and, after excepting to the jurisdiction of the court, traversed the main allegations of the libel.

The steamship Montenegro was chartered by the respondent, her owner, to take a cargo of mules from the port of New Orleans to a port in South Africa. The libelant was engaged to go on the steamer as a veterinary surgeon by the British government, and went on the said steamer as a passenger, his expenses to be paid at Cape Town, South Africa, and from port of arrival, on his return to the United States, to Denver, Colo. The ship took the cargo of mules to South Africa, delivered them, and started on her voyage to New Orleans for another cargo. When she reached the mouth of the Mississippi she was met by a telegram instructing her to go to Galveston for a cargo of cotton. She at once, greatly to the disgust and against the protest of libelant and two others, also veterinary surgeons, on the ship, set out for Galveston, libelant and his companions having in vain sought the means of going ashore at Port Eads, at the mouth of the Mississippi. In order safely to transport the mules, the vessel had had stalls and other fixtures set up in her hold

and on the main deck. The structure on the main deck extended from the bridge to the forecastle, and was covered over with a good roof; this roof, in effect, making another deck extending from the bridge forward. The timbers used in the construction of this structure were many of them long and heavy. On the roof of this structure the passengers and officers of the ship could take exercise, and frequently used it for this purpose. When he was on this voyage to Galveston under his new instructions, the master of the Montenegro began to prepare his ship for a cargo of cotton. To this end he employed his crew and a gang of muleteers, who having gone with the mules to South Africa, were now returning. These tore down the partitions and stalls in the hold and dismantled the structure on the deck. This work of demolition began on the day after leaving Port Eads; that is, 13th November, 1901, and was continued all the next day. Two gangs were employed, one under the mate on the starboard side of the ship, and the other under the boatswain on the port side. The smaller pieces, as they were disengaged, were sent over the side of the ship in a basket. The steam winch of the ship was used for this purpose. The longer and larger beams, after being disengaged from their fastenings, were lifted by the workmen and placed on the rail of the ship and shoved along until the weight of the part over the rail counterbalanced that on the ship. They were then let go, striking the water and falling overboard. As the vessel was moving through the water at the rate of eight or ten knots, the ends of the beams, being shoved overboard, when they struck the water, were driven aft, and that portion of the beams resting on the rail, which acted as a sort of pivot, were necessarily driven forward. Of course, there was great danger during this operation to every one on the main deck in proximity to the beams which were being put overboard. During the morning of the day on which the working parties were thus dismantling the ship, the libelant and his companions were on the bridge, watching the operation with interest. They saw very many beams disposed of as above described, and very great progress was made in the work. The libelant and the other doctors lived in the cabin at the stern of the ship occupied by the officers. During the afternoon the libelant, after afternoon tea, went down upon the main deck where this work was being performed. A very short time afterwards, whilst he was on that deck in proximity to a large beam, which was in the act of being discharged over the side of the ship, he was struck a violent blow on the head by that part of the beam still over the ship, the other end having struck the water. The lower end of the beam having been suddenly drawn aft, the upper end of the beam was canted forward. There is conflict in the testimony upon two principal points. The libelant denies that he was warned either against going on the deck or whilst upon the deck. He heard a cry immediately before he was struck, which he did not understand. Witnesses for respondent say that whenever a beam was thrown in this way overboard, the general warning had been given by the crew of "Look out!" and also that the libelant had been specially warned about going on the main deck where the men were at work. An-

other point of contradiction is as to the place in which he was standing when the blow came. On his behalf it is said that he was on the deck four or five feet from the rail, looking at the ship. The witnesses for the respondent say that when he was on the deck he ran to the rail whilst the beam was being shoved over it, and watched it as it fell in the water. Whilst he was leaning over the rail and looking down, the beam slid on the rail and struck him. The court below heard the case upon testimony taken before him and by deposition, gave a decree for the libelant, and fixed his damages at $12,000. An appeal was allowed, and the case comes up on many assignments of error. The first two of these are error in entertaining jurisdiction of the case and error in not holding that the action is governed by the law of Great Britain, and that therefore libelant had no right of action in admiralty. The other assignments of error go to the merits; error in holding that respondent was guilty of negligence; error in holding respondent for damages; error in granting excessive damages; error in admitting the libelant to say that, if he had been warned not to go to the scene forward by the captain, he would have obeyed him, but that in fact he had no such warning.

As to the Jurisdiction.

The respondent insists, as the cause of action in this libel originated on the high seas, on a British ship flying the British flag, it must be treated as if it occurred on British soil, solely within the jurisdiction of the British courts. The appellant admits that many decided cases sustain the general jurisdiction of our courts in admiralty over cases of tort arising on the high seas on vessels of other nationality than ours. But he insists that these are cases of collision where the tort did not occur wholly on either ship, or contracts of carriage, or for seamen's wages; all of which are communis juris, and are cognizable by courts of admiralty of all nations. It must be borne in mind that the libelant is a citizen of this country, under his contract to be restored to the country. The Supreme Court of the United States has established the doctrine that the courts of admiralty of this country can, in their discretion, take jurisdiction of cases of tort occurring on the high seas between subjects or citizens of foreign states; that, if they decline to exercise such jurisdiction, it is not for a want of authority to do so, but because they deem it expedient, under the circumstances of the particular case, to do so. Take a case of foreign seamen suing because of ill treatment. In such cases the consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction, not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not. And where the voyage is ended, or the seamen have been dismissed, or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. The Belgenland, 114 U. S. 363, 364, 5 Sup. Ct. 864, 29 L. Ed. 152. See, also, for a full discussion of the law Deady, J., in Bernhard v. Creene et al., 3 Sawyer, 230, Fed. Cas. No. 1,349. If this be the law as to actions by foreigners against foreigners, a fortiori it is the law as

between an American citizen and a foreigner. The language of Dr. Lushington in The Johann Friederich, 1 W. Rob. 35, quoted in The Belgenland, supra, is proper here:

"If these parties must wait until the vessel that has done the injury return to its own country, their remedy might be lost altogether, because she might never return; and, if she did, there is no part of the world to which they might not be sent for redress."

Our admiralty courts certainly take jurisdiction of collisions on the high seas occurring between vessels of different nationalities both foreign to this country. This not for the reason that in cases of collision a tort did not occur wholly on either ship. In this very case of The Belgenland, the ship only was found guilty of tort in colliding with a Norwegian vessel, and she was made to pay heavy damages. Judge Brown, of New York, than whom there is no better authority in admiralty, in The Brantford City (D. C.) 29 Fed. 383, quotes from The Belgenland the following:

"As to the law which should be applied in cases between parties or ships of different nationalities arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

To this he adds:

"The fact that in most of the cases cited the injury arose from collision is immaterial. The gravamen of the action is negligence. On that alone the action depends. It is the negligence only that constitutes the tort."

We concur fully in the conclusion of the District Court that jurisdiction can be taken in this case.

On the Merits.

Assuming that the libelant occupied the position of a passenger in this steamship, and that as to him the ship was a common carrier, what was the responsibility of the shipowner to him? In Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379, Chief Justice Marshall, after stating the doctrine of the common law that a carrier is responsible for every loss which is not produced by inevitable accident, says that this doctrine cannot be applied in the case of passengers, living beings, over whom the carrier cannot have the same control as he has over inanimate matter. He applies this modification of the doctrine to the carriage of slaves, and says that in that case the carrier was only liable for ordinary neglect, that being the law with respect to the carriage of passengers. The same distinction was observed and applied in a similar case of McDonald v. Clark, 4 McCord, 223, and in the Alabama case, Williams v. Taylor, 4 Port. 238. In Chicago, etc., Ry. Co. v. Zernecke, 183 U. S. 587, 22 Sup. Ct. 231, 46 L. Ed. 339, the Supreme Court of the United States, discussing the general law on this subject, says:

"It seemed to the able judges who decided Coggs v. Bernard [2 Ld. Raym. 909], that on account of the conditions which then surrounded common carriers public policy required responsibility on their part for all injuries and losses which occurred from the acts of God or public enemies, and many years afterwards Chancellor Kent praised the decision of cases which de-

clined to relax the rule to excuse carriers for losses by fire. That rule was not and has not been extended by the courts to passengers, and Chief Justice Marshall, in speaking for this court in Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379, refused to apply the rules to slaves, saying: 'The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases in which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them.'"

In Stokes v. Saltonstall, 13 Pet. 191, 10 L. Ed. 115, the Supreme Court says:

"It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable at all events, except the acts of God and public enemies. But, although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent: that he, as agent, as in this case he acted by an agent, shall possess competent skill, and that, so far as human care and foresight can go, he will transport them safely."

This case quotes 2 Kent, Comm. (14th Ed.) p. 600:

"The proprietors of a stage coach do not warrant the safety of passengers in the character of common carriers, and they are not responsible for mere accidents to the persons of passengers, but only for want of care."

This same principle is illustrated in the common law. A carrier may be responsible for negligence, but, if the passenger be also negligent, and his negligence is the proximate cause of the injury, the carrier cannot be held. The court below, in dealing with this subject, says:

"In determining the question of fault in bringing about the misfortune, nothing need be said as to the degree of care required of the respondent ship, as a carrier of passengers. The law in this regard is too well settled to need special comment at this day further than to say that the highest degree of care and caution is required, and that the presumption of negligence is against the carrier where injury is sustained by a passenger."

It seems to us that the learned judge states this proposition too broadly, and that his doctrine is inconsistent with the opinion of Chief Justice Marshall in Boyce v. Anderson. For the proposition thus stated by him the learned judge below quotes The New World, 16 How. 469, 14 L. Ed. 1019. In that case the passenger was injured by the explosion of a boiler on a steamboat racing with another on the Mississippi river. The case was held to come within and to be decided by the thirteenth section of the act of July 7, 1838 (5 Stat. 306), as follows:

"In all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue or other dangerous escape of steam, the fact of such bursting, collapse or injurious escape of steam shall be taken as full prima facie evidence sufficient to charge the defendant or those in his employ with negligence, until he shall show that no negligence has been committed by him or those in his employ."

The other case quoted by him is The City of Panama, 101 U. S. 462, 25 L. Ed. 1061. In that case the court says:

"Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some

few respects less extensive and more qualified than in the latter, as the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, but in most other respects the obligations assumed are equally comprehensive and even more stringent."

In Simmons v. New Bedford, etc., Steamboat Co., 97 Mass. 367, 93 Am. Dec. 99, the court stated the law thus:

"A carrier of passengers for hire is not, like a common carrier of goods, an insurer against everything but the act of God and public enemies. He is not held to take every possible precaution against danger, for to require that would make him an insurer to the same extent as the carrier of goods, and might oblige him to adopt a course of conduct inconsistent with economy and speed essential to the proper disposal of his business. But he is bound to use the utmost care which is consistent with the nature of and extent of the business in which he is engaged, in the providing of safe, sufficient, and suitable vehicles or vessels and other necessary and appropriate means of transportation, as well as in the management of the same, and he making such reasonable arrangements as a prudent man would make to guard against all dangers from whatever source arising which may naturally and according to the usual course of things be expected to occur."

In Ingalls v. Bills, 9 Metc. (Mass.) 7, 43 Am. Dec. 346, the court, after stating the law with regard to carriers of goods, says:

"But in regard to the carriage of passengers the same principles of law have not been applied, and for the obvious reason that a great distinction exists between persons and goods; the passengers being able to take care of themselves and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods cannot do, who have intrusted them to others."

So, also, in Tood v. Railway Co., 7 Allen, 207, 83 Am. Dec. 679:

"If passengers voluntarily take exposed positions with no occasion therefor, and no inducement thereto caused by the managers of the road, except a bare license by noninterference, or express permission of the conductor, they take the special risk of the position on themselves."

And in Hickey v. Railway Co., 14 Allen, 429:

"It is equally the duty of the passenger to avoid all unnecessary risks."

See, also, our own case of Kimball v. Palmer, 80 Fed. 240, 25 C. C. A. 394, to the same effect; and in the same volume, Chicago, etc., Railway Co. v. Myers, 80 Fed. 361, 25 C. C. A. 486. In this last case it is said:

"If a passenger of mature age leaves the place which he knows has been provided for him, and, without any occasion for so doing, or to gratify his curiosity, goes to another, where the dangers are greater, or places himself in a dangerous attitude, which he was not intended to assume, or if he disobeys any reasonable regulation of the carrier, it should be held that he assumes whatever increased risk of injury is incurred in so doing."

Keeping in mind this qualification of the broad language of his honor the District Judge, let us examine the undisputed facts in this record. In all the disputed facts we recognize the force and value of his conclusions. The libelant, a man of more than ordinary intelligence and education, watched for some hours the operation of dismantling the structures on the ship. He saw and understood the method used in throwing overboard the larger pieces of timber, and saw that when they struck the water the end in the water went aft, and the end on the vessel canted forward on the rail. As he had full

opportunity of seeing all this from his position on the bridge, he must have seen the precautions which the men at work took when the timber was pushed over the rail into the water. He must also have seen and fully realized the danger attending these operations. He was in a place of perfect safety on the bridge, and as the work was proceeding rapidly he could easily realize that the necessity for him to remain in this place of safety would soon cease. He was not confined on the bridge. He could move about upon it and take a moderate degree of exercise on it. The bridge was seven or eight feet wide and the whole width of the ship in length. After observing for nearly a whole day what was done and how it was done by the men at work, he left the bridge, and went down to the scene of operations. On both sides of the deck gangs of men were tearing down and moving parts of the structures and putting them overboard. He went in close proximity to them. If he did not closely observe them, and keep his attention alive so as to take precautions when threatened with danger, it was his own neglect for not doing so. The gangs of men were at the same work which he had seen them at all that day. Why did he go there? He knew that on the bridge he was safe. He could not avoid knowing that on the Montenegro, where the work was going on, he was in more or less danger. There certainly was no necessity for him to go down upon this deck. He did it voluntarily. If he went there from curiosity, or to take exercise, or from any other motive, he was using his right as a reasonable being, but at the same time he assumed the risk. He could only have been prevented from doing that which he did by being shown the danger, which was unnecessary, as he could himself see it without being told, or by being forcibly arrested, carried back to the cabin, and confined there—a doubtful proceeding with regard to one not one of the crew. This was not a passenger ship, but a freight ship, on which the libelant had gone from New Orleans to South Africa in charge of the cargo of mules, and he was returning on her with full knowledge that the business for which she was intended was carrying freight. The work which was going on to remove the temporary fittings no longer needed was necessary and proper work on a freight steamer, and there was no concealed danger connected with it. The libelant was not an inexperienced landsman freshly come aboard, but had lived aboard the ship for over three months. He had been watching the work for hours, and must have understood the danger as well as those engaged on it. There were only three passengers, and they were quite naturally allowed greater freedom of action than would be allowed on an ordinary passenger ship. Can it be said that under these peculiar and unusual circumstances the shipowner owed a duty to the libelant to warn him of that which he already knew, and to station a man to pull him out of a danger from which he, of his own prudence, should have retreated? Unless there was a duty there was no negligence, and unless there was negligence there can be no recovery. The fact that the beam, one end of which was in the water down at least 23 feet below the top of the rail, struck the libelant at all supports the testimony of the master, the ship's doctor, the boatswain, and one of the sailors that the libelant was near the rail, and that he had come from the middle

of the deck to the rail to look and see what would happen when the beam struck the water.

We are constrained to reach a conclusion different from that of the court below. In our opinion, the proximate cause of the injury was the act of the libelant himself. He was in a place in which he had no occasion to be, certainly no necessity for being. He suffered the consequence of his own act.

The decree of the court below is reversed, and the case is remanded to that court with instructions to enter a decree dismissing the libel, with costs. Reversed.

On Petition for Rehearing.

(November 20, 1903.)

PER CURIAM. This case was ably and exhaustively argued before us, and has received careful attention. We have examined the petition of the appellee for a rehearing, which has been presented, and see no reason for reconsidering our conclusion. The prayer of the petition is denied.

Libelant's application for a writ of certiorari from the Supreme Court denied.

BOYCE v. CONTINENTAL WIRE CO. et al. WOLFE et al. v. BOYCE et al. AMERICAN STEEL & WIRE CO. OF NEW JERSEY v. WARE. SAME v. WOLFE (two cases). SAME v. WOLFE et al. (two cases).

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

Nos. 965, 966, 967, 968, 970.

1. MORTGAGES—APPOINTMENT OF RECEIVER IN FORECLOSURE SUIT—RIGHT TO NET INCOME.

When a receiver has been appointed in a suit for the foreclosure of a mortgage on the ground, either admitted or established, of the insolvency of the mortgagor and the inadequacy of the security, the equitable right of possession and prima facie the right to the net income derived from the property is in the mortgagee.

2. SAME—ESTOPPEL—OPPOSING USE OF PROPERTY.

A receiver was appointed for the manufacturing plant of a corporation in a suit to foreclose a mortgage thereon, with the consent of the mortgagor, on the ground that it was insolvent, and had no other property, and that the security was inadequate. Subsequently certain judgment creditors intervened and joined with the mortgagor in a petition for an order authorizing the receiver to operate the plant under an offer made by a third party. The sole owner of the mortgage bonds appeared and opposed such order, but the same was made, and the plant operated thereunder during the term of the receivership. The proceeds realized from the sale of the property left a deficiency due on the mortgage debt. *Held*, that the mortgagee was not estopped to assert its prior right to the net earnings of the receivership as against the judgment creditors by the fact that it opposed the use of the property by which such earnings were made, nor were its motives in such opposition material.

¶ 1. Foreclosure of mortgages in federal courts, see note to Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 523.

See Mortgages, vol. 25, Cent. Dig. § 1384.

8. SAME—NECESSITY OF DEFICIENCY DECREE.

A deficiency decree, equivalent to a judgment at law, in favor of a mortgagee after a foreclosure sale of the mortgaged property, is not essential to entitle the mortgagee to assert the right to the earnings of the receivership in the foreclosure suit, which constitute a fund for distribution by the court in such suit.

Appeals from the Circuit Court of the United States for the Southern District of Illinois.

In 1896 the Continental Wire Company made a trust deed of its manufacturing plant to Boyce, trustee, to secure the payment of 125 bonds, of $1,000 each. The trust deed did not specifically pledge the rents and profits, but it did provide that on default the trustee might take possession.

The indebtedness having become due and remaining unpaid, the trustee in October, 1898, filed his bill to foreclose, making the Continental Wire Company sole defendant. The bill showed the insolvency of the defendant, alleged the lack of other property out of which the debt could be collected and the insufficiency of the trust estate, and prayed for the appointment of a receiver to take possession of the plant. The defendant appeared, and consented to the appointment of a receiver, and Boyce was thereupon appointed. He was empowered to collect the rents, issues, and profits of the premises, but he was not directed nor specifically authorized to operate or contract with respect to the operation of the plant; and the defendant surrendered possession to the receiver.

In November, 1899, appellees Ware, Wolfe, and Wolfe, judgment creditors of the Continental Wire Company, asked leave to intervene. And thereupon they joined the Continental Wire Company in a petition that the court direct the receiver to operate the plant in accordance with a proposition made by the Merchants' Wire & Nail Company. That company proposed to furnish money and material, and to pay the receiver $2,000 a month in addition, if the receiver would run the mill on such goods and in such manner as the company directed, and turn over to it the product. The petitioners represented that an acceptance of the proposition would benefit all creditors, and that if the plant were put in operative condition it would bring enough on foreclosure sale to pay the debt secured by the trust deed. Thereupon the American Steel & Wire Company, appellant, appeared, and showed that it owned and held all the bonds, and it objected to the receiver's operating the plant "because (1) said receiver was appointed for the sole purpose of collecting, preserving, and caring for the mortgaged premises; (2) said receiver has no power under the order of appointment to borrow money wherewith to operate the property; (3) the court has no power to authorize said receiver to undertake the operation of said plant, or to conduct the business of manufacturing wire or other products, or to borrow money or to incur any liability for such purpose, the property in question being charged with no public interest or duty, and the receiver possessing no function other than that of a custodian of said property; (4) to allow said receiver to operate said plant or to borrow money for such purpose or to incur any liability on that account might subject the mortgaged premises to the payment of losses thereby incurred, and would endanger the lien of the mortgage, and hazard the security of your petitioner as holder of said bonds." The court overruled these objections, and ordered the receiver to operate the plant under the directions of the Merchants' Wire & Nail Company, with the limitation, however, that the mortgaged property should not be liable in any way for the expense of operation. Appellant moved to vacate the order, stating as an additional ground that the operation of the plant would depreciate the value of the wire nail and barbed wire machines much more than to allow the machinery to stand idle, and supported the motion by the affidavit of a mechanical engineer and patentee of a wire machine. This motion was never passed upon. December 30, 1899, a decree of foreclosure and sale was entered, adjudging $148,000 to be due upon appellant's bonds. At the sale, February 6, 1900, the property was sold for $100,000. The report of sale, showing a balance of $60,000 due on appellant's bonds after payment of costs and compensation to the master, the receiver, and solicitors, was confirmed March 15, 1900.

Appellant on June 1, 1900, petitioned for the entry of a deficiency decree, but the court never ruled on it. The receiver continued to operate the plant under the court's order until the expiration of the redemption period, and surrendered the plant to the purchaser on May 7, 1901. The receiver then had on hand about $28,000 as the net profit from operating the plant. On May 18, 1901, appellant filed its petition that the balance in the receiver's hands be applied on its deficiency. Appellees Ware, Wolfe, and Wolfe resisted this, and filed cross-petitions. By its decree of June 26, 1902, from which these appeals are taken, the court, after allowing certain sums to the receiver and his solicitor, awarded the balance to appellees Ware, Wolfe, and Wolfe.

Logan Hay and Harry B. Hurd, for appellants.
P. B. Warren, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill was against the mortgagor corporation alone. It appeared and consented to the appointment of a receiver. It thus virtually confessed at the beginning, as it did explicitly in the foreclosure decree, its insolvency, the lack of other property, and the insufficiency of the mortgaged estate to pay appellant's bonds. By this action, and by voluntarily turning over the plant to the receiver, the mortgagor impregnably established, as against itself, that at the time the bill was filed its right of possession had ceased. And the facts respecting insolvency, inadequacy of the security, and the nature of the property would have warranted the court in taking the possession away from the mortgagor over its resistance. Kountze v. Omaha Hotel Co., 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609; Grant v. Phœnix Life Ins. Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; First National Bank v. Illinois Steel Co., 174 Ill. 140, 51 N. E. 200.

In the original order of appointment the receiver was authorized to collect the rents, issues, and profits of the trust estate. But there were none, for the plant was held and run by the mortgagor until surrendered to the receiver. If, however, after the suit was pending and before the receiver was appointed, the mortgagor had leased the plant, it would have been the duty of the receiver under the original order not only to seize the corpus, but to collect the rents, and, the insolvency of the mortgagor and the inadequacy of the security being established, to apply the net income, under the court's direction, upon the remainder of the mortgage debt.

When the judgment creditors, a year later, came into the case, they adopted the situation as it then existed. They joined the mortgagor in asking the court, through its officer, the receiver, to operate the plant. That presented an administrative question for the court to solve as it thought for the best interest of all the parties. And in the absence of waiver or estoppel, the fruits of possession should go according to priority of right of possession, no matter what party presented the administrative question. Daniell's Chan. Prac. (6th Am. Ed.) 1740; Miltenberger v. Logansport R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; Cross v. Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322; Williamson v. Gerlach, 41 Ohio St. 682.

The judgment creditors assert that a waiver or an estoppel arose against appellant by its filing its objections to the petition for the operation of the plant. The first two grounds of objection showed that the receiver could not operate the plant without a further order from the court. This was recognized as true by the appellees and the court, and no party has since changed his attitude with respect to that fact. The third ground raised the question whether, the mortgagor being insolvent and the security inadequate, the court could lawfully operate a private manufacturing plant over the objection of the mortgagee whose right of possession had ripened. Surely a party is not to be penalized for propounding a question of law which the court thinks is either unsound or irrelevant under the circumstances. The fourth urged the court not to imperil the already inadequate security by allowing receiver's certificates or expenses of operation to become liens ahead of the mortgage. And the court accordingly limited the order. These objections of appellant did not create an estoppel in favor of the judgment creditors. Appellant's representations were made to the court, not to them. They took no steps relying upon assurances by appellant. And the order was made despite the objections. Nor did appellant's opposition to the operation of the plant constitute a waiver of its claim arising from its priority of right of possession. Appellant said to the court, in effect: "The receiver cannot operate the plant unless the original order of appointment is broadened. That should not be done, because you have no right to run the plant; but, if you think otherwise, you ought not to create liens ahead of mine." This was far from saying: "If you sustain my objections, these judgment creditors, of course, will get nothing; but if you overrule them, I, who equitably am the owner and entitled to the possession of this plant, agree that the judgment creditors shall have all that may be made and I will bear the loss from depreciation."

Appellees say it was an "open secret" in the court below that appellant is a "trust," and that its opposition was inspired by its wish to prevent the product of this plant from coming into competition with its goods. Even if this was established by the record, it would be irrelevant. A court should act upon the merits of demurrers, motions, and objections, and not upon the purposes of parties in presenting them.

It is claimed that the judgment creditors made an "equitable levy" upon the rents, issues, and profits by filing their petition for the operation of the plant. When the petition was filed there was nothing to seize but the corpus, and it equitably belonged to appellant, and was already in the hands of the court to be devoted to the payment of appellant's bonds. The judgment creditors did not file the petition. They joined the appellee mortgagor in asking that the plant be operated. If the mortgagor alone had presented the same facts, the court, viewing the situation as it did, probably would have made the same order; and then it would scarcely be said that the mortgagor should be paid the rents, issues, and profits in preference to the mortgagee. How the equities are changed by the joinder of the judgment creditors, who claim through the mortgagor, is not ap-

parent to us. And, at all events, the petitioners did not present the issue that they were entitled to the fruits of possession despite the insolvency of the mortgagor and the inadequacy of the trust estate; but, on the contrary, they explicitly represented to the court that in their judgment the plant, if operated, would bring enough to pay the mortgage debt in full, and leave something over for other creditors. On that basis the order was secured.

Finally, as a technical obstacle to reversal, appellees insist that appellant can have no relief, because a deficiency decree was not, and could not be, entered in its favor. If a deficiency decree could properly be entered in favor of a bondholder in a suit by the trustee, appellant made its motion promptly, and is not to be prejudiced by the court's passing over the matter and entering an adverse final decree of distribution. But this is not a case in which it is necessary to have a deficiency decree (equivalent to a judgment at law) under which by an execution the marshal may bring outside property into court. The fund in controversy was already in court in the very cause in which all the contestants were appearing.

The decree is reversed, and the cause is remanded, with the direction to award the fund to appellant.

LASSEN v. BAYLISS et al.

(Circuit Court of Appeals, Third Circuit. December 1, 1903.)

No. 15.

1. BROKERS—COMMISSIONS—PERFORMANCE OF CONTRACT—BURDEN OF PROOF.
Where a broker's employment contract for the sale of certain land provided that it should be void in case of a failure of the agreement of sale, it was incumbent on the broker, in an action for commissions, to show that the agreement of sale was performed by the purchasers, or by some one who took their place under the agreement.

In Error to the Circuit Court of the United States for the District of New Jersey.

Edward Stetson Griffing, for plaintiff in error.
Addison Ely, for defendants in error.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

ACHESON, Circuit Judge. To entitle the plaintiff to recover his commissions as broker under the written contract of January 13, 1900, between him and the defendants, it was incumbent upon the plaintiff to show that the agreement of sale between the defendants as vendors and Eakins and Dignowity as purchasers of the described land had been performed by those purchasers, or by some one who took their place, under that agreement of sale. The contract for the commissions here sued for concludes with the following provision, namely, "And a failure of said agreement of sale shall make this agreement void." Now, it affirmatively appeared by the clearest proof that the agreement of sale between the defendants and Eakins and Dignowity (evidenced by the articles of agreement dated Jan-

uary 15, 1900) was not carried out, but failed by reason of the defaults of the purchasers, Eakins and Dignowity. The subsequent transaction between Bayliss and Schuler, on the one side, and Messrs. Ely, Bell, and McKenzie, on the other side, involved the sale of considerably more land than was embraced in the agreements of January 13 and 15, 1900, and the sale to Ely and his associates was upon terms of purchase materially different from the terms of the agreement of January 15, 1900. Certainly the burden of proof was upon the plaintiff to show either that by the consent of the parties in interest Ely and his associates were substituted as purchasers in place of Eakins and Dignowity, and that the agreement with the latter was carried out in a modified form agreed on by the parties in interest, or that the transaction with Ely and his associates was a device to defraud the plaintiff out of his commissions. The evidence, we think, failed to sustain either of these propositions. The plaintiff's own proofs were inconclusive, and we are of the opinion that upon the uncontradicted evidence the court was right in directing a verdict for the defendants.

Upon an attentive examination we are not convinced that any of the various assignments of error relating to the rulings of the court during the progress of the trial should be sustained.

The judgment of the Circuit Court is affirmed.

BRIGGS v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 26, 1903.)

No. 1,868.

1. MASTER AND SERVANT—RAILROADS—DEATH OF FIREMAN—EQUIPMENT OF ENGINE—PILOTS.

Where a railroad company necessarily substituted a short or "stub pilot" in place of a long pilot previously used on an engine engaged in interstate traffic, in order to equip the engine with an automatic coupler, as required by Act Cong. March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), such change did not constitute actionable negligence, though charged to have been the cause of the overturning of the engine, and the killing of plaintiff's intestate, who was fireman thereon, in a collision with a bunch of cattle on the track.

2. SAME—PROXIMATE CAUES.

Where, at the time of a collision between a passenger train and a bunch of over 100 cattle on the track, some of which were lying down, resulting in the fireman's death, the train was running at the rate of 35 miles per hour, and, by reason of the darkness, neither the fireman nor the engineer saw the cattle in time to arrest the motion of the train to any considerable extent before the cattle were struck, the fact that the engine was equipped with a stub pilot, which was less able to throw cattle from the track than a long pilot, which had been previously taken from the engine, constituted no substantial evidence that the use of a stub pilot was the proximate cause of the fireman's death.

3. SAME—EXCLUSION OF EVIDENCE—REVIEW.

Where a witness was not permitted to answer a question on objection, and the record did not disclose what answer was expected, the objection will not be reviewed on appeal.

¶ 3. See Appeal and Error, vol. 3, Cent. Dig. § 2905.

In Error to the Circuit Court of the United States for the District of South Dakota.

T. H. Null, for plaintiff in error.

Coe I. Crawford, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. This is an action for personal injuries which was brought by Eva L. Briggs, the plaintiff in error, against the Chicago & Northwestern Railway Company, the defendant in error, in the Circuit Court of the United States for the District of South Dakota. The facts, as they were developed at the trial, are few and simple. The plaintiff's husband was a locomotive fireman on a passenger engine belonging to the defendant company, which ran between Huron and Pierre, in the state of South Dakota. On the night of July 19, 1900, in making the trip from Huron to Pierre, the engine ran into a herd of over 100 head of cattle; the result being that it was derailed and overturned, and the plaintiff's husband was killed. She brought this action, alleging as a ground of recovery that the engine in question was not equipped with a suitable pilot to throw cattle and horses from the track when they were encountered. At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendant, and such action on its part is assigned for error.

The following facts are undisputed: The engine which was overturned was a light passenger engine. Originally it had been equipped with a long pilot (that is, one which projected some distance ahead of the frame of the engine), but, to comply with the act of Congress of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), requiring common carriers to equip cars used in moving interstate traffic with couplers coupling automatically by impact, it became necessary to remove the long pilot, and substitute a shorter or "stub" pilot, as it is termed. The engine could not be equipped with an automatic coupler without making this change in the pilot. The change was effected some time in June, 1900, and the plaintiff's husband continued to serve as a fireman on the engine from that time forward until he was killed. The stub pilot, at the time of the accident, was in good order, and in no respect defective or out of repair. After the passage of the act of Congress above mentioned, and for at least one or two years prior to the accident, the defendant company had been removing long pilots from its engines, and substituting stub pilots in lieu thereof, so that automatic coupling appliances might be attached to the front end of their engines as well as to the rear end. Indeed, "stub pilots," as they are termed, such as the engine in question was provided with, were in general use on railroads wherever the Janney automatic coupling appliances were used. At the time of the accident the train was running at the rate of 35 miles per hour. There were over 100 head of cattle bunched on the track, some of them lying down, and some standing up; and, owing to the darkness of the night, neither the

plaintiff's husband nor the engineer saw them in time to stop the train or to arrest its motion to any considerable extent before they were struck.

On this state of facts, we are of opinion that no error was committed by the learned trial judge in directing a verdict for the defendant. In the first place, we do not perceive that there was any substantial evidence from which a jury of 12 reasonable men could have inferred or found that the defendant company was guilty of culpable negligence; that is to say, of a want of reasonable or ordinary care. It was its duty, or at least its privilege, to equip its engine, as it did, with an automatic coupling appliance, which it could only do by removing the long pilot and substituting a shorter one. The shorter pilot which it adopted was then in general use on other roads, and was regarded as a reasonably safe appliance, and at the time of the accident it was in no wise out of repair. As a general rule, a railroad company is not required to use upon all of its cars the safest possible appliances, or those of the latest and most improved pattern, but is at liberty to make use of such appliances as are at the time in general use on other well-managed railroads, and are of a kind that are regarded as reasonably safe. Northern Pacific Railroad Company v. Blake, 11 C. C. A. 93, 63 Fed. 45. In the case in hand it appears that stub pilots are in general use, and are the only ones that can be successfully employed when engines are fitted with automatic couplers. In what respect, then, was the defendant company guilty of any negligence? Counsel for the plaintiff in error says that he concedes that the company was not negligent in leaving its road unfenced, but he suggests that as the engine in question happened to be employed at the time in what is termed "open range country," where cattle roamed at will, the defendant company was negligent in removing the long pilot and substituting a shorter one. We cannot adopt this view. As locomotive engines are liable to be used on any portion of a railroad, and as they may be needed at any moment to handle interstate traffic, we think that an interstate carrier like the defendant company is entitled to have all of its engines so equipped that they may at any time be used in such service without violation of the act of Congress, and that it cannot be found guilty of negligence in so doing.

In the second place, we feel disposed to agree with the views which were expressed by the lower court when directing a verdict for the defendant—that there was no substantial evidence tending to show that the death of the plaintiff's husband was proximately caused or occasioned by the fact that the engine was not provided with a long pilot. It is most reasonable to believe that if the engine had been provided with a long pilot, and had run into a herd of 100 head of cattle asleep on the track, going at a speed of 35 miles an hour, the result would have been a derailment and the overthrow of the engine. That such would not have been the result if it had had a long pilot, instead of a short one, seems to us to be mere speculation, or, in other words, an inference resting upon no substantial basis of fact such as will serve to sustain a verdict.

Counsel for the plaintiff in error calls our attention to the fact that he asked one of the plaintiff's witnesses, namely, the engineer of the train, whether, if the engine in question had been equipped with a long pilot, such as was at first attached to it, it would have cleared the track of cattle standing up when struck; and he complains because the witness was not permitted to answer the question. We think, however, that if he had been permitted to answer, and had replied in a manner favorable to the plaintiff, the answer would have been a mere guess or surmise on his part, rather than credible expert testimony on which the jury could have lawfully founded a verdict in favor of the plaintiff. Such testimony, in our opinion, would have been in the highest degree speculative and unreliable. The question, however, was left unanswered, and the fact that the record fails to disclose in any form what answer the engineer would have given to this question—whether favorable or unfavorable to the plaintiff—if he had been permitted to answer it, precludes this court from noticing the alleged error, or reversing the judgment because the witness was not permitted to answer it, since, to establish a reversible error in the rejection of evidence, it must be made to appear affirmatively that the excluded evidence was competent, and of such materiality and weight that its exclusion has probably caused injury to the party offering the same. Atchison, Topeka & Santa Fe Railroad Co. v. Phipps, 125 Fed. 478 (decided at the present term of this court). See, also, Packet Company v. Clough, 20 Wall. 528, 542, 22 L. Ed. 406. There is in the case before us no evidence that the failure to provide the engine in question with a long pilot, in place of the stub pilot, was the proximate cause of the injury.

The judgment below must be affirmed. It is so ordered.

AJAX FORGE CO. v. PETTIBONE, MULLIKEN & CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 962.

1. PATENTS—INFRINGEMENT—RAILWAY SWITCH RODS.
The Calvert patent, No. 651,413, for an adjustable switch rod, construed, and, as limited by the prior art and the amendment of the claims in the patent office, *held* not infringed by the device shown in the Strom patent, No. 625,961, conceding priority of invention to Calvert.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

James H. Raymond, for appellant.
William H. Dyrenforth, for appellees.

Before JENKINS and BAKER, Circuit Judges, and BUNN, District Judge.

BAKER, Circuit Judge. Appellant unsuccessfully sought to hold appellees for infringement of letters patent No. 651,413, June 12, 1900, to Calvert, assignor, for improvements in switch rods.

The structure that is exhibited in the drawings and described in the specification belongs to a class of appliances for adjusting the operative length of the tiebar that couples the point rails of a split switch, and consists of the following elements in combination: A rod having an ear thereon extending parallel therewith to form a jaw; a circular opening in the ear; a notch on one side of this opening; a chair or clip rigidly attached to the point rail and formed to fit into the jaw of the rod; a circular opening in the part of the chair that fits into the jaw; a disk that sits in the circular opening in the chair; an eccentric bolt hole through this disk; an extension or flange to this disk, which extension is circular and concentric with the bolt hole through the disk, has a notched periphery, and fits into the circular opening in the ear; a pin to engage any peripheral notch with the notch in the opening in the ear when they are in register; and a pivot bolt to lock the chair in the jaw of the rod, which pivot bolt passes through the bolt hole in the disk and its extension and through a bolt hole in the lower jaw of the rod. The adjustment of the point rails of the switch is accomplished by setting the eccentric bolt hole of the disk towards or from the center of the track and locking the parts in place with the pin and pivot bolt.

Calvert not only thought that he was entitled to protection in the specific device, but evidently believed that he was the first to invent any form of adjustable pivot connection between the rod and the chair, and, of course, the first to employ an eccentric to make the pivot connection adjustable; for he stated in the specification:

First. "My invention, broadly stated, consists of an adjustable pivot connection between the switch rod and the chairs, brackets, or other devices secured to the switch rail and connecting the rod therewith. * * * In effect, the constructions which I have herein illustrated and described afford an adjustable or movable pivot connection between the switch rod and the chair, or, more remotely, between the switch rod and the switch rail, which feature I consider the broad idea of my invention, however it may be embodied in detailed construction."

Second. "An obvious modification of this means of locking and adjusting the eccentric, and one so simple as to not require illustration herein, is to have the bolt at the part where it passes through the rod or the ear and the cam polygonal in cross-section, so that the bolt will be in nonrotative engagement with the rod or ear, while the cam will be in nonrotative engagement with the bolt. Such construction would dispense with the extension and also the pin and washer."

Third. "It is also obvious that the extension may be formed upon a common axis with the eccentric and any suitable means provided for preventing rotation of the eccentric about the axis of the pivot bolt, such, for instance, as by the engagement therewith or with the extension thereon of a suitable device upon the chair."

On his application, which was filed April 5, 1899, Calvert based nine claims, as follows:

"(1) An adjustable switch rod comprising a reciprocating rod, a chair secured to the switch rail, and an adjustable pivot connection between said rod and chair, substantially as described.

"(2) An adjustable switch rod comprising a reciprocating rod, a chair secured to the switch rail, an adjustable pivot connection between said rod and chair, and means for adjusting said connection and locking the same in any adjusted position, substantially as described.

"(3) An adjustable switch rod comprising a reciprocating rod, a chair

secured to the switch rail, and an adjustable eccentric or cam interposed between and connecting said rod and chair, substantially as described.

"(4) An adjustable switch rod comprising a reciprocating rod, a chair secured to the switch rail, an adjustable eccentric or cam interposed between and connecting said rod and chair, and means for adjusting said eccentric or cam and locking the same in any adjusted position, substantially as described.

"(5) An adjustable switch rod comprising a reciprocating rod, a chair pivoted thereto and rigidly secured to the switch rail, and an adjustable eccentric or cam interposed between said rod and chair for adjusting the relative positions of said rod and chair, substantially as described.

"(6) An adjustable switch rod comprising a reciprocating rod, a chair pivoted thereto and secured to the switch rail, an adjustable eccentric or cam interposed between said rod and chair, and means for adjusting said eccentric or cam and locking the same in any adjusted position, substantially as described.

"(7) An adjustable switch rod comprising a reciprocating rod having an ear thereon extending parallel therewith, a chair fitting in between said ear and rod, a pivot bolt passing through said rod, ear, and chair, an eccentric working in an opening in said ear surrounding said bolt, and means for adjusting said eccentric and locking the same in any adjusted position, substantially as described.

"(8) An adjustable switch rod comprising a reciprocating rod having an ear thereon extending parallel therewith, a chair fitting in between said ear and rod, a pivot bolt passing through said rod, ear, and chair, an eccentric working in an opening in said ear surrounding said bolt, a peripherally notched extension on said eccentric, and means for engaging and locking said extension and eccentric in any adjusted position, substantially as described.

"(9) An adjustable switch rod comprising a reciprocating rod provided with an ear, a pivot bolt passing through said rod and ear, said ear being provided with a circular opening concentric with said bolt and having a notch in one side thereof, of a chair provided with a circular opening therein eccentric to said bolt, an eccentric working in said opening, an extension on said eccentric working in the opening in the ear and provided with peripheral notches and a pin adapted to seat in one of said notches in the extension when the same registers with the notch in the ear, substantially as described."

It will be observed that the first two claims attempt to cover broadly any form of adjustable pivot connection between the rod and the chair, and the third to the sixth, inclusive, any kind of adjustable eccentric. These six claims were manifestly intended to secure the "broad ideas" stated in the above given quotations from the specification. The seventh, eighth, and ninth claims are progressively closer descriptions of the device disclosed in the drawings and specification; but the seventh and eighth are somewhat inaccurate in defining the eccentric as "working in the opening in the ear," which is the position occupied by the peripherally notched extension. The ninth is more accurate in describing the eccentric as working in the opening in the chair, and the extension as working in the opening in the ear.

April 22, 1899, the Patent Office rejected all the claims on reference to "patent No. 543,605, Strom, July 30, 1895 (R'ys, Switch Rods), which shows an adjustable switch rod, in view of patent No. 386,888, Lounsbery, July 31, 1888 (Drawbars), which shows the specific form of adjustment of applicant. To substitute the specific form of adjustment of the latter patent for that of the former would not amount to invention."

The Strom patent, No. 543,605, shows a construction in which a chair, formed to fit into the jaw of the rod, is rigidly attached to the switch rail; in the chair is a series of holes in a right line that runs obliquely to the line of the rail; and the switch rails are adjusted by moving the rod along the chair and bolting it at the proper point.

Lounsbery exhibited, for use in connecting a locomotive to its tender, "a drawbar provided with an eccentric so arranged as to render possible the shortening of the connection between the engine and the tender at will." He used a flat plate formed to fit into the jaws of the drawheads. In the plate, where it extends into the jaws, is provided a circular opening. In this opening is seated a disk that has an eccentric bolt hole. The disk has a flange, with a notched periphery, that rests upon the upper surface of the plate. A pin engages any peripheral notch with a notch in the opening when they are in register. When the disk, with its eccentric bolt hole, has been locked in the desired position in the plate, the whole is inserted into the jaw of the drawhead, and the coupling pin is placed in the bolt holes in the jaw and disk.

The examiner, it will be noted, did not cite either of these patents in denial of the novelty of Calvert's combination; but he denied invention to the act of transferring Lounsbery's flanged disk from its plate to the chair of Strom's switch with its adjustable pivot connection. From the examiner's point of view, the references were undoubtedly destructive of Calvert's first six claims; and also the seventh, eighth, and ninth, unless Calvert limited himself to differences in structural details. The position taken by the Patent Office was a clear notification to the applicant that his broad claims would not be allowed, and that the remaining ones were not sufficiently limited to differences, if any, in details of construction.

For nearly a year the applicant remained silent. On April 11, 1900, he addressed this communication to the Patent Office:

"Cancel all of the claims, and substitute instead thereof the following:

"(1) The combination with a switch rail, of an adjustable switch rod comprising a rod having an ear thereon extending parallel therewith to form a jaw, a chair fitting in said jaw and secured to said rail, a pivot bolt passing through said rod and chair, an eccentric working in an opening in said chair and through which the bolt passes, and means for adjusting said eccentric and locking the same in any adjusted position, said eccentric being supported by said ear, substantially as described.

"(2) The combination with a switch rail, of an adjustable switch rod comprising a rod having an ear thereon extending parallel therewith to form a jaw, a chair fitting in said jaw and secured to said rail, a pivot bolt passing through said rod and chair, an eccentric working in an opening in said chair and through which said bolt passes, a peripherally notched extension on said eccentric working in an opening in said ear, and a pin for engaging one of the notches in said extension and locking the same and the eccentric in any adjusted position substantially as described.

"(3) The combination with a switch rail, of an adjustable switch rod comprising a rod provided with an ear to form a jaw, a pivot bolt passing through said rod, said ear being provided with a circular opening therein concentric to said bolt and having a notch on one side thereof, a chair secured to said rail and provided with a circular opening therein, an eccentric working in said opening and through which the pivot bolt passes, an extension on said eccentric working in the ear and provided with peripheral notches and

a pin adapted to seat in one of said notches in the extension when the same registers with the notch in the ear, substantially as described.

"The foregoing claims have now been amended so that they are believed to avoid the references cited.

"The specific form of adjustment of the Lounsbery patent is not the specific form of applicant's. It will be noted that in the Lounsbery patent the bolt passing through the eccentric will be subjected to a shearing strain tending to cut the same in two or wear it at a point between the eccentric and the part to which the bolt is secured. In applicant's construction, however, it will be noted that by reason of the support of the eccentric block in the ear, afforded by the peripherally notched extension, the pivot bolt is practically entirely relieved of the shearing strain, no matter what the adjustment the parts may have. This is of special importance in a switch rod where the bolt is subjected to constant service resulting not so much from the adjustment of the switch rod as from the strain due to passing trains. Furthermore, the combination of the claims as now called for is not found in either of the prior patents."

On June 12, 1900, the patent was issued with the three claims worded as in the above amendment.

Appellees are manufacturing an adjustable switch rod under patent No. 625,961, May 30, 1899, to Strom, assignor. Briefly, the construction consists in placing the Lounsbery flanged disk in a suitable opening in Strom's old chair, with this single exception, that, instead of a movable pin to engage the notched periphery of the flange, Strom employs a stop stud that is permanently secured to the chair. In his application, filed February 11, 1899, nearly two months before Calvert's, Strom, being the inventor of the device of patent No. 543,605, unlike Calvert, did not claim broadly every sort of adjustable pivot connection, but, evidently unaware of Lounsbery's patent, he, like Calvert, thought he was the pioneer in employing an eccentric to make the pivot connection adjustable. On February 20, 1899, the officials of the Patent Office rejected Strom's broad claims for want of invention, as they did Calvert's two months later and on the same references. Strom filed amended claims, in each of which a permanently fixed stop stud was made an essential element; and on this difference in construction the patent was granted.

The record discloses a sharp dispute between Calvert and Strom as to priority of invention, but, assuming that Calvert is senior, we find no infringement.

The only basis for the contention that appellees infringe is found in appellant's reading of claim 1 of the Calvert patent. Appellant admits that the phrase "said eccentric being supported by said ear" describes a material element of the claim, but insists that the condition is fulfilled if the ear affords any support, in any manner, to the eccentric. It will be remembered that the only difference between Lounsbery's construction and Strom's is that Strom used a permanently fixed stop instead of a movable pin to engage the notched flange of the disk. So far as infringement of Calvert's claim 1 is concerned, appellees might as well use Lounsbery's very construction, for Strom and Lounsbery both lock the disk against rotation in its seat in the chair by means of a stop between the chair and the notched flange of the disk, and then, after inserting the chair, disk, flange, and pin between the jaws of the rod, place in position the bolt that

passes through the jaws of the rod and the disk and flange. The disk is supported against lateral movement by the edges of the opening in the chair. The chair, with the disk seated therein, is supported against up and down movement by the jaws of the rod, and is held in place within the jaws by the bolt. So appellant's insistence that the Strom device infringes a claim wherein an essential condition is that the "eccentric (the disk) be supported by the ear (the upper jaw of the rod)" comes to this, that appellant is entitled to the exclusive use of that support which the disk gets from the upper jaw of the rod when the chair, with the disk seated therein, is inserted between the jaws and bolted in place. But it is a necessary condition, in every old and common construction in which a member is held between jaws, that the upper jaw afford support to the inserted member. So does the lower jaw. And, if Calvert had nothing else in mind, he should have omitted the limitation. And that is just what appellant's reading of the claim leads to. When counsel assert that claim 1 is infringed by a combination "of an adjustable switch rod comprising a rod having an ear thereon extending parallel therewith to form a jaw, a chair fitting in the jaw and secured to the rail, a pivot bolt passing through the rod and chair, an eccentric working in an opening in the chair and through which the bolt passes, and means for adjusting the eccentric and locking the same in any adjusted position," they eliminate the condition that the eccentric be supported by the ear; and they do not bring it back into the claim by saying that the support, which the applicant made an essential element of the claim, is that support which unavoidably comes from the presence of the other elements. To be given the quality of an essential element, the support referred to in the claim must be a support that the applicant devised and added to the other elements. Looking alone to the claim, in connection with the specification, we find that the support Calvert had in mind was the support given to the eccentric (the flanged disk) by the insertion of the flange into the opening in the ear.

When the file wrapper and contents are taken into view, the meaning of the limitation is doubly clear. The Patent Office rejected Calvert's broad claims on the ground that there was no invention in putting Lounsbery's eccentric into Strom's chair. Calvert amended and distinguished his device by adding the element of supporting the eccentric by the ear. If he was in good faith, he desired the Patent Office to understand that his support was different from that necessarily afforded the Lounsbery eccentric by the upper jaw of the rod. There is no doubt that the Patent Office so understood his representations. Under these circumstances, appellant will not be heard to assert that the Patent Office erred in rejecting Calvert's broad claims, or that we should give to the claims allowed the meaning of those rejected. Roemer v. Pettie, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 10 Sup. Ct. 409, 33 L. Ed. 663.

Appellant urges that the support referred to in claim 1 cannot be the support afforded by the insertion of the flange into the opening in the ear, because claim 2 covers the flange "working in an opening

in the ear," and an interpretation that makes two claims identical is not permissible. If, in order to hold a patentee to his representations to the Patent Office, it were necessary to read two claims as being the same, no court should hesitate to do so. But the presence of the same element in two or more claims does not prove them to be identical. In this case, claim 2 calls for notches on the flange and a pin for engaging one of the notches and locking the eccentric in any desired position. Claim 1 is broader, and calls for any suitable "means for adjusting the eccentric and locking it in position"—provided that the flange (which claim 1 does not require to be notched) fits into an opening in the ear.

The decree is affirmed.

SCHMITT v. NELSON VALVE CO. et al.

(Circuit Court of Appeals, Third Circuit. October 30, 1903.)

No. 44.

1. PATENTS—ASSIGNMENT—CONTRACT—EVIDENCE.
Evidence in a suit to restrain the infringement of a patent examined, and *held* to show that complainant, while in defendant's employ, made a contract agreeing to assign his patent to defendant in consideration of employment at a salary progressively increasing for 10 years, but to terminate on his discharge for cause.

2. SAME—FAILURE TO FULFILL CONTRACT.
The owner of a patent who agrees to assign it, but in violation of his agreement refuses to do so, cannot recover from his intended assignee for an infringement.

Acheson, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity.

Hector T. Fenton, for appellant.

George Wharton Pepper, for appellee.

Before ACHESON and GRAY, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. This bill in equity was filed to prevent the infringement of letters patent No. 675,979, issued to protect an improvement in valves, but it does not present the usual questions. No attack is made in this court upon the validity of the patent, nor is infringement denied, in case the complainant's right to maintain the suit should be upheld. The principal defenses that were set up in the court below, and are insisted upon here, are these: First, the defendant company has an equitable title to the patent, based upon the complainant's express parol agreement to assign it, although he has hitherto failed to carry out his contract; and, second, the defendant company is manufacturing the valves described in the patent under an implied license from the complainant. The facts established by the testimony are so clearly stated by the learned

judge of the Circuit Court that we adopt his findings as our own. His opinion, which is reported in 121 Fed. 93, is as follows:

"At the time of making this invention, and for some time prior thereto, the complainant was the superintendent and acting draftsman of the Nelson Valve Company. The need for the improvement which he devised was brought to his attention by a representative of the American Product Company, a buyer of valves, who explained to him that those which had been theretofore constructed by the Nelson Company were not satisfactory to the Product Company. He told him why they were not satisfactory, but did not tell him how they could be made so. He pointed out their defective operation, but proposed no remedy for it. He prompted the invention, but he had no part in making it. It was made solely by the plaintiff, but it was his connection with the Nelson Company which led him to make it. He has testified that it was conceived at his home, and that he there made a rough drawing of it; and I would not be warranted in wholly discrediting this testimony, either because he was unable to produce the drawing when the evidence was being taken, or because he had not shown it to Mr. Bonnell, an officer of the Nelson Company, to whom, as has been argued, he would naturally have exhibited it. On the other hand, there is nothing to impeach the testimony of Mr. Bonnell to the effect that the construction of the valve which would meet the requirements of the Product Company was the subject of a conversation, at the Nelson Company's works, between himself and the plaintiff, of the Nelson Company, and Mr. Beaston, of the Product Company, and that suggestions were then made by both Bonnell and Beaston. This may all be true, however, and yet the plaintiff's statement as to the time and place at which the invention was actually made be consistently accepted. That he, and he only, in fact made it, is, in this case, incontestable; and there is no necessary conflict between his assertion that he worked it out at his home and that of Mr. Bonnell that suggestions were made at the Nelson Company's works. In accordance, therefore, with the testimony of both of them, I find the fact to be that the invention was conceived, and was set forth in a rough drawing, at the residence of the plaintiff, but that suggestions, not effecting, in the sense of the patent law, any substantial change therein, were made at the works of the Nelson Company, before all the mechanical details of the particular valve to be manufactured for the Product Company were determined. The plaintiff made the working drawing for this valve in the company's shop, during working hours, and from the company's material. This drawing the Product Company approved, and at once ordered thirty-two valves. The plaintiff gave it to the Nelson Company's pattern maker, and had patterns and core boxes made from it, in the company's shop, from its materials, and by its men, who were paid by it for this work. The defendants contend that 'there was experimenting with this valve for several days in the company's shop'; but I do not think that what was really done has any legal significance. There was no experimenting by the inventor for the purpose of perfecting his invention. It was found that certain parts of the construction should be somewhat modified, and this was done, but without making any change in the original design which, with reference to the patent law, can be regarded as material. The 'valve spindle' was made heavier, and a hand hole, for convenience of access to the interior, was put in the casing of the valve; but neither of these affected the integrity of the device. Subsequently valves of the same pattern were made and sold to the Product Company and to another company; and up to the time when the complainant left the employ of the Nelson Company, on January 1, 1902, all of said valves were manufactured and sold under his direction, supervision, and orders, and were, by his direction, marked, 'Nelson Valve Co., S. & B., Pat'd,' as, with reference to a certain earlier patent of Schmitt and Bonnell, all the valves theretofore manufactured by the Nelson Company had been marked. The defendants contend that 'the complainant made no suggestion that he expected compensation (other than the salary he was drawing) for the manufacture and sale of the said valves until about August, 1901'; but the complainant disputes this statement, and claims that the evidence shows that 'the first valves were not put out until March, 1901'; that 'Schmitt spoke to Bonnell on the subject at or about that time'; and that the complainant (who

was in the employ of defendant until December 21, 1901), 'while permitting the defendant company to make and sell these valves during the year 1901, did so on the promise of defendant's officers that it would be made all right.' For solution of the question of the fact thus presented, we have but the testimony of Mr. Schmitt upon the one side and of Mr. Bonnell upon the other. The former testified that he had informed Mr. Bonnell that he had applied for a patent some time in March; that he told him that he wanted some compensation for his invention outside of his salary; that Mr. Bonnell replied, 'We will make these valves and adjust these small difficulties afterwards.' Mr. Bonnell testified that 'no conversation of that kind ever took place'; that 'there never was such a conversation'; that 'there was nothing of that kind said'; and that he 'never had any conversation with Mr. Schmitt in regard to compensation which he was to receive for the use by the company of this patent.' It is only upon the assumption that such a conversation may have occurred and have been forgotten by Mr. Bonnell that the veracity of both of these witnesses can be sustained, and therefore I deem it to be incumbent upon me to adopt that assumption. Accordingly, I find that Mr. Schmitt did tell Mr. Bonnell that he wanted some compensation for his invention, and that Mr. Bonnell replied, in substance, 'We will proceed manufacturing these valves, and will straighten this small difficulty later on.' As to the time at which this occurred, the testimony of Mr. Schmitt was very vague and inconclusive. He said that his recollection was that it took place after his application, which is dated March 12, 1901; that he did not recollect whether anything had been done in the way of manufacturing these valves at the time; and though, immediately afterwards, he said that 'they had not manufactured them before,' yet this seemingly positive statement was in turn followed by a reiteration of his previous avowal that he did not recollect whether the company had or had not manufactured or taken any steps towards the manufacture of these new valves prior to the date of the conversation. The first order was given on or about the last day of February, and the first delivery was made on March 11, 1901; and Bonnell's testimony is that Schmitt never advised him that he had applied for the patent prior to April or May. I therefore cannot say that the conversation in question took place before the Nelson Company had, with Schmitt's knowledge and assent, sold and delivered valves embodying his invention. On the contrary, the testimony as a whole has convinced me, and accordingly I find, that whatever was said by Schmitt on the subject of compensation was said after some of these valves had been ordered, made, and delivered; that Bonnell then indefinitely postponed consideration of the matter; and that Schmitt acquiesced in that postponement, without any understanding having been reached as to whether he was to be compensated by raising his salary as prior to the making of this invention had several times been done, or by paying him a royalty or license fee. The statement made by Schmitt that the 'little difficulty' to which Bonnell had referred was 'royalty' is mere surmise. There is no evidence to support it, and Bonnell testified that nothing was ever said by him to Schmitt about royalty.

"It is admitted on both sides that there was a parol agreement made between these parties on October 26, 1901, but they differ as to what that agreement was. The undisputed facts are that a special meeting of the directors of the Nelson Valve Company was held upon October 26, 1901, at which a majority of the board and Mr. Schmitt himself were present, and at which a paper was drawn up, and signed by all the directors in attendance, as follows:

" 'It is agreed by the Nelson Valve Company, its successors and assigns, that the salary of H. J. Schmitt shall be as follows from January 1, 1902, to June 30, 1904, at the rate of forty-five dollars per week, payable weekly, from June 1, 1904, to December 31, 1906, at the rate of fifty dollars per week, payable weekly; from January 1, 1907, to June 30, 1909, fifty-five dollars per week, payable weekly; from July 1, 1909, to December 31, 1911, sixty dollars per week, payable weekly, for services to be rendered to the said Valve Company, its successors and assigns.

" 'S. F. Houston.
" 'E. W. Ward.
" 'Russell Bonnell.'

"An attested copy of this paper was given to Schmitt, and subsequently he requested a copy under the company's seal, and this was given to him in substitution for the attested copy. Schmitt has testified that at this meeting all open questions between him and the company were settled, and, indubitably, the assignment of this patent was then agreed upon. But the parties disagree as to the terms upon which this was to be done. The defendants insist that the paper of October 26, 1901, contained the entire agreement on the part of the company, and that thereupon the defendant orally agreed to have his counsel prepare and to execute an assignment to the Nelson Company of, inter alia, the patent in suit. The plaintiff, on the other hand, contends that his agreement to assign was made 'in consideration of a promise of employment for ten years from the following January, 1902, at an increased salary.' The question, briefly stated, therefore, is, did Schmitt agree to assign in consideration of the company's undertaking as set forth in the writing of October 26, 1901, without the assumption by it of any obligation to continue him in its employ, other than such as is by law attached to such an undertaking, or was it further and additionally agreed that the company would absolutely, and under all contingencies and conditions, retain him in its employment for ten years? The question admits of but one answer. It is hardly conceivable, I think, that the company would, if asked, have promised that for ten years it would keep Schmitt in its service, no matter what occasion should arise to justify a determination of his connection with it; and though it is true that the paper of October 26, 1901, did not set out the agreement of Schmitt, yet to me it seems to be evident that it was intended to present the entire agreement on the part of the company, and that the stipulation on its part which the complainant now asserts was made would not have been omitted from it if in fact it had been made. But probabilities and presumptions need not be dwelt upon, for the weight of the evidence directly upon the subject is unquestionably with the defendants. Bonnell, Ward, and Houston, all, in substance, testified that Schmitt expressed himself as being satisfied with the paper which they signed, and that in consideration of the promise evidenced by it, and of that alone, he agreed to assign this patent, and I believe, and therefore find, such to be the fact, notwithstanding the testimony of Schmitt himself to the contrary. I need not impute to him conscious and deliberate falsification, but the utmost that can be fairly said in his exculpation is that some time after the agreement in question had been actually made he was led to think that the writing was not as advantageous to him as it should be, and that, dwelling upon this thought, he may have persuaded himself that an additional oral promise had been made to him, although the fact was otherwise. At all events, he refused to assign the patent unless the company would covenant for his employment for ten years, and this it has declined to do.

"I do not deem it necessary to decide whether or not, at any time prior to the meeting of October 26, 1901, the Nelson Company had acquired an implied license to manufacture and sell the invention covered by the patent in suit, or to determine whether, in point of fact, the valves which it has made and sold embodied that invention; for, in my opinion, the agreement of October 26, 1901, is, in itself, a sufficient and full defense to this suit. It canceled all claims (if any) then existing, for it settled all 'open questions'; and that by virtue thereof the Nelson Company became the equitable owner of the patent itself seems to me to be scarcely questionable. Walker on Pat. § 274; Dalzell v. Dueber Co., 149 U. S. 320, 13 Sup. Ct. 886, 37 L. Ed. 749. A complainant who has refused performance of a contract cannot be awarded relief to which, if he had performed it, he would not have been entitled."

Upon the facts thus found, we agree that the defense of equitable ownership has been established. It is no doubt true that the complainant made a contract that in some respects was perhaps unwise. It would have been much more to his interest if the agreement had provided either that the company would not discharge him for 10 years, or that his increased compensation should be paid to him whether he remained in the company's service or not, and it might

have avoided this dispute if the parties had agreed to put their contract in writing. But neither provision formed part of the parol agreement that was made on October 26, 1901, and if we should now add these terms, or any one of them, to the contract, we should be making a new agreement for the parties—an agreement which they did not choose to make for themselves. The evidence satisfies us that when the prolonged discussion of October 26th came to an end all open questions between the parties had been settled and determined, and a definite agreement had been entered into. What the complainant was to do appears clearly from the testimony of several witnesses. He was to assign to the company two patents—the patent in suit, and one other—and was to put at the company's disposition any similar inventions that he might make while he continued in their employ. He carried out part of his agreement by assigning immediately one of the patents, for which the deed had already been drawn and only needed his signature to be complete. The patent in suit was to be assigned by an instrument which his counsel was to prepare, and this should have been a paper in the ordinary form, conveying the letters patent directly to the defendant company. Instead of such a paper, however, his counsel prepared, and he submitted to the company, a writing in the following terms:

"The said Henry J. Schmitt being the patentee of a certain valve under letters patent No. 675,979, and the said Nelson Valve Company being manufacturers of valves and desiring an assignment to them of said letters patent of said Henry J. Schmitt, bargain and agree as follows:

"In consideration of the assignment of said letters patent to the said Nelson Valve Company, it is agreed that the said Valve Company shall well and truly pay to the said Henry J. Schmitt the sum of forty-five dollars ($45.00) per week, payable weekly, from January 1st, A. D. 1902, to June 30th, 1904; and at the rate of fifty dollars ($50.00) per week, payable weekly, from July 1st, 1904, to December 31st, 1906; and at the rate of fifty-five dollars ($55.00) per week, payable weekly, from January 1st, 1907, to June 30th, 1909; and at the rate of sixty dollars ($60.00) per week, payable weekly, from July 1st, 1909, to December 31st, 1912.

"But it is understood and agreed that the said Henry J. Schmitt shall contribute his services daily to the said Nelson Valve Company as superintendent of the manufacture of valves, from the first day of January, 1902, to the thirty-first day of December, 1912, provided that the said Nelson Valve Company desire or have use for said services, but in the event of the failure of said Nelson Valve Company in this regard, then the said sums or weekly payments above mentioned shall be due and payable as a consideration for the assignment of the patent rights without regard to services rendered or to be rendered."

Manifestly, this was not the assignment that he had agreed to make—it does not contain a word that could be construed to pass the title to the patent—but was an attempt to vary the contract of October 26th by adding a new provision entirely in the complainant's interest. In the correspondence that followed stress seems to be laid also upon the fact that the company's resolution, in speaking of "services to be rendered," did not add "as superintendent" or some similar phrase, and thus left Schmitt's position (so it is said) at the company's mercy. We do not see the importance of adding the suggested words. The resolution clearly implied an agreement by the company to avail itself of Schmitt's "services"; in other words, to

continue him in its employ for 10 years, and to pay him a weekly salary for his work. The company did not bind itself to continue him as superintendent, but it was certainly bound to accept his "services" as long as he conducted himself properly and furnished no just ground for discharge. It would be extraordinary to find in such a contract a positive agreement to keep a servant in one position for 10 years, and in any event to pay him wages, whether he had been discharged or not, and even if he had been discharged for abundant cause; and, while such an agreement may no doubt be made, its unusual character is of itself enough to lend strong support to the defendant's contention that in the present instance the agreement was not entered into. If it had been a part of the company's obligation, it is scarcely conceivable that Schmitt would have accepted the resolution without insisting that an omitted provision, that was of so great importance to him, should be plainly expressed.

The complainant relies with apparent confidence upon Dalzell v. Dueber Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749, as substantially on all fours with the case at bar. An examination of the opinion discloses, however, that the points actually decided were, first, that an oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within section 4898 of the Revised Statutes [U. S. Comp. St. 1901, p. 3387], requiring assignments of patents to be in writing, and may be specifically enforced in equity upon sufficient proof thereof; and, second, that under the evidence then being considered no such agreement had been proved by evidence sufficiently clear and satisfactory to justify a court of equity in making a decree of specific performance. A witness for the Dueber Company had testified that Dalzell had voluntarily offered to have his invention patented in the name of the company, with no other motive than to prevent the workmen of the Dueber Company from injuring it by communicating the invention to rival companies, and for no other consideration than payment by the Dueber Company of the expense of obtaining the patents, and without himself receiving any other consideration, benefit, or reward, *and without the company's even binding itself for any fixed time to pay him the increased wages or to keep him in its service.* The phrase that we have italicized is obviously what the complainant relies upon to affect the present controversy, but it is not applicable to the facts as we have found them to be established. The essential difference between the two cases is that, while no contract at all was proved there, a contract was proved here on the part of the company—it is clearly evidenced by the resolution of October 26th—to pay to the complainant the increased wages for a fixed time and to keep him in the company's service. If he had fulfilled his part of the bargain, and had continued to render faithful service to the company, his place and wages were secure for 10 years; or, at least, if he had been improperly discharged, he would have had a good cause of action upon the contract, and could have recovered compensatory damages. It is true that the contract did not bind the company to retain him in its service, even though proper grounds for discharge might exist; but we see nothing in the language just quoted to require

as to suppose that the Supreme Court of the United States had such an unusual provision in mind, and intended to intimate that unless Dalzell had been protected against discharge, even if he should deserve it, the agreement would be too unconscionable to be enforced.

This seems to be the whole case. The dispute is simply a question of fact, and, having determined the question in favor of the defendants, nothing remains except to add, in the language of the court below: "A complainant who has refused performance of a contract cannot be awarded relief to which, if he had performed it, he would not have been entitled." If this view of the case be correct, it would obviously be superfluous to consider the question of implied license.

The decree is affirmed, with costs to the defendants in error.

ACHESON, Circuit Judge (dissenting). I dissent from this decree. The paper signed at the meeting of October 26, 1901, by the three directors of the company then present, namely, Houston, Ward, and Bonnell, was an ex parte memorandum. Manifestly it is incomplete. It recites no consideration. It does not show any contract. Indeed, unless supplemented by oral testimony, the paper would not be evidence at all against the corporation. Mr. Bonnell was a witness for the company, and speaking of what occurred at the meeting of October 26th, and referring to the paper signed by himself and the two other directors, he testified thus: "Q. 6. I understand from you that the whole contract was not put down in writing? A. No; it was not." It is plain to me from all the evidence that a further writing was contemplated. The plaintiff was rightly advised by counsel that he could not safely rely upon the paper which the three directors signed. No doubt the writing which the plaintiff submitted to the company was open to criticism, but no specific objection was made to it. Good faith required the company to specify wherein it was objectionable. The company, however, took the arbitrary position that the plaintiff must be content with the incomplete ex parte memorandum of October 26th, and should execute to the company an absolute assignment of his letters patent. Had the plaintiff complied with this unfair demand, he would have been left without any adequate protection. The plaintiff, in my judgment, was entitled to some writing embodying the whole contract. The conduct of the company was so unreasonable that a court of equity, it seems to me, would not decree in its favor specific performance of the alleged oral contract. Yet the effect of the decree here is to strip the plaintiff of his patent and give it to the defendant without any compensation whatever. The result, I think, is inequitable.

WISCONSIN COMPRESSED AIR HOUSE CLEANING CO. v. AMERICAN COMPRESSED AIR CLEANING CO.*

(Circuit Court of Appeals, Seventh Circuit. October 7, 1903.)

No 953.

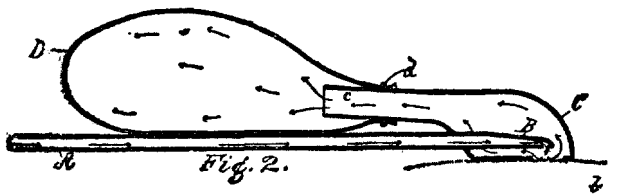
1. PATENTS—INFRINGEMENT—CARPET CLEANING MACHINES.

The Nation patent, No. 521,174, for a duster, adapted to the cleaning of articles or goods having a nap surface, covers a machine in which a current of compressed air is directed at right angles against the surface of the article to be cleaned from a pipe having a nozzle some distance from such surface and within a hood which envelopes it except for an opening opposite the outlet to permit the air current to come into contact with the goods, and terminating at the other extremity in a cloth sack or strainer which retains the dust while permitting the air to escape. The Thurman carpet renovator, made in accordance with the Thurman patents, Nos. 634,042, 663,943, and 665,983, consists of a machine for cleaning carpets on the floor, in which there is a pipe having an expanded nozzle, the lips of which are substantially in the plane of the bottom of the machine, through which a current of compressed air is forced at an angle of 45 degrees through the carpet, striking the floor, and, being deflected up through the carpet into a hood with a strainer which is carried in front of the nozzle. *Held* that, in view of the prior art, which disclosed stationary machines for renovating carpets by the use of compressed air, movable machines for dusting carpets by means of air currents in connection with hoods and strainers and the open blast nozzle used for dusting carpets and upholstered articles, the Nation patent was not for an invention of a primary character, and was not infringed by the Thurman machine.

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

This appeal is from a decree enjoining the Wisconsin Company from infringing letters patent No. 521,174, June 12, 1894, to Enoch Nation, assignor, the property of the American Company.

Figure 2 of the drawings is here reproduced:



The specification and claims read thus:

"Be it known that I, Enoch Nation, a citizen of the United States, residing at Indianapolis, in the county of Marion and state of Indiana, have invented certain new and useful improvements in dusters; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

"This invention relates to improvements in mechanism for cleaning carpets, velvets, furs and goods of any kind having a nap surface and will be found specially useful in dusting upholstered goods such as car seats, the object of the invention being to utilize compressed air as the active agent in liberating the foreign particles, and to provide means for straining the dust

* Rehearing denied November 18, 1903.

out of the air and retaining it while allowing the air to escape after it has been used.

"The objects of this invention are accomplished by the mechanism illustrated in the accompanying drawings, in which—

"Figure 1 is a view in perspective of my complete duster and showing the method of applying it in dusting a car seat. The condensing pump and the chamber for the condensed air are not shown. Fig. 2 is a detail in vertical section of the device, in which the direction of the air is shown by the arrows. Fig. 3 is a detail showing an under side view of the head of the device where the air comes in contact with the goods to be cleaned.

"Similar letters refer to like parts throughout the several views of the drawings.

"A is a metallic tube which will serve the double purpose of an inlet through which the air to operate the duster will be conducted to the nozzle, B, and as a handle by which the duster will be guided over the material to be cleaned. This tube may be bent in any desired shape that will best conform to the special work to be done, such as being curved upwardly for a device for dusting carpets, instead of being made straight as shown in the drawings.

"A^1 is a flexible connection, preferably a rubber hose, by means of which the tube, A, will be placed in communication with an air tank, so as to be supplied with air through the hose from the tank. The air will be condensed into the receiver or tank by means of a pump suitably arranged and connected.

"A^2 is a valve in the tube, A, by means of which the supply of air may be cut off or the amount of supply regulated.

"B is an expanded nozzle or head terminating the outer end of the tube, A, and is provided with the transverse opening, b, on its under side, arranged so as to give a direct downward course to the stream of air that will be allowed to escape through the opening under heavy pressure. The air thus liberated and coming violently into contact with the nap of the goods to be cleaned dislodges every particle of dust and dirt, which in dusters of this class has been simply thrown into the air by the action of the current only to settle down again upon the goods afterward. To obviate this, which is one of the principal features of my invention, I provide the hood, C, to envelop the nozzle on all sides, but so arranged as not to interfere with the free passage of the dust laden air as it leaves the goods. The hood will be made of any suitable material—as sheet metal—and shaped so as to guide and conduct the current of air with its impurities into a cloth sack, D. This cloth sack will act as a strainer by allowing the air to pass through its meshes but retarding the dust and foreign matter, which will not be able to pass through, and will be accumulated within the sack. As shown in the drawings, the sack is removably secured to the hood by having the contracted portion, c, of the hood, C, projected into the open mouth of the sack and the sack retained by means of an impinging rubber band, d, or by simply tying the sack upon the hood with a cord. When it is desired to empty the accumulated dust, the sack is removed and the contents emptied.

"Having thus fully described my invention, what I claim as new, and wish to secure by letters patent of the United States, is:

"(1) The combination with an air-pump hose or a hose connected with a tank of compressed air and a nozzle terminating said hose and means for regulating the escape of air through the nozzle, of a hood enveloping the nozzle and having an opening opposite the outlet in the nozzle through which the compressed air may be brought into contact with the goods to be cleaned, and an outlet from the hood terminating in a strainer, by which the impurities may be deposited and collected in a body and the air allowed to escape.

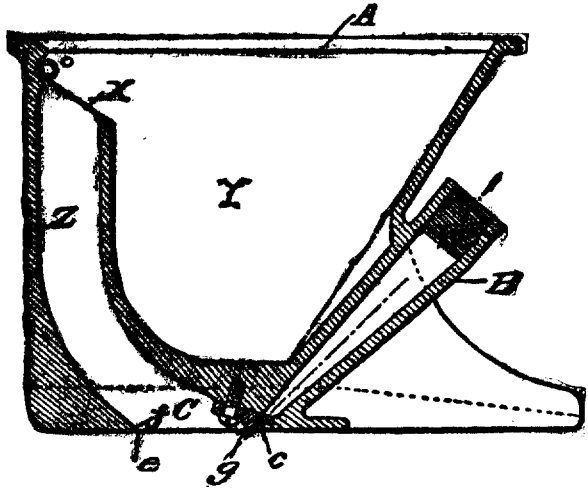
"(2) The combination of an air-pump hose or a hose connected with a tank of compressed air and a nozzle terminating said hose and means for regulating the escape of air through the nozzle, of a hood enveloping the nozzle and having an opening opposite the outlet in the nozzle through which the compressed air may be brought into contact with the goods to be cleaned, and having an outlet from the hood terminating in a strainer, said strainer consisting of a cloth bag removably secured to the discharge outlet of the hood, substantially as described and for the purposes specified."

Before the patent was issued, Enoch Nation assigned to William E. Nation. On October 15, 1901, William E. Nation assigned the patent to Frank J. Matchett, and he, having organized the American Company for the purpose, transferred the patent to that corporation on December 12, 1901, and this suit was begun on the 16th of the same month. None of the owners of the patent in suit ever developed it commercially.

The Wisconsin Company is a licensee of the General Compressed Air House Cleaning Company. The latter is located at St. Louis, owns patents Nos. 634,042, 663,943, and 665,983, dated respectively October 3, 1899, December 18, 1900, and January 15, 1901, all issued to John S. Thurman, and since December, 1899, has been engaged successfully in making and using carpet renovators, under the Thurman patents. In September, 1900, Matchett, who organized the American Company 14 months later, procured the organization of the Wisconsin Company to use the Thurman carpet renovators, made by the General Company. And it was while Matchett was secretary of the Wisconsin Company that he picked up the Nation patent and formed the American Company. The General Company, licensor, defended this suit.

Complainant's expert identified the following drawing of the alleged infringing device as being correct in all essentials:

Vertical Section Defendant's Machine



Evidence of the prior art included exhibits of the "open blast nozzle"; British patents to Lake, No. 676, 1870, to Norris, No. 4,538, 1876, to James, No. 4,931, 1878, to Sörensen, No. 3,134, 1892; United States patents to Miller, No. 288,720, 1883, to McClain, No. 365,192, 1887, to Warsop, No. 407,309, 1889, to Ethridge, No. 434,178, 1890; and modified machines of the McClain and Sörensen patents, made by defendant, and claimed to represent correctly the essential principles respectively embodied in those patents.

The open blast nozzle has been in use since 1886. It comprises the combination of an air-pump hose or a hose connected with a tank of compressed air and a nozzle terminating said hose, and means (a cock) for regulating the escape of the air through the nozzle. The orifice in the nozzle is straight, and is from 10 to 16 inches one way by $1/100$ to $1/32$ of an inch the other. It is extensively used by railroad companies in cleaning cars. The removable seats and carpets are taken out of the car and subjected to the blast. The windows and doors of the car are left open and the blast is used in blowing

the dust from the backs of the seats, from the window ledges and curtains, and from the ventilators along the ceiling. In cleaning the plush cushions the blast is usually held close to or against the surface. In cleaning ledges and ventilators the blast is effective some feet away.

The specification of the Lake patent states that the "invention consists in mechanism for producing a draft or current of air to take up the dust and dirt (from carpets), and carry the fine particles into a porous air chamber which allows the air to escape while the dust is retained therein." In the machine's base, which bears upon the carpet to be cleaned, is an opening through which the dust is taken by a suction draft created by a fan revolving in the casing and discharged into a cloth bag fastened to the outlet of the casing. The fan is driven by means of two pulleys, a band, and a crank in the hand of the operator.

In Norris's specification it is said that: "This invention relates to a dust-removing machine for carpeted apartments or surfaces, so constructed that the surface shall not be subject to a rubbing or frictional action, but be lightly but sharply beaten to raise the dust at the same time that a strong current of air shall be produced so as to take up and deposit the light dust and heavier particles of the sweepings in a suitable bag or dust receptacle attached to the sweeper." A hood, the edges of which bear upon the carpet, envelops the beating and blowing elements. Mounted on a horizontal shaft, revolving within the hood, are flexible arms, some carrying beaters and others fan blades. Attached to the outlet of the hood is a bag to receive the dust-laden air and retain the dust while the air passes out through the meshes of the cloth. The fan and beaters are driven as in the Lake patent.

The James patent states that it is an improvement upon the Norris in certain particulars, but, as affecting the present case, the machines are essentially identical.

The Sörensen machine was designed primarily for gleaning grain from fields, but the specification asserts that "it may also be used in collecting and removing dust and dirt from streets, floors, carpets, and the like." "The machine operates by forcing an air jet or current through air channels and through an air-shaft furnished with apertures or outlets. The air current is led through these outlets to the ground beneath the lower part of a grain or dust trunk, the lower end of said trunk passing closely over the surface, where the particles are lying, the other end being connected with a reservoir, into which the particles are carried by the air jet." In the form most elaborately described, air jets are thrown against the ground obliquely and opposite each other so that each aids the other in forcing the particles from the ground into the trunk or hood. In one form described there is a single straight jet, thrown against the ground obliquely towards the front of the trunk; and while, of course, the lower edges of the trunk are "sufficiently elevated to admit of the machine's passing over the ordinary irregularities of such surface," the front edge is provided with a "hinged guard, adapted to drag over the surface to be cleaned." It is also suggested that, "if it be desired to isolate the air current from the external air, such protection may to a certain extent be obtained by applying some elastic bottom linings." The machine as built for a grain gleaner cannot be taken into a house. Defendant exhibited a modified Sörenson machine of the size of the ordinary carpet sweeping devices. As the surface to be cleaned was not irregular, the front edge of the hood was not hinged, and instead of elastic bottom linings the edges of the hood were made to rest flatly upon the carpet. For the "sieve" in the reservoir was substituted a bag. The air jet was supplied from a tank of compressed air. This modified Sörensen machine performed all the service that can be obtained from the device of the Nation patent.

The Miller patent illustrates a stationary machine to which the carpet is taken and cleaned by air jets that are supplied by "a fan or other blower."

The McClain machine consists of a casing or hood having an opening in its under side. To the front edge of the casing is attached an adjustable brush, designed to loosen the dust or dirt. Within one part of the hood is a fan that is rotated by pulleys, a band, and a crank in the hand of the operator. The air, as compressed by the fan, is forced through a conduit and discharged against the carpet at an angle of about 45 degrees. As the dust-laden

air rises within the hood, it revolves a light drum, the lower edges of which touch the water in a pan. The wet drum is intended to catch the dust and deposit it in the pan. The air finally passes out of small apertures in the back of the hood, which may strain out dust not caught by the drum. Defendant exhibited a modified McClain machine, in which the air current was taken from a tank of compressed air, and in which, to illustrate claim 2 of the Nation patent, a bag was substituted for the apertures in the hood as the air strainer. This modified McClain machine performed all the service that can be obtained from the device of the Nation patent.

The Warsop patent exhibits a stationary machine for cleaning carpets with compressed air. "For this purpose we cause a powerful current of compressed air, divided either into a number of small jets or one or more extended jets or sheets of air, to be thrown onto the carpet or other fabric to be cleansed and purified in such a manner that the air is forced completely through the interstices of the carpet or other fabric, and thereby carries with it the dust or other impurities that may be in the carpet into a receptacle made to receive them, and from which they are drawn away by a flue, fan, or other means. The carpet or fabric during the operation is drawn by hand or other suitable means over a revolving perforated roller, the curved surface of the roller opening temporarily the interstices of the carpet, and more freely allowing the dust and impurities to be forced out by a powerful current or currents of compressed air from the supply pipe and nozzles or slots placed immediately over this roller." The perforated roller revolves within a casing through which the carpet is passed.

The Ethridge patent is for a street-sweeping machine. It discloses a combination of "an air-forcing apparatus" ("preferably a blower of any suitable type") operated by means of a gas engine on the carriage, an air pipe or conduit communicating therewith and arranged to deliver jets or blasts of air upon the surface to be cleaned in such a manner as to loosen and set in motion the particles to be removed, a hood or casing over the area on which the débris is loosened and agitated by the air blast, an air-exhausting apparatus to assist in moving the particles from the hood through a passage to a receptacle, from which the air is let out through a screen.

The propositions which defendant advances for reversal of the decree may be summarized thus: (1) Equity will not protect the naked legal right to use a patented invention. The patentee will be protected only in the actual commercial use of his device. As Nation and his successors never introduced the device commercially, there is no equity in the case. (2) Matchett, organizer of both companies, while secretary of defendant bought the Nation patent, and conveyed it to complainant for the purpose of harassing defendant. Equity should discountenance this. (3) Noninfringement. (4) Anticipation. (5) Lack of invention.

Paul Bakewell, for appellant.

E. H. Bottum, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

As the decree will be reversed for other reasons, we deem it unnecessary here to agitate the first and second questions.

1. The respective experts agree in defining a duster as that which sweeps dust away from a surface, and a renovator as that which restores to freshness throughout; and the distinction is justified by the lexicographers. Nation classified his device as a "duster," and stated that his invention "relates to improvements in mechanism for cleaning carpets, velvets, furs, and goods of any kind having a nap surface, and will be found specially useful in dusting upholstered goods, such as car seats." Referring to the drawing, the specifica-

tion says: "B is an expanded nozzle or head terminating the outer end of the tube A, and is provided with the transverse opening, b, on its under side, arranged so as to give a direct downward course to the stream of air." Thus the air comes "violently into contact with the nap of the goods to be cleaned." "The direction of the air is shown by the arrows" in the drawing. The hood, C, is made "to envelop the nozzle on all sides, but so arranged as not to interfere with the free passage of the dust-laden air as it leaves the goods" and is conducted into the strainer, "cloth sack, D." Looking to the drawing and specification, it seems clear that Nation had in mind a mechanism for dusting nap surfaces, consisting of an expanded nozzle through whose orifice, held above the surface, a blast of compressed air could be directed down upon the nap of the goods to be cleaned; a hood that completely enveloped the nozzle on all sides, except that, to enable the air blast from the inclosed nozzle to be thrown down against the nap, an opening was made in the bottom of the hood, directly opposite the orifice of the nozzle, through which opening in the bottom of the hood the air blast could reach the goods to be cleaned; and a strainer to release the air and retain the dust. And the claims, as we read them, do not purport to cover any broader invention. The only difference between the two claims is that the general strainer of claim 1 is replaced by the specific cloth bag of claim 2. Both claims describe an essential element as being "a hood enveloping the nozzle and having an opening opposite the outlet in the nozzle through which the compressed air may be brought into contact with the goods to be cleaned." That is, the hood completely envelops the nozzle on all sides, except that, to enable the air blast from the inclosed nozzle to be thrown down against the nap, an opening is made in the bottom of the hood, directly opposite the orifice of the nozzle, through which opening in the bottom of the hood the air blast may reach the goods to be cleaned.

Thurman's patents refer to his device as a carpet renovator. It is designed to renovate carpets without removing them from the floor, by directing a blast of compressed air into and through the carpet against the floor at an angle of about 45 degrees, so that the blast rebounds from the floor and passes at the angle of reflection through the carpet and into a hood and strainer. Referring to the drawing of the alleged infringing machine, without detailing other differences in construction between this and the device of the Nation patent, it will be noted that the forward lip of the nozzle's orifice rests upon the carpet and is in the plane of the machine's base. Except for convenience of manufacture, the nozzle, instead of being cast in one piece with the hood, might be made separately and bolted to the outer wall of the hood. The air is discharged into and through the carpet outside of the hood, and reaches the hood by reason of being deflected forward at an angle from the floor, and is aided in this course by the forward lip's being narrower than the rear lip of the orifice. If the nozzle, the orifice being in the same location relative to the hood as now, were directed rearwardly at an angle of 45 degrees, the air, as the machine moved forward, would escape under the rear lip, up

through the carpet, into the room. As it is, the air escapes under the forward lip, up through the carpet, into the hood.

The Thurman machine that was put in evidence by the complainant has the forward lip rounded up so that it is one-sixteenth of an inch above the plane of the base. But the scratches made upon its surface show that the forward lip came in close contact with the carpet. And the complainant's expert testified that there was no difference in principle between the machine as exhibited and the machine of the drawing. In this conclusion we agree. Furthermore, the record shows that before the trial the licensor, who is defending this suit, was making his machines so that the forward lip of the orifice was in the plane of the base.

Nation did not disclose that his air blast would penetrate the carpet, strike the floor, and carry up through the carpet the dust on the floor and in the body of the carpet into the hood. His drawing indicates that the air rebounds from the surface of the goods to be cleaned. But if his device, without material modifications, could be made to do the work of the Thurman machine, it would be by a different mode of operation. If Nation's air blast penetrates the carpet and rebounds from the floor, it is an incident, and not an essential, of the device's operation. The air is discharged within the hood. It is true that the height of the orifice above the plane of the base is left by Nation to the builder's discretion. But it is an essential condition that the orifice be within the hood, and opposite (which cannot be in the same plane with) the opening in the base through which the air blast reaches the carpet. In Thurman's machine it is an essential condition of operation that the air be discharged into and through the carpet outside of the hood. It reaches the hood only after striking the floor and passing up through the carpet.

Unless the wording of Nation's claims be ignored, we think the Thurman machine, in which the nozzle is not enveloped within the hood, cannot be held to infringe.

It should not be forgotten that the defendant was operating under later patents, and that the art prior to Nation discloses stationary machines for renovating carpets by the use of compressed air, movable machines for dusting carpets by means of air currents in connection with hoods and strainers, and the "open blast nozzle." In this connection the observation of the Supreme Court in Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689, is pertinent:

"Considering the complainants and Whitney (patentee of defendant's machine) as alike having improved on the prior art, the question is whether the specific improvements of the one actionably invaded the domain of the other. The presumption from the grant of the letters patent is that there was a substantial difference between the inventions."

2. Respecting anticipation it is true that the combination of elements in Nation's claims is not found in any one prior device. So the citations are not effective to disprove the novelty of Nation's combination. But the modified Sörensen and McClain machines would be anticipative, and, in our opinion, it did not require invention to produce these modified machines. The modification con-

sisted in substituting the known means for directing an air current from a tank of compressed air upon the goods to be cleaned for the Sörensen and McClain air currents from blowers. This selection among known means, though increasing the degree of efficiency, did not rise to the dignity of independent invention. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; Lumber Co. v. Perkins, 25 C. C. A. 613, 80 Fed. 528; Kelly v. Clow, 32 C. C. A. 205, 89 Fed. 297, and cases there collated.

3. It is evident that the defendant's machine cannot be brought within Nation's claims without giving them the character of a primary invention of means for using compressed air in conjunction with a hood and strainer.

The claims comprise the following elements: (1) An air-pump hose, or a hose connected with a tank of compressed air; (2) a nozzle terminating said hose; (3) means (a valve is the means disclosed) for regulating the escape of air through the nozzle; (4) a hood enveloping the nozzle, and having an opening opposite the outlet in the nozzle, through which (opening) the compressed air may be brought into contact with the goods to be cleaned; (5) a strainer (generic in claim 1, and the specific cloth bag in claim 2).

We have already stated our conclusion that the fourth element, without disregarding the language employed, cannot be accepted as a generic description of a hood. But, if the words could properly be given a generic scope, the claims would be void for want of invention.

The first three elements are an exact description of the old "open blast nozzle." The fourth and fifth, if treated generically, cover the hood and strainer of the old Lake, Norris, and James patents. Nation, in testifying to his discovery, showed that he was employed for several years by railroad companies in cleaning cars, and used the "open blast nozzle" for that purpose; and that one day, a piece of burlaps having caught on the nozzle, he observed that the dust was strained out as the air passed through the fabric. Certainly, Nation was not, as is now claimed for him, the discoverer "of the function of air under high pressure as an active agent for thorough cleaning when the full benefit of the rebound current of air was obtained." Nation's machine brings together means for performing two functions—the function of raising the dust, and the function of catching and holding the dust after it is raised. The two functions are not interactive; not even synchronous; but successive. For discharging the first function Nation employed a blast of compressed air, the use of which for that purpose was old and commonly known. If there is any difference in getting "the full benefit of the rebound," it lies in favor of the old "open blast nozzle"; for, to the extent of the back pressure within the hood and strainer, the blast, discharged within the hood, is retarded in striking and in rebounding from the surface from which the dust is to be raised. For discharging the second function Nation employed (on the present hypothesis of a generic claim) the old hood and strainer of the English patents. Certainly he was not the discoverer of the function of the hood and strainer in catching and holding the dust that has been raised by an

air current. So the question is whether a claim of primary invention lies for bringing these two old devices into a union in which each performs only its old function. The authorities answer in the negative.

A cupola furnace being old, and it being old to use a cinder-notch in a blast furnace, there was no invention in putting a cinder-notch in a cupola furnace to perform the same function it had in a blast furnace. Vinton v. Hamilton, 104 U. S. 485, on page 492, 26 L. Ed. 807.

Rice did not prove himself an inventor by combining the return flue of a Cornish boiler with the Morey straw-feeding device, which had been used with a common form of return flue. Heald v. Rice, 104 U. S. 737, on page 755, 26 L. Ed. 910.

It did not require invention to couple an engine, which had theretofore been used in turning a windlass, to a capstan, which had theretofore been operated with handspikes. Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702.

A claim based on combining a relief valve with a steam fire engine, when similar relief valves had been used on engines in steamships, was held to lack invention in Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. 692, 28 L. Ed. 1070.

A fireplace heater was old. A fuel magazine in a base-burning stove was old. The quality of invention did not inhere in the act of coupling the fuel magazine to the fireplace heater. Thatcher Heating Co. v. Burtis, 121 U. S. 286, on page 294, 7 Sup. Ct. 1034, 30 L. Ed. 942.

To age wine by applying heat being old, there was no invention in heating it with an apparatus that had never before been used for this purpose, but had been used for heating other liquids. Dreyfus v. Searle, 124 U. S. 60, 8 Sup. Ct. 390, 31 L. Ed. 352.

A claim for a process of spreading a known composition on paper to form a surface, in view of other patents showing that it was old to coat paper with other substances, was held void, in Underwood v. Gerber, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710.

In Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689, the question was whether Kitselman had made a primary invention in producing a portable fence machine that was capable of weaving a diamond mesh wire fence in the open field. A prior machine, stationary in a factory, produced diamond mesh wire fabric for fencing. Another prior machine "walked" along in the field as it wove a wire and picket fence. "Kitselman converted the stationary into a portable machine by setting it on end and mounting it on a truck. * * * Whatever its merits, it was not in itself primary invention to mount a machine for making diamond mesh on a truck, and using it in the field as the old machine had been used to make wire and picket fence. The getting up and walking was not new, though the machine may have gone at a better gait and made a better fence."

And the cases might be multiplied indefinitely.

The decree is reversed, with the direction to dismiss the bill for want of equity.

UNITED STATES MINERAL WOOL CO. v. MANVILLE COVERING CO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 934.

1. PATENTS—PRIOR USE—PROCESS FOR MANUFACTURING MINERAL WOOL.
The Rockwell patent, No. 447,360, for processes of manufacturing mineral wool by remelting hardened slag from a smelting furnace with lime, or with lime and silica, is void for anticipation by the prior public use of the process by others.

2. SAME—INFRINGEMENT.
The Rockwell patent, No. 452,733, for a process of manufacturing mineral wool by remelting hardened slag from a smelting furnace with silica, *held* not infringed.

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

See 101 Fed. 145.

Albert G. Welsh and E. W. Frost, for appellant.

Curtis T. Benedict, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Appellant failed in its suit to hold appellee for infringement of letters patent 447,360, March 3, 1891, and 452,733, May 19, 1891, both issued on applications of Charles H. Rockwell, assignor, for new and improved processes in the manufacture of mineral wool.

Mineral wool, as a product, had long been known. It had been made either by taking molten slag from a blast furnace in a metal car to the blowing device, where the car was tapped and a jet of steam or air converted the molten slag into mineral wool, or by fusing lime and silica-bearing rocks in a cupola, and blowing the stream as it came from the tap. In the specification of the first patent, Rockwell stated that hardened slag could not be remelted and made into mineral wool without the addition of other material, and that he had found by experiment that lime (an alkali) or silica (an acid) or both were suitable.

"Whether lime or silica or both shall be used depends upon the nature of the slag. This can be determined, for one or two inexpensive trials will decide which, and whether both, of the ingredients named should be used. The proportion of each ingredient to be used will also depend upon the nature of the slag, to be determined in like manner by trial. In all cases the proportion of lime or silica or both will be small. In the use of ordinary slag, I have found the following proportions to produce good results, viz.: Slag, eighty per cent.; limestone, fifteen per cent.; quartz pebbles (silica), five per cent. In many cases the slag will be found to be so silicious as to render the addition of quartz pebbles or silica unnecessary, but I do not confine myself to the proportion named."

In the specification of the second patent, Rockwell said:

"In practice, I have found that ninety-five per cent. of slag and five per cent. of silica or silica-bearing stone produces a good result, but I do not intend to confine myself to the exact proportions mentioned. The amount of silica to be used can be easily ascertained by a few inexpensive trials."

The claims of the first patent are these:

"(1) The process of manufacturing mineral wool, consisting of remelting hardened slag or scoria from a smelting furnace with lime and silica, or lime and silica-bearing stone, mixed in proper proportions, and blowing the same into mineral wool, substantially as described. (2) The process of manufacturing mineral wool, consisting of remelting hardened slag or scoria from a smelting furnace with lime, or lime-bearing stone, mixed in proper proportions, and converting the same into mineral wool, substantially as described."

Of the second patent:

"In the manufacture of mineral wool, the process consisting in melting in a cupola hardened slag or scoria with silica, or silica-bearing stone, mixed in proper proportions, and converting the same into mineral wool, substantially as described."

It was shown that appellee made mineral wool from a fusion of hardened slag and dolomite (a stone containing lime and magnesia in about the ratio of 5 to 4), and occasionally a very little feldspar.

If there was any infringement, it was not of the second patent, which claims the process of reducing slag with silica alone.

The Circuit Court held the first patent void for want of novelty, in view of the prior use of the process by others. The evidence satisfies us beyond any reasonable doubt, as it did the court below, of the existence of the following facts: In 1884 Pettigrew was the superintendent, and Gleason the chief engineer, of the Illinois Steel Company's plant at Joliet. They knew the article, mineral wool, and were using it as pipe covering in the plant. Instead of continuing to buy it in the market, they undertook to provide a supply from the refuse of the furnaces. They did not use the direct process of blowing the slag as it came molten from the furnaces, but endeavored to make mineral wool by remelting hardened slag in a cupola. They found that the product was too dark, brittle, and shotted. Pettigrew, Gleason, and others interested in the experiments, knew the use of limestone in fluxing ores. A Mr. Hay, now dead, suggested that the slag was deficient in lime. Thereupon they added a limestone (dolomite), and found that they could produce a good article of white and fibrous mineral wool by the process of remelting in a cupola hardened slag with lime, or lime-bearing stone, mixed in proper proportions; that the proportions depended upon the nature of the slag, and could be easily determined by testing the fusion from time to time by blowing. A Mr. Kelly, to whom some samples were sent, testifies that the wool was dark, coarse, and shotted. Pettigrew and Gleason say that the samples were white and fibrous. But it is not necessary to discredit Mr. Kelly's recollection of the product he saw, to find that at Joliet, in 1884, the process of remelting hardened slag with limestone in proper proportions was known. It may be that further experience in the use of the process and repeated tests of the fusion were necessary (as the patent itself indicates) to produce the best product. But there is no doubt that the process employed would do it. And there is no doubt that Pettigrew and Gleason, who were familiar with the mineral wool on the market, finally produced in 1884 about two tons of mineral wool which was suitable for use and was used in covering the pipes, and was sufficient to meet the needs of the plant at the time. In 1886, without further

experiment, and by the use of the same process, they made a further supply.

At Joliet they remelted hardened slag with limestone (claim 2 of the patent). It is not shown that they added silica or silica-bearing stone (claim 1). But when they remelted the slag, a composition of the silica of the ore and the limestone flux, and, finding it by test deficient in lime, put limestone in the cupola, it would not require invention, if they added too much limestone to a particular charge of slag, to offset the excess by adding a proper amount of silica-bearing stone.

If the patent is not void for indefiniteness (Cerealine Mfg. Co. v. Bates, 101 Fed. 280, 41 C. C. A. 341; Tyler v. Boston, 7 Wall. 327, 19 L. Ed. 93), we think the process was anticipated by the prior use at Joliet. What Pettigrew and Gleason did was not an abandoned experiment. They knew the product they wanted to get. They experimented with hardened slag alone unsuccessfully. They determined what should be added, and why, and thereupon they succeeded. The process they discovered in 1884 did not lapse into a lost art. In 1886 they used it in successful manufacture. Why the Illinois Steel Company did not have them continue is not clear, but they were not the masters. Nevertheless, whenever they have been called upon since 1884 to explain the process, they have done so. The use was not secret. The process was practiced by Pettigrew and Gleason, and those who assisted, and was open to the observation of the employés generally, and of all who passed through the plant. We think there was abundant publicity. Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821; Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251; Forncrook v. Root, 127 U. S. 180, 8 Sup. Ct. 1247, 32 L. Ed. 97; Peters v. Active Mfg. Co., 129 U. S. 530, 9 Sup. Ct. 389, 32 L. Ed. 738.

The decree is affirmed.

In re LANE.

(District Court, D. Massachusetts. December 26, 1902.)

No. 5,191.

1. BANKRUPTCY—COMPOSITION—CREDITORS—FAILURE TO PROVE CLAIM—SUBSEQUENT ALLOWANCE—OBJECTION BY BANKRUPT.

Where a composition offered by a bankrupt was accepted, and some of the creditors failed to claim their dividends, the bankrupt was entitled to object to a preferred claim of a creditor, omitted from the schedule in good faith, and not proved within a year after the adjudication, and to the payment of such claim from the surplus in the hands of the court.

In Bankruptcy.

Eaton, McKnight & Carver, for creditor.

Joslin & Mendum, for bankrupt.

LOWELL, District Judge. The petitioner in this case failed, by inadvertence, to prove his claim within a year of the adjudication. The debt was not on the bankrupt's schedule, but its omission by the bankrupt was made in good faith, and under the circumstances was

almost unavoidable. The bankrupt offered a composition, which was duly accepted, and he made a sufficient deposit. Some of the creditors have failed to claim their dividends, and the petitioning creditor now seeks, against the objection of the bankrupt, to prove his claim, which is in its nature preferred, and to obtain payment thereof from the surplus left in the hands of this court. No objection has been made by other creditors. By the terms of the act proof is barred, provided the bankrupt has standing in court to raise an objection.

In Re Morton, 118 Fed. 908, this court said, "The purpose of the bankrupt act is the equal and equitable distribution of the bankrupt's property among his creditors, and the consequent discharge of the bankrupt from his obligations;" and again, "The bankrupt's property belongs to his creditors, and not to himself." It may be doubted, therefore, if the bankrupt can object to the proof and allowance of a just claim to share in an ordinary distribution in bankruptcy, though the claim is not proved within a year. In the case of an ordinary distribution, section 57n (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]) may be intended to protect only the other creditors.

But the question here presented is not that raised by an attempt to prove in ordinary bankruptcy proceedings, after the expiration of the year, as against the sole objection of the bankrupt. The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary. Section 12e (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides: "Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." Composition is thus treated, even in the act, as in some respects outside of bankruptcy. In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts, and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property whether the debtor likes it or not, and the debtor is released whether the creditor likes it or not. The bankrupt's rights of property arise only in the event of a payment of his creditors in full. If a creditor will not prove his claim, the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. Section 66 of the act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3448]) has the same purpose, and does not apply to composition. But if

the composition is paid the creditors have no further claim upon the debtor or his property. In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more. If he does not enforce his bargain, his failure should enure to the bankrupt's benefit, not to the benefit of another creditor. It follows that a bankrupt may be heard to object to the allowance in composition of a claim offered for proof after the expiration of a year. True, section 12e, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], permits the distribution of the deposit in composition as the judge shall direct; but that provision does not require the court to permit the petitioner to prove in this case, and, if the matter be within the court's discretion, the court is not disposed to exercise that discretion in favor of the petitioner, though it might do so if the failure of the petitioner to prove were in any way chargeable to the bankrupt.

The petition to prove is denied.

UNITED STATES v. CLARK.

(Circuit Court, D. Montana. November 7, 1903.)

No. 157.

1. PUBLIC LANDS—SALE BEFORE ISSUANCE OF PATENT—BONA FIDE PURCHASERS.
Where an entryman of public lands sold the land to defendant's vendor after the issuance of the entryman's final certificate, who thereafter sold the land to defendant before the issuance of patents, which were subsequently issued to the original entryman, the fact that defendant purchased before the issuance of the patent did not deprive him of the rights of a bona fide purchaser for value.

2. SAME—VACATION OF PATENT—FRAUD—EVIDENCE.
A patent for public land will not be set aside on the ground of fraud committed by the patentees, where the proof is only sufficient to raise a suspicion of fraud not amounting to a conviction.

3. SAME.
Facts reviewed, and *held* insufficient to authorize a decree setting aside a patent for public lands on the ground of fraud alleged to have been committed by the patentees.

In Equity.

Fred. A. Maynard, for the United States.
Walter M. Bickford and T. J. Walsh, for defendant.

KNOWLES, District Judge. In this suit the United States has filed its bill of complaint praying that certain patents, 82 in number, under which the defendant, William A. Clark, claims title to certain timber lands within the state of Montana, be set aside and annulled, upon the ground of alleged frauds committed by the patentees named in said patents in procuring the issue of the same. The patentees obtained these patents for timber lands under Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545], and, after having made final proof

¶ 1. See Public Lands, vol. 41, Cent. Dig. § 368.

upon their several entries, and having received certificates of purchase from the proper officers of the United States Land Office for the districts in which their several entries were situated, conveyed the same to one Robert M. Cobban. The said Cobban conveyed the same to the defendant, William A. Clark. The defendant, Clark, filed an answer to the bill, in which he denies all of the material allegations therein contained, and sets up the defense to the effect that he was and is an innocent purchaser of said lands for a valuable consideration and without notice. To this answer the general replication was filed, and the case was referred, and proofs taken.

The proof discloses the fact that Clark purchased the lands from Cobban for a valuable consideration, before the patents were issued therefor by the government. It is claimed on the part of the government that on account of this fact Clark could not be a bona fide purchaser, and was chargeable with notice of certain frauds alleged to have been committed by the patentees. In support of this contention counsel for the government has cited the following authorities: U. S. v. Steenerson et al., 50 Fed. 504, 1 C. C. A. 552; American Mortgage Company of Scotland, Ltd., v. Hopper et al. (C. C.) 56 Fed. 67, affirmed in 64 Fed. 553, 12 C. C. A. 293; Hawley v. Diller (C. C.) 75 Fed. 946; Diller v. Hawley, 81 Fed. 651, 26 C. C. A. 514; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157; U. S. v. Bailey, 17 Land Dec. Dept. Int. 468. In all of the above-cited cases no patent had been issued by the government to the entryman, and pending such issue of patent, and while the Land Department of the government had still full jurisdiction over the matter, the entries were canceled and patents refused. The purchasers from the entrymen had made their purchase after the issue of certificates of purchase, but before the issue of patent, and claimed that the Land Department of the government could not lawfully cancel such entries, and contended that they stood in the same position as if a patent had been issued to the entryman. Under the practice of the Land Department of the United States any allowance of an entry for a patent can be recalled for sufficient reasons at any time before the actual issue of the patent therefor, and the entry of the applicant canceled. Any one purchasing from an entryman who has received his final certificate of purchase only purchases such interest in the land as the entryman has, subject to the right of the Land Department of the government to review its action and refuse to issue the patent. This is a well-known practice, and often resorted to, and any one purchasing from an entryman who has not obtained a patent must take notice of the same. Hence a purchaser under such circumstances is not entitled to the protection accorded an innocent purchaser for a valuable consideration and without notice. That is all that was decided by the cases above cited.

In the case at bar the Land Department had made no withdrawal of its approval of the right of the entrymen to a patent, but, on the contrary, issued a patent to each of them, which they now hold, and has converted an otherwise equitable title into a full legal title, and under the laws of Montana their after-acquired title inured to the benefit of the defendant, Clark. See section 1512, Civ. Code Mont.

The jurisdiction and power of the Land Department over these entries ceased wholly when the patents were issued, and it could not recall the same. U. S. ex rel. McBride v. Carl Schurz, Secretary of the Department of the Interior, 102 U. S. 408, 26 L. Ed. 219. It has often occurred that parties have purchased land from entrymen who had received certificates of purchase of the land sold, and subsequently patents have been issued therefor. In none of these cases has it been contended that the purchaser to whom the title inured after issue of the patent was not considered entitled to the rights accorded to a bona fide purchaser under the law, if he was without notice of any fraud committed by the entryman. In the case of Colorado Coal & Iron Co., 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182, the fact was presented that a purchase of some of the property a patent to which was sought to be canceled and annulled had been made before the patent was issued. This is the statement contained in the opinion:

"For these [entries] Hunt sent to Jackson deeds duly executed, attested, and acknowledged, accompanied by receiver's certificates in regular form, showing that the party named as grantor was entitled to a patent. These he was advised by counsel to accept, and did accept in good faith, as being equivalent to patents."

That case was presented by eminent counsel, and very carefully considered by the Supreme Court, and no suggestion was made that a purchaser of lands from an entryman before patent issued was not to be considered as a bona fide purchaser after such patent was in fact issued, and thereby his equitable title had become merged into the full legal title. If the doctrine contended for by counsel for the government in this case should prevail, no purchaser of a title to government land which has a foundation in a deed executed before patent issued would be secure, and the insecurity pointed out that would arise in the cases where it is sought to set aside and cancel patents against bona fide purchasers for alleged fraud on the part of the entrymen would be ever present, and could not be eliminated, for the reason that the statute of limitations does not run against the government. But let it be considered that the defendant, Clark, was bound to take notice of the different steps taken by the entrymen in obtaining these patents. What would he be required to take notice of? The records of the Land Office appear to have been in due form and correct. They were such as induced the Land Department to issue the proper patents to the entrymen and entrywomen. I do not think he could be required to be more astute than the land officers themselves. But suppose he had gone further, and made inquiry of the various persons who made the entries, and secured the final certificates of purchase from the proper officers of the Land Department, and upon inquiry had been told the same facts as were sworn to in the affidavits of these parties at the time when they made their final proofs and payment, and the same as was testified to at the hearing before the special examiner in this case? But it cannot be conceded that there is any evidence that shows that Clark was put upon his inquiry as to the sources of his title. There is absolutely no proof showing or tending to show

that Clark had any actual knowledge of the frauds alleged to have been committed by the entry men and women. The evidence shows conclusively that Cobban was not the agent of Clark in the purchase of these lands. Cobban was the vendor. In setting aside a patent issued by the government after the title has passed from the patentee to a third party, the rule laid down in U. S. v. Maxwell Land Grant Company, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949, as to the evidence necessary to authorize a court to do this, should be observed and control the court in a case like this. That rule is as follows:

"We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumption that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

It is not necessary to consider the various contentions in this case upon the subject of the evidence admitted. All of the evidence presented in the record, whether objected to or not, would not change the ruling of this court. It should be observed, however, that there is a great deal of irrelevant testimony presented, and there has been an indulgence in asking leading questions of the witnesses for the complainant that is unprecedented. It is claimed that these witnesses were hostile witnesses. There is no appearance, however, of reluctance on the part of any of the witnesses to testify in the case. The witnesses were the witnesses of the complainant, and it ought to have been made to appear clearly in the record that these witnesses were hostile. They were not parties to the suit. As to the witness Griswold, who was certainly a most willing witness for the complainant, the same practice was observed. It does not seem to me that in considering a case like this, under the rule laid down in the Maxwell Land Grant Case, supra, his testimony ought to be given any weight. According to his own admissions, he had willfully, deliberately, and corruptly sworn falsely as a witness for some of the entrymen and entrywomen who made proofs in the Land Office. He had also made an affidavit contradicting his evidence as to the agreement he had

with Cobban, which agreement he previously claimed had authorized him to make contracts for the purchase of their lands with the entrymen and entrywomen before their final proofs were made in the Land Office. His general reputation for honesty and truthfulness was attacked in court by respectable witnesses, and he did not sufficiently rebut this evidence. It was shown that he had received money from parties to suppress evidence concerning the alleged illegal cutting of timber upon the public domain. It was further shown that he had received some kind of assurance from representatives of the government that, should he testify as he had stated to them, he might be awarded public employment. What passed between him and the Department of the Interior upon this subject that department claimed as being privileged, and refused to divulge. Such a witness as this could hardly furnish proofs clear and satisfactory. If we consider the evidence of the entrymen and entrywomen, we find that they positively and emphatically deny that they had made any contracts to convey the lands to Cobban before final entry and purchase. While there may be suspicion that this evidence was not correct, and a supposition that there must have been made some contract between Cobban and themselves in regard to this matter, it must be borne in mind that these witnesses were witnesses produced by complainant, and, except where the witness Griswold testified otherwise, no evidence was introduced to contradict this, and the court is called upon by the complainant to find from its suspicion or supposition that there was such a contract. Cobban himself testified that he knew the law, and knew that such a contract was in violation thereof, and that he was careful to make no such contract whatever; and, again, Cobban was a witness for the complainant.

Considering all of this evidence, it would seem that stronger cases for the setting aside of a patent for fraud on the part of the entryman were presented in the cases of Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; and U. S. v. Detroit Timber & Lumber Co. et al. (C. C.) 124 Fed. 393. Considering the rule as to evidence necessary to establish fraud in such cases as this, and the rulings of the courts in the above cases, I am constrained to the view that it is not established that the entrymen and entrywomen and Cobban committed the frauds charged in the bill.

For the above reasons the bill must be dismissed.

UNITED STATES v. BEAVERS.

(District Court, S. D. New York. October 24, 1903.)

1. UNITED STATES COMMISSIONERS—POWERS AS MAGISTRATES—ISSUANCE OF SUBPŒNAS.

Under Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], which authorizes United States commissioners to act as examining and committing magistrates in criminal cases in any state "agreeably to the usual mode of process against offenders in such state," a commissioner in New York, sitting as a magistrate, has power to issue subpœnas for witnesses, crim-

inal magistrates of the state being given such power by statute; but under Code Cr. Proc. N. Y. § 618, which in effect provides that no person shall be obliged to attend as a witness out of the county of his residence upon a subpœna issued by a magistrate, unless on an order indorsed thereon by a court or judge on a showing made, a commissioner has no power to compel the attendance of a witness by a subpœna issued by him at the instance of a defendant, and served outside of the county where the hearing takes place, unless an order therefor is obtained from a federal court or judge in conformity to the state practice.

2. SAME—PUNISHMENT OF WITNESS FOR CONTEMPT.

By the weight of federal authority, a United States commissioner is held to be an officer of the court which appointed him, and without power to punish for contempt in proceedings before him, such power being in the court.

On Motion to Punish for Contempt.

Morgan & Seabury, for the motion.
Thomas Ives Chatfield, opposed.

HOLT, District Judge. These are motions to punish William J. Youngs, the United States district attorney for the Eastern District of New York, and Miss Amy Wren, a stenographer in his office, for contempt for failure to obey subpœnas.

The defendant, George W. Beavers, was indicted by the federal grand jury in the Eastern District of New York, and a warrant issued there for his arrest, but he was not found in that district. Thereupon an application for his arrest and removal was made before Samuel M. Hitchcock, Esq., a United States commissioner for the Southern District of New York, and the commissioner issued a warrant to the marshal for the Southern district of New York, under which the defendant was arrested and brought before the commissioner. He demanded an examination, and in the course of the examination applied to the commissioner to issue, and the commissioner thereupon did issue, two subpœnas to each of the persons William J. Youngs and Miss Amy Wren. One of these subpœnas was a general subpœna to appear and testify; the other was a subpœna duces tecum, requiring the person subpœnaed to produce certain contracts and documents, which apparently constituted evidence relating to the charge on which the indictment was based. These subpœnas were signed and sealed by the commissioner, and countersigned by the defendant's attorneys, but they were not issued or countersigned by a judge or by the clerk of this court. They were served upon Mr. Youngs and Miss Wren in Brooklyn, in the Eastern District of New York, and have not been served in the Southern District. They did not obey the subpœnas, and this motion is made to punish them for contempt in neglecting to obey them.

United States commissioners were originally authorized to be appointed by the United States Circuit Courts for the purpose of taking oaths and acknowledgments. Their powers were subsequently increased by various statutes and rules of court. By section 1014 of the Revised Statutes [U. S. Comp. St. 1901, p. 716], they are authorized to act as examining and committing magistrates in criminal cases in any state "agreeably to the usual mode of process against offenders in such state." There is no United States statute expressly author-

izing a United States commissioner, when sitting as a criminal magistrate, to issue subpœnas for witnesses; but it has always been the universal practice for commissioners to issue subpœnas, and the United States Statutes impliedly recognize that witnesses are to be subpœnaed before commissioners by regulating the fees of witnesses to be taxed against the United States in any criminal case before a commissioner (Rev. St. U. S. § 981 [U. S. Comp. St. 1901, p. 705]), and by authorizing the commissioner to take the recognizances of the witnesses before him for their appearance to testify in the case (Rev. St. U. S. § 1014). The power of a commissioner, when sitting as a criminal magistrate, to issue subpœnas, has sometimes been thought to be a power inherent in his office, independent of statute; for although he is not strictly a court of the United States (Todd v. United States, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982) he discharges judicial functions of grave importance, and in doing so has no divided responsibility with any other officer of the government, and is not subject to any other's control (United States v. Schumann, 2 Abb. U. S. 523, Fed. Cas. No. 16,235; Ex parte Kane, 3 Blatchf. 1, Fed. Cas. No. 7,597; United States v. Jones, 134 U. S. 483, 10 Sup. Ct. 615, 33 L. Ed. 1007; United States v. Ewing, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. Ed. 388). I think, however, that the true basis of his power to issue subpœnas is contained in the provision of section 1014 that the proceedings shall be agreeably to the usual mode of process against offenders in the state in which the arrest is made. The adoption by Congress of state laws regulating procedure and practice in the United States courts is not unusual; as, for instance, in the well-known sections providing that the practice at common law in United States courts shall be governed by the state law regulating practice at common law in the state courts (Rev. St. U. S. § 721 [U. S. Comp. St. 1901, p. 581]), and that any offense committed in a place under the jurisdiction of the United States, which is not expressly prohibited by a United States statute, may be prosecuted and receive the same punishment as the laws of the state provide for such offense when committed within the jurisdiction of the state (Rev. St. U. S. § 5391 [U. S. Comp. St. 1901, p. 3651]). As a criminal magistrate in this state has the power to issue subpœnas (Code Cr. Proc. N. Y. §§ 607, 608), a United States commissioner, having power to act as a committing magistrate "agreeably to the usual mode of process against offenders in such state," has, it seems to me, by the express provision of section 1014, authority to issue subpœnas.

As there is no United States statute specifically authorizing a United States commissioner to issue subpœnas, so there is no United States statute specifically authorizing a commissioner or any court to punish any person for disobeying a subpœna issued by a commissioner. Of course, however, unless such authority rests somewhere, the power of a United States commissioner to hold a judicial investigation is practically at the mercy of the witnesses summoned. It would seem at first view that if the commissioner has power to issue a subpœna he has power to punish for contempt a person who disobeys it. The general rule is that any court or person having au-

thority to discharge judicial functions has inherent power to punish persons guilty of contempt, unless such power is specifically lodged elsewhere. Such a power is a necessary incident of the authority, and essential to the proper discharge of it. Moreover, the provision in the statute which has been already referred to, that a United States commissioner sitting as a criminal magistrate shall proceed agreeably to the usual mode of process against offenders in such state, would seem to authorize a commissioner sitting in this state to punish a person guilty of contempt, inasmuch as a criminal magistrate in this state has such power. Code Cr. Proc. N. Y. § 619. But I think that the weight of authority is to the effect that a commissioner has no power to punish for contempt, but that such power exists in the court which appoints the commissioner. Ex parte Perkins (C. C.) 29 Fed. 900; In re Perkins (D. C.) 100 Fed. 950. The doctrine of these cases appears to be that a United States commissioner is an officer of the court which appoints him, so far as the power to punish for contempt is concerned, and that any person guilty of a contempt in proceedings before a commissioner is guilty of a contempt of the court. No authority has been called to my attention in which the action of a commissioner in punishing a witness for contempt has been upheld, and I think that I am bound to follow the authority of the cases cited, and to hold that this court has the power and the duty to punish persons who are guilty of contempt in refusing to obey subpœnas issued by one of the United States commissioners appointed by this court.

The question, therefore, which remains is, were Mr. Youngs and Miss Wren guilty of contempt in not obeying these subpœnas which were served upon them. One of the grounds upon which they declined to obey the subpœnas was that a commissioner's subpœna cannot be served outside the district for which he was appointed. Upon this question again there is no United States statute prescribing the limit within which a commissioner's subpœna may be served. It is argued that there can be no presumption that the jurisdiction of the commissioner extends in any respect outside of his district, and that, therefore, no jurisdiction was obtained by the service of the subpœnas in the Eastern District I think, however, that the same provision, which already has been quoted several times, that the proceedings should be agreeably to the usual mode of process against offenders in the state, applies. This makes it necessary to see what jurisdiction a criminal magistrate in this state has to issue subpœnas. A criminal magistrate in this state is authorized to "issue subpœnas, subscribed by him, for witnesses within the state, either on behalf of the people or of the defendant." Code Cr. Proc. N. Y. § 608. In respect, however, to the service of a subpœna out of the county where the magistrate sits, the Code of Criminal Procedure contains the following provisions, in section 618:

"A person served with a subpœna, issued by any officer of any court of record of this state, a district attorney or a county clerk, must attend in obedience to the subpœna, at the time and place and before the court therein named, within any county of this state. No person is obliged to attend as a witness upon a subpœna, issued by any person or court other than a judge of a court of record, a court of record, a district attorney, or a county clerk,

out of the county where the witness resides or is served with the subpœna, unless the county judge of the county where such subpœna is returnable, a justice of the Supreme Court, or a court of record, upon an affidavit of the prosecutor or district attorney, or of the defendant or his counsel, stating that he believes that the evidence of the witness is material, and his attendance at the trial or examination necessary, shall indorse on the subpœna an order for the attendance of the witness."

In my opinion, this section regulates the power of a United States commissioner to issue subpœnas in criminal cases. The effect of it, if my view is correct, is that the United States district attorney may issue a subpœna in a criminal case pending before a United States commissioner, which may be served anywhere in the state; but that if a subpœna is issued by a commissioner on the application of a defendant, and it is served outside the county where the hearing takes place, the person served is not obliged to attend, unless this court shall indorse on the subpœna or make an order for the attendance of the witness, upon such an affidavit as is provided in section 618. I think that Congress intended to make, and did make, the practice before a United States commissioner substantially similar to the practice before a state criminal magistrate, and that as the state has guarded against the possible abuse of summoning witnesses a long distance from their homes by irresponsible defendants, by providing that that shall not be done without the previous authority of the court, the same practice should be followed in a proceeding before the United States commissioner. The subpœnas in this case were not ordered or authorized by this court, and I think, therefore, that Mr. Youngs and Miss Wren were not obliged to attend as witnesses under such subpœnas.

This conclusion makes it unnecessary to discuss the other questions argued. If the view is not correct that the jurisdiction of a United States commissioner is to be determined by the statutes of the state fixing the jurisdiction of state criminal magistrates, the result, it seems to me, must be the same. The alternative must be either that a United States commissioner has no jurisdiction outside of his own district, or that there is no power anywhere to punish for a disobedience of a subpœna issued by a commissioner. The whole subject is obscure and difficult under the statutes and decisions, and should be regulated by a simple statute. But it seems to me that, in any point of view, this motion must be denied.

HEUBLEIN et al. v. ADAMS et al.

(Circuit Court, D. Massachusetts. November 9, 1903.)

No. 1,455.

1. TRADE-MARK—"CLUB" COCKTAILS—PROPRIETY OF DESIGNATION.

The word "Club," as applied to a brand of cocktails, is not a term of description, but an application of a common word to a commercial article in an arbitrary or fanciful sense to indicate origin or ownership, and is consequently appropriate as a trade-mark.

¶ 1. Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.

2. SAME—PRIOR APPROPRIATION—SUFFICIENCY OF EVIDENCE.
In 1892 complainants adopted, and have since used, the term "Club Cocktails" as a distinguishing trade-name for their bottled cocktails. About 1892, and perhaps earlier, a limited quantity of bottled cocktails was put on the market under the name of "Outing Club Cocktails," but these goods made little or no impression on the trade, and the use of the name was in the nature of an experiment, and was transitory and inconsiderable. In 1898 the manufacturer of the "Outing Club Cocktails" caused to be inserted in Mida's Register a label on which those words appeared, with the statement, "Used since 1894." *Held*, that the evidence did not establish any commercial use of the word "Club," as applied to cocktails, sufficient to show an appropriation thereof as a trade-name prior to complainants' adoption thereof.

3. SAME—UNFAIR COMPETITION.
In 1892 complainants began the use of the phrase "Club Cocktails" as the distinguishing trade-mark for their goods. Several years later the defendants began selling bottled cocktails under the name "Boston Cocktails," and in 1900 adding the word "Club," calling their product since that time "Boston Club Cocktails." Complainants built up an extensive trade in "Club Cocktails," both in this country and abroad, and their goods received a universal trade recognition, and completely occupied the market. Defendants' reason for incorporating the word "Club" in the name of their product was that they heard some other dealer was using their original designation. On two occasions defendants filled orders for "Club Cocktails" by furnishing their own goods. There is no similarity between the label and the size and color of the bottles used by the respective parties. *Held*, that the defendants' adoption of the word "Club" constituted unfair competition entitling complainants to an injunction.

In Equity.

Hiram R. Mills and N. L. Frothingham, for complainants.
John Lowell and Jesse C. Ivy, for defendants.

COLT, Circuit Judge. This is a bill for infringement of a trade-mark and to restrain unfair competition in trade. The material facts disclosed by the proofs may be summarized as follows: Since 1892 the complainants have adopted "Club Cocktails" as the distinguishing trade-name for the cocktails which they put up in bottles and sell to the trade. Several years later the defendants began putting up and selling bottled cocktails under the name "Boston Cocktails." In 1900, however, they added to this name the word "Club," and since that time they have called their product "Boston Club Cocktails." "Club Cocktails" was registered in the Patent Office by the complainants as their trade-mark on June 23, 1896, upon an application filed October 5, 1893. These words were also registered and published as complainants' trade-mark in the recognized trade publication known as "Mida's Register." The complainants have built up an extensive trade in "Club Cocktails," not only in this country, but in most of the foreign markets of the world. They have spent over $125,000 in advertising, and their business has grown to be of large value. Their use of this trade-name since its adoption in 1892 has been continuous, uniform, and notorious. It has been substantially an uninterrupted and exclusive use. The complainants' goods have received a universal trade recognition, and, in a broad commercial

¶ 3. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

sense, have completely occupied the market. "Club Cocktails" mean in the trade only the cocktails made by the complainants. It is true that about 1892, and perhaps earlier, there were put upon the market in limited quantities bottled cocktails under the name of "Outing Club Cocktails." These goods, however, may be said to have made little or no impression upon the trade. The use of this name seems to have been in the nature of an experiment, and it was at most transitory and inconsiderable.

While the form and appearance of defendants' labels and the size and color of their bottles are unlike the complainants', it appears that the distinguishing feature by which complainants' cocktails are commercially known resides in the word "Club," and not in the dress of the goods. These goods are advertised in newspapers, periodicals, and booklets simply as "Club Cocktails." They are ordered under this name by dealers and consumers, and they appear under this name on current wine lists, both of merchants and others. In other words, complainants' cocktails are identified, recognized, and known in the trade and by the public solely by the word "Club."

The only reason which defendants give for incorporating the word "Club" into the name of their cocktails is that they heard some other dealer in Boston was using the name "Boston Cocktails," and they intended by this change to avoid confusion in the trade. At the same time they say that "Club," as applied to cocktails, was in common commercial use. It also appears that upon two occasions the defendants filled orders, one by letter and the other verbal, for "Club Cocktails," by furnishing their own goods; and in one of these instances it was stated by the clerk in their employ that their goods were the only "Club Cocktails" on the market.

The complainants contend, first, that they have a technical trade-mark or trade-name in "Club Cocktails"; and, second, if they have not an exclusive property in these words, that their use by the defendants is an unfair interference with their trade, and calculated to deceive the public. Upon full consideration it seems to me that the term "Club Cocktails," as applied to a commercial article in the form of bottled cocktails, may be rightfully appropriated as a trade-mark. These words respond to all the tests of a valid trade-mark. They are not a geographical name, nor a personal name, nor are they descriptive within the meaning of the trade-mark law. "Club," in this connection, is the application of a common word to a commercial article in an arbitrary or fanciful sense, to indicate origin or ownership. When applied to liquors, cocktails, or other articles, "Club" may be suggestive of excellence or quality, but this does not make it descriptive within the law. Many trade-marks are suggestive of quality. Nor is the use of "Club" in this connection descriptive in the sense that it designates an article made by a social organization known as a club. Such use is no more descriptive than "Club Skates," "Club Guns," or "Club Saddles" would be descriptive. Social clubs are not engaged in the business of putting bottled cocktails on the market, any more than athletic clubs are engaged in the manufacture and sale of skates, guns, or saddles. To render "Club" descriptive in this sense, there must be added the name of a particular club, as, for in-

stance, Manhattan, Somerset, Hartford; and no such organization could properly apply the word "Club" to its own manufacture or product as an article of commerce without the addition of its own specific name. Because a common word like "Club" may become descriptive when used in combination with a particular name, and because others may have a right to use it when so combined, does not render it, in my opinion, incapable of appropriation as a trade-mark. I see no reason, therefore, why "Club Cocktails" may not be appropriated as a trade-name, since the words are not descriptive, since they are used in a purely arbitrary sense, and since they were originally adopted to indicate the origin or ownership of the commercial article to which they are applied.

Upon the question of the first appropriation of "Club Cocktails" as a trade-name, I find that the use of this name in connection with "Outing Club Cocktails" was so transitory, spasmodic, and inconsiderable, as contrasted with the long-continued, notorious, and universally recognized use by the complainants, that the case at bar clearly falls within the doctrine laid down by the Circuit Court of Appeals for this circuit in the case of Levy v. Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190. The complainants adopted "Club Cocktails" as the distinguishing mark for their goods in September or October, 1892. In 1898—five years later—the Otis S. Neale Company, of Boston, caused to be inserted in Mida's Register a label on which appears the words "Outing Club Cocktails," with the accompanying statement, "Used since 1894." This published notice to the world that the use of "Outing Club Cocktails" began in 1894 raises a strong presumption against any intention to appropriate this name at an earlier date. It may be that a few bottled cocktails having this brand were put up at an earlier date, but I do not think the evidence establishes any commercial use of this name sufficient to overcome the date deliberately fixed in Mida's Register.

The essential nature of all trade-mark suits is the same, whether they rest upon infringement or upon unfair competition. At the foundation of the law lies the rule that every person should so use his own property as not to injure the property of another. The essence of the wrong consists in the sale of the goods of one person as those of another, thereby misleading the public and injuring the business of another. It is only when this false representation is directly or indirectly made that a court of equity will grant relief. Canal Company v. Clark, 13 Wall. 311, 20 L. Ed. 581; Paul on Trade-Marks, § 7, p. 34. Every trade-mark case is based upon fraud, actual or constructive. In technical trade-mark cases fraud is presumed, while in cases of unfair competition the plaintiff must prove a fraudulent intention, or show facts or circumstances from which it may reasonably be inferred. Paul on Trade-Marks, § 210. The proofs essential to make out a case of unfair competition depend upon the nature of the trade-mark. Where the mark is in the form of a label, it is necessary to show such a simulation of it as would be likely to mislead the public. Where the mark is in the form of a trade-name, and consumers have come to recognize the particular goods by that name,

rather than by their dress, then the difference in the label or wrappings becomes immaterial.

Turning to the case at bar, I find that the complainants' goods are bought and sold under the trade-name "Club Cocktails." The word "Club" is a kind of catch-word by which these goods are known in the trade and among consumers; consequently the difference in the defendants' labels and the size and color of the bottles they use is unimportant, and does not touch the real issue in the case. Again, the defendants are not a club, and the reasons which they give for adopting this word, after the complainants' goods had acquired a wide reputation on the market, are inconsistent and unsatisfactory. Assuming, however, that the word was innocently adopted by the defendants, it still remains true that the effect of such adoption must be, upon all the facts and circumstances disclosed in the proofs, to deceive the public and to injure a rival manufacturer. The evidence specifically shows that in two instances, upon an order given for "Club Cocktails," the defendants supplied their own article. Independently, therefore, of the question whether the complainants have a technical trade-mark in "Club Cocktails," I am of the opinion that the defendants should be restrained from the use of the word "Club" as a distinguishing mark for their cocktails, upon the ground of unfair competition in trade.

Decree for complainants.

THE MUSSELCRAG.

(District Court, N. D. California. October 9, 1903.)

No. 12,145.

1. SHIPPING—DAMAGE TO CARGO—CLAIM OF IMPROPER STOWAGE.
   Where a ship during the voyage encountered storms of such violence as to reasonably account for the opening of her deck seams and the consequent damage to her cargo from water, the burden of proof rests upon the cargo owner to establish a claim made by him that improper stowage of the cargo caused or contributed to the strain on the vessel's deck and the resulting injury thereto.

2. SAME—CARE REQUIRED IN STOWAGE.
   A ship is bound to the exercise of reasonable care and skill only in the stowage of cargo, and to render her liable for damage to cargo on the ground that she was unseaworthy by reason of improper stowage it must be shown that the manner of stowage was such as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage to be made and the weather and sea conditions which the vessel might reasonably be expected to encounter.

3. SAME—NEGLIGENT FAILURE TO PROTECT CARGO—HARTER ACT.
   A ship bound from Antwerp to San Francisco with a cargo of cement encountered such rough weather in attempting to round Cape Horn, and was subjected to such strain, that her deck seams opened and a part of the cargo was damaged by water. She finally abandoned the attempt, and completed the voyage by way of Cape Good Hope and Australia. When she changed her course she was within 60 miles of the Falkland

¶ 1. Statutory exemption of shipowners from liability, see note to Nord-Deutscher Lloyd v. Insurance Co., 49 C. C. A. 11.

Islands, but did not put in for repairs, and before she reached Australia the cargo suffered further damage by reason of the open seams. *Held*, that the failure of the master to seek a port and repair the deck before starting back was not a fault or error in navigation or in the management of the vessel, within section 3 of the Harter act, but simply a failure to use proper care for the protection of the cargo, which rendered the ship liable for the resulting damage.

4. SAME—MEASURE OF DAMAGES—DAMAGE RESULTING ONLY IN PART FROM FAULT OF SHIP.

Where it appears that the greater part of the damage to a cargo resulted from sea perils for which the ship is not liable, but further damage occurred through the negligence of the master in failing to put into port to make repairs, it would be inequitable to hold the ship liable for the entire damage, although it cannot be separated, and the loss should be divided.

In Admiralty. Action to recover for damage to cargo.

Nathan H. Frank, for libelant.

Page, McCutchen, Harding & Knight, for respondent.

DE HAVEN, District Judge. This libel was filed against the ship Musselcrag to recover for alleged damage to a cargo of cement, shipped on that vessel at Antwerp for carriage to the port of San Francisco. The cargo consisted of 3,278 tons of cement, and of this 2,350 tons were stowed in the lower hold and 928 tons between-decks. The cement was damaged by reason of water, which came through the seams of the deck, and it is claimed by the libelant that the opening of the seams and the consequent damage to the cargo was the result either in whole or in part of improper stowage, in this, that the cargo was not properly distributed, that too much weight was placed in the lower hold, which made the ship so stiff that she would not roll easily, and caused her in a rough sea to right herself quickly with a jerk or sudden lurch, the effect of which was to place so great a strain upon the deck that its seams were opened. In short, the contention of the libelant is that the ship was rendered unseaworthy by the improper manner in which her cargo was laden. When she left Antwerp the vessel was sound in hull and properly equipped, and the evidence shows that in attempting to round Cape Horn she met with storms of extraordinary severity and of several days' duration, during which she labored and strained to such an extent that the seams in her deck were opened and the deck almost continuously flooded with water, making it necessary, in the judgment of the master, to raise some of the cargo from the lower hold and stow it between-decks, in order to ease the ship; and about two weeks after this was done 50 tons of cement were taken from the lower hold and jettisoned. By reason of adverse winds and the violence of the storms thus encountered, the ship was compelled to abandon the attempt to pass around Cape Horn, and she changed her course and came to San Francisco by way of the Cape of Good Hope and Australia.

By the terms of the bill of lading the ship was not to be responsible for any loss or damage which the cargo might sustain by reason of perils of the sea. The question of fact, therefore, to be decided, is whether the damage for which the libelant sues was occasioned by perils of the sea or by improper or negligent stowage, causing the

vessel to labor and strain more than she otherwise would have done, and thus contributing to the opening of the deck seams. Upon this question there is a decided conflict in the evidence. Upon the one side three witnesses, one a competent stevedore and two master mariners, gave it as their opinion that in its stowage the cargo was not properly distributed; that there were about 150 tons too much put into the lower hold; and that the effect of thus stowing a heavy, compact cargo, like that of cement, caused the ship to roll more heavily and increased the strain upon her decks. Upon the other hand, the master of the ship, a seaman of long experience, testified that the cargo was laden under his general supervision, and was in his judgment properly distributed; that the ship did not give evidence of unusual straining until the severe weather was encountered; and this evidence is corroborated by the second mate, and also finds some support in the testimony given by two of the stevedores who assisted in loading the ship.

It having been shown that the vessel encountered storms of such violence as to reasonably account for the opening of the seams in her decks and the consequent damage to her cargo, the burden of proof is upon the libelant to establish the fact of improper stowage, contributing to the strain upon the vessel's deck and the resulting injury thereto. The Neptune, 6 Blatchf. 193, Fed. Cas. No. 10,118; The Polynesia (D. C.) 30 Fed. 210; The Fern Holme (D. C.) 24 Fed. 502; The Burswell (D. C.) 13 Fed. 904; Clark v. Barnwell, 12 How. 280, 13 L. Ed. 985; Muddle v. Stride, 9 Carr. & Payne, 380. It is not deemed necessary to analyze the testimony, or to discuss the reasons which were given by the expert witnesses in support of the opinions expressed by them. It will be sufficient to say that, after careful consideration of all the evidence, I have reached the conclusion that it is not sufficient to establish the fact of improper stowage. Stowage, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, is a matter which calls for the judgment of those under whose supervision it is done. The carrier is only required to exercise reasonable care and skill in stowing cargo, and the mere fact that if it had been differently distributed the ship would have been more easy does not necessarily show that the cargo was negligently stowed, that is, stowed in such a manner as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage upon which the vessel was about to sail, and the weather and sea conditions which she might reasonably be expected to encounter. In order to establish such negligence as is claimed here, the disproportion between the amount stowed in the lower hold and that placed between-decks must be so great as to warrant the conclusion that reasonable judgment was not used in loading the vessel, and I am not satisfied from the evidence that such great disproportion existed in this case.

2. It is further claimed by the libelant that the ship is liable because of the failure of the master to repair her damage at the Falkland Islands, instead of proceeding to Australia with the decks in the condition in which they were when the attempt to round Cape Horn

was abandoned. The evidence certainly shows that the injury which the vessel's decks suffered before sailing for Australia was so severe as to render them unseaworthy with respect to the protection of the cargo, and during the voyage to Sydney the vessel encountered weather so rough that her decks were often filled with water, from which cause the cargo received additional damage. When the master of the Musselcrag started for Australia he was within 60 miles of the Falkland Islands, and it seems to me that in the then condition of the ship he ought, in the exercise of a reasonable judgment, to have sought that port for the purpose of making repairs, and in not doing so he failed to use that care for the protection of his cargo from further damage which was incumbent upon him. For this negligence and breach of the contract of affreightment the ship is liable. The Niagara v. Cordes, 21 How. 7, 16 L. Ed. 41. It is argued upon the part of the claimants that, assuming this action of the master to have been negligent, it was a fault or error in navigation or in the management of the vessel, for which the vessel is not responsible under section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]); but this was not a fault or error in navigation or in the management of the vessel, but simply the failure of the master to use proper care for the protection of the cargo in his custody.

3. The question relating to the measure of damages is more difficult. It is certain that part, and probably the greater part, of the whole damage which the cargo sustained on the voyage between Antwerp and San Francisco, was occasioned by perils of the sea before the vessel changed her course at Cape Horn and sailed for Australia; but just how much damage was received by the cargo before such change of course, and how much was sustained between Cape Horn and Australia, cannot be separately stated from the evidence. The libelant insists that, because this separation cannot be made, the ship should be held responsible for the entire damage, as well that occasioned without its fault as that which was caused by the negligence of the master in not going to the Falkland Islands for repairs. There is some language used by Judge Hoffman in the case of Speyer v. The Mary Belle Roberts, 2 Sawy. 1, Fed. Cas. No. 13,240, cited by the libelants, which seems to support this proposition; but, in my opinion, the more equitable rule to be applied in this case is to divide the damages. Under this rule it is reasonably certain that the ship will be required to respond for all of the damage occasioned by its fault, and the libelant has no right to insist upon more than this. In the case of The Shand (D. C.) 16 Fed. 570, it was said:

"In the case of the Mary Belle Roberts, where the loss from sea peril, if any, was comparatively small, it was just to hold the carrier answerable for the whole, unless he could show how much was to be deducted on account of the minor cause as to which he might claim exemption. But, if the general circumstances of the case show that the loss has probably arisen as much from the act or cause attributable to the one party as from that attributable to the other, there would be no justice in imposing the whole loss upon one simply because he could not separate and distinguish the exact amount arising from his own fault, and the rule adopted by Sprague, J., is, in such a case, obviously the juster one."

The rule referred to in the above quotation was announced by Sprague, J., in Snow v. Carruth, 1 Spr. 324, Fed. Cas. No. 13,144, as follows:

"I am satisfied that the great loss in this case (above the necessary leakage) was partly attributable to the negligence of the carrier, and partly to the negligence or misfortune of the shipper or consignee, and that it is not practicable to ascertain for how much of the loss the one party or the other is in fact responsible. I am therefore obliged to adopt some arbitrary rule in determining the amount to be allowed the respondents. An analogy may be found in the rule adopted by courts of admiralty in cases of collision, when both parties are in fault. In such cases the aggregate amount of the damages is divided equally between the parties."

The case of The Young America (D. C.) 26 Fed. 174, is precisely in point. The Young America was a tug, and a canal boat which it had in tow was stranded, and after having been abandoned by the tug became almost a total loss. The tug was sued by the owner of the canal boat for the damages thence resulting. The court found that the stranding was not caused by the tug's negligence, but that the tug was in fault in leaving the canal boat without any one in charge of it, and that by reason of such abandonment the damage to the canal boat had been increased. It was held that the damages should be divided, the court saying:

"The nature of the case is such that it seems clearly impossible to determine with any approximation to exactness how much of the whole loss is attributable to the original stranding, and how much to the subsequent want of protection. The best that can be done under such circumstances is to divide the damages, as was done in the case of Snow v. Carruth, 1 Spr. 324, Fed. Cas. No. 13,144."

It is not deemed necessary to further discuss the questions arising in this case. My conclusion is that the libelant is not entitled to recover for the cargo which was jettisoned, but is entitled to recover one-half of the damage sustained by the remaining cargo, with interest from the date of the filing of the libel and costs of suit, and the case will be referred for the purpose of ascertaining and reporting such damages. Let such a decree be entered.

INTERNATIONAL REGISTER CO. v. RECORDING FARE REGISTER CO. et al.

(Circuit Court, D. Connecticut. October 30, 1903.)

No. 1,121.

1. CONTEMPT—VIOLATION OF INJUNCTION.
Whether or not a preliminary injunction, restraining defendants from filing a certain class of orders or contracts, applied to a particular contract, *held*, under the circumstances of the case, to be a question which the court would not determine on a motion to punish defendants for contempt, but only after a hearing on the merits.

In Equity. On motion to punish defendants for contempt.

Walter Carroll Low, for plaintiff.
White, Daggett & Tilson, for defendants.

PLATT, District Judge. On April 21, 1903, the defendants were restrained from doing various things, and, among others, from "filling or attemping to fill any of the orders or contracts of the New Haven Car Register Company," and also from "using any and all information in reference to the business of the New Haven Car Register Company obtained by the defendants, or any of them, while in its employ, and which information could only have been obtained by the confidential relationship existing by such employment." The defendants sought to dissolve the injunction, and, after a protracted hearing, I refused, on the 9th day of May, 1903, to dissolve or modify the injunction in any material respect, on condition that the plaintiff file a bond of $5,000, which the plaintiff did.

The trouble arises out of the transaction whereby the plaintiff acquired possession and control of the New Haven Car Register Company, which culminated at New Haven on March 17, 1903. Under the bargain then made, the New Haven Company turned over all its property to the plaintiff, and agreed not to fill or attempt to fill any orders or contracts which it had received, with a few unimportant exceptions. Certain members of the New Haven Company, and other parties whom they influenced to associate themselves with them in the enterprise, believing that an opportunity for successful competition in the same line of goods presented itself, organized the defendant company, and began business at New Haven. At the time of the original injunction order the defendants had obtained and were preparing to fill an order to supply the Boston Suburban Electric Company with certain equipments relating to a car registering device, which the complainant claims the right to fill under the terms of its contract. The defendants halted in their work on the order, awaiting the outcome of the motion to dissolve. Upon learning that the injunction had been continued in force, they decided, under advice of counsel, to go ahead and finish the order. That defendants are filling the order is made the basis of the request for punishment in contempt, and they frankly admit the fact, but say they have a right to do so. Counsel were heard in court, and have filed briefs which set forth their respective claims with much ability. My action is undoubtedly awaited with interest by all parties. Uncertainty as to the bearing of the injunction upon the Boston order was avowedly the main reason for the motion to dissolve the injunction. In refusing the motion I saw no reason for taking up that special branch of the inquiry. Every clause of the injunction was warranted by the evidence before me, and it seemed premature and unwise to attempt a settlement, at that time, of the contention which had arisen over the Boston order. The defendants, by their motion to dissolve, sought an answer to the puzzle then; the plaintiff, by its present motion, asks for an answer now. The defendants' request was denied, and nothing has since transpired which entitles the plaintiff to any different treatment. It is a matter which, from every point of view, should await settlement until the hearing on the merits.

Let the defendants be discharged from the proceedings in contempt.

HARLEY et al. v. HOME INS. CO. et al.

(Circuit Court, D. South Carolina. November 4, 1903.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—DEFENDANTS OF DIFFERENT CITIZENSHIP—SEPARABLE CONTROVERSY—DETERMINATION.
Where a defendant who is a citizen of the same state as plaintiff is joined with a defendant of different citizenship, and such defendant claims the right to remove the cause to the federal court on the ground that the causes of action against the defendants are separable, such question is to be determined by an examination of the complaint alone.

2. SAME.
Defendant J. received under the will of her husband certain real estate and personal property for life, remainder to plaintiffs. Defendant J. insured the property with defendant insurance company for $2,875, the policy providing that in case of loss the insurer should be bound for three-fourths of the actual cash value of the property. After loss a settlement was made between defendant J. and insurer, fixing the loss at $1,500. Thereafter plaintiffs, who were remaindermen, brought suit against J. and the insurance company, claiming, as against the insurance company, to recover the entire face value of the policy, and, as against J., that the insurance covered the interest of the remaindermen, and that J. was a trustee of the fund to hold for herself for life, remainder to plaintiffs. Plaintiffs and J. were citizens of the same state, but defendant insurance company was not. *Held*, that the controversies between plaintiffs and each defendant were different and separable, and that the insurance company was therefore entitled to remove the cause to the federal court.

3. SAME—PETITION FOR REMOVAL—VERIFICATION.
In the absence of an express requirement of Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510], providing for removal of causes, where a cause is sought to be removed on the ground of the separable controversies between plaintiffs and defendants, only one of whom is entitled to remove for diverse citizenship, the petition for removal need not be verified.

S. McG. Simpkins, for plaintiffs.
Spalding & Little and Smythe, Lee & Frost, for defendants.

SIMONTON, Circuit Judge. This is a motion to remand a cause. The action was brought in the court of common pleas of Edgefield county, S. C., by Robert L. Harley, administrator of Emma Hulda Harley, and guardian of the minor children of his decedent, against the Home Insurance Company, a corporation of the state of New York, and Mrs. Mary E. Jennings, in her own right and as executrix of Joseph H. Jennings, deceased. The plaintiffs and the defendant Mrs. Jennings are citizens and residents of South Carolina. The Home Insurance Company in due time filed its petition, with bond, in the state court, praying removal upon the ground of separable controversy. The prayer of the petition was refused. Notwithstanding this, the petitioner filed in this court a certified copy of the record, and now the plaintiffs enter their motion to remand.

We can only examine the allegations of the complaint. The rule

¶ 1. Separable controversy as ground for removal of cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.
See Removal of Causes, vol. 42, Cent. Dig. § 115.

governing cases for removal on the ground of separable controversy, and for discussing whether or not such controversy exists, has been laid down in many cases in the Supreme Court of the United States, from Hyde v. Ruble, 104 U. S. 409, 26 L. Ed. 823, to Torrence v. Shedd, 144 U. S. 530, 12 Sup. Ct. 726, 36 L. Ed. 528.

The case of Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514, had laid down the doctrine that, when two causes of action are joined 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, which, had it been sued alone, would have been removable. Commenting on this case, and analyzing it, Waite, C. J., in Hyde v. Ruble, 104 U. S., at page 409, 26 L. Ed. 823, says:

"Two separate and distinct controversies were directly involved in this cause. * * * One was a controversy about the land, and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in each suit as to the particular controversy involved."

Or as stated in Torrence v. Shedd, supra:

"The whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

The complaint in this case sets out these facts: The Home Insurance Company had issued a policy to Mrs. Mary E. Jennings in her own name—a policy of fire insurance, insuring certain real and personal property. This property was derived by her under the will of her husband, Joseph H. Jennings, deceased. She held under this will the land on which was a dwelling house, covered by the policy, for her use during her widowhood; remainder to Emma Hulda Harley, the decedent of Robert L. Harley, administrator; remainder to the minor plaintiffs, the children of Mrs. Harley. The personalty covered by insurance was held by her under this will for her widowhood, with remainder to Emma Hulda Harley absolutely. The property was insured as follows: To an amount not exceeding $1,875 on the dwelling house, and $1,000 on the personalty; the company, in case of loss or damage by fire, to be liable for three-fourths of the actual cash value thereof. The property insured was destroyed by fire. A settlement made between Mrs. Jennings and the insurance company put the loss at $1,500. The complaint charges that, in effecting this insurance, Mrs. Jennings acted as trustee for herself and the remaindermen; that, when the risk insured against had been incurred, the proceeds of the policy became impressed with a trust; that the full sum of $2,875 should be paid to Mrs. Jennings; that on its receipt this sum should be or have been reinvested by her, and held subject to the limitations and provisions declared in the will with regard to the property insured. Proceeding upon this ground, the plaintiffs ignored the settlement between the insurance company and Mrs. Jennings, and demanded judgment as follows:

"(1) Against the defendants for the sum of two thousand eight hundred and seventy-five dollars, with interest thereon from the 14th day of August,

1902, at the rate of seven per cent. per annum. (2) That the said defendants be required to pay the said sum into the hands of this honorable court, to be invested or put out at interest for the benefit of these plaintiffs and the remaindermen under said will, as well as the defendant Mrs. Mary E. Jennings; the said interest on said fund to be paid the said defendant Mrs. Mary E. Jennings during her widowhood or life, and thereafter to be paid these plaintiffs; said fund, after being paid by the said defendants as herein prayed for, to be disposed of as set forth in paragraph 19 of this complaint; for such other and further relief as seemeth to the court just and equitable; and for the costs and disbursements of this action."

Assuming, for the purposes of this motion, that the plaintiffs have a right of action, there appears in this complaint a controversy as to the amount due on this policy of insurance. There also appears a controversy as to the disposition of the proceeds of the policy when they are realized. The controversy as to the true amount of the proceeds of the policy is the one with which the Home Insurance Company is concerned. If it admit the claim of plaintiffs, or if, against its contention, that claim be established, and it should pay it, it would leave this case wholly discharged therefrom. It is in no way interested in, concerned in, or chargeable with its disposition—especially with the disposition claimed by the plaintiffs. On the other hand, the controversy between the infant plaintiffs and Mrs. Jennings is as to the proceeds of the policy of insurance, when they are realized. Did she, in taking out the policy, seek to protect only her own interest in the property—her own indemnity for her own loss—or did she intend to, or will the law presume that she did, represent the estate, and will it be held that its indemnity and benefit necessarily incurred to the protection of the estate, and that its proceeds, when the loss occurred, took the place of the dwelling house and personalty? This is a controversy wholly between the plaintiffs and Mrs. Jennings, in which the Home Insurance Company, as has been seen, has no concern of any kind. These are two distinct controversies. The answers have not been filed, and the line of defense is not stated. Suppose that the Home Insurance Company should admit the contention of the plaintiffs, and pay the money into court. Would it not be discharged? Would there be any further necessity for its presence in the case? Suppose that Mrs. Jennings should admit the contention of the plaintiffs—should be brought to realize that she has been acting as, or is bound by the responsibility of, a trustee. Then, in this view, the certain sum insured should be paid to her, and, of necessity, the plaintiffs would be bound to take her as a coplaintiff with them, and, as their trustee, recover through her all they claim.

The plaintiffs made further objection to the removal upon the ground that the petition for removal was signed by the attorney of the Home Insurance Company, and in the verification the attorney does not explain why he, and not the defendant, makes the verification; and, further, because he does not make it as of his own knowledge. There is no settled practice on this point. In some forms prepared by text-writers a verification of the complaint is added. In others it is omitted. Perhaps this will depend on the practice in the state courts. In South Carolina, by section 177 of

the Code of Civil Procedure, every pleading in a court of record must be subscribed by the party or his attorney; and, when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. If the state practice prevail, and the petition for removal be a pleading, in the present case it will not require verification, as the complaint—the only pleading in the case—is not verified. It would seem that, if the petition for removal is based upon the existence of certain matters of fact, the petition ought to be verified. Where, as in this case, the ground of removal is the existence of a separable controversy—a fact which can appear on the complaint only, and is dependent upon the construction of it by the court—a verification is not necessary. Be this as it may, in the absence of an express requirement in the act of Congress (Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510]), this objection cannot prevail.

It appears that there is a separable controversy here. The motion to remand is refused.

In re AH TAI.

(District Court, D. Massachusetts. November 16, 1903.)

1. ALIENS—CHINESE—EXCLUSION—NATURE OF PROCEEDING—BAIL.
   A proceeding for the deportation of a Chinese alien under the exclusion acts is not criminal in its nature so as to entitle such alien to bail, as a person accused of crime, pending appeal from a commissioner's order of deportation.
2. SAME.
   A proceeding under the exclusion acts for the deportation of a Chinese alien, though civil in its nature, is sui generis, and the District Judge to whom an appeal is taken from a commissioner's order directing deportation has inherent power to admit the alien to bail pending the appeal.
3. SAME.
   Chinese Exclusion Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322], providing that an order of deportation shall be executed by the United States marshal of the district within which such order is made, and pending execution the Chinese person shall remain in the custody of the marshal and shall not be admitted to bail, applies only where the order of deportation is final, and does not prevent the admission of a Chinese alien, ordered to be deported, to bail pending an appeal from such order.

William H. Garland, Asst. U. S. Atty.
John L. Dyer, for Ah Tai.

LOWELL, District Judge. A Chinaman was complained of under the Chinese exclusion acts of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], as being a Chinese laborer in the United States without authority. After hearing, the commissioner

¶ 1. Citizenship of the Chinese, see notes to Gee Ford Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.

¶ 3. See Aliens, vol. 2, Cent. Dig. § 94.

ordered his deportation. He has duly appealed to me, and, pending a hearing on his appeal, asks to be admitted to bail. The district attorney has opposed his petition, and has objected that he cannot be bailed under the circumstances.

The bailing of a Chinaman under the exclusion acts is not easily brought within the general principles governing the law of bail and recognizance. In Fong Yue Ting, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, it was held that the proceedings under these acts are not criminal in their nature. It was there said, "When * * * the executive officer * * * brings the Chinese laborer before the judge in order that he may be heard, and the facts upon which depend his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant, and a judge." Page 728, 149 U. S., page 1028, 13 Sup. Ct., 37 L. Ed. 905. "The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense." Page 730, 149 U. S., page 1028, 13 Sup. Ct., 37 L. Ed. 905. See Li Sing v. U. S., 180 U. S. 486, 494, 21 Sup. Ct. 449, 45 L. Ed. 634. The decision of the first-mentioned case turned upon the nature of the proceedings for deportation. Had these been deemed criminal, the statute would have been held unconstitutional. It seems to follow that Chinamen whose deportation is sought by the United States have not the right, as persons accused of crime, to demand release upon bail. On the other hand, if the proceedings for deportation are deemed civil in their nature, it is not easy to find authority for admission of the respondent to bail, unless an arrest in a civil case necessarily imports the right to a release upon bail. The statutory provisions for special bail (Rev. St. § 942 [U. S. Comp. St. 1901, p. 693]), have little apparent application to a case like this, and section 945 [U. S. Comp. St. 1901, p. 694] provides merely that certain officers may take bail where bail is required or allowed. In the deportation of Chinese the proceedings are sui generis; they are authoritatively declared to be civil in their essence, but they are somewhat criminal in their appearance. Thus the statutes speak of violation of the provisions of the act, of arrest, conviction, and imprisonment at hard labor. In judicial opinions the courts have spoken of testimony in a deportation case as incriminating the respondent (Ex parte Sing [C. C.] 82 Fed. 22); of "the offense" (using the word only for convenience), and of punitive provisions (In re Ng Loy Hoe [C. C.] 53 Fed. 914); of "verified complaint" and "warrant" (U. S. v. Wong Dep Ken [D. C.] 57 Fed. 206. See U. S. v. Long Hop [D. C.] 55 Fed. 58); of "presumption of innocence" (In re Chu Poy [D. C.] 81 Fed. 826, 828); of "a plea of not guilty" and "a finding of guilty" (In re Tsu Tse Mee [D. C.] 81 Fed. 562; In re Gut Lun [D. C.] 83 Fed. 141, 142); of a respondent as "tried and convicted" (U. S. v. Long Hop [D. C.] 55 Fed. 58, 59).

In this and other districts, bail has been taken at some stage of the proceedings for deportation. This is the practice in the Districts of Vermont and Southern New York, both before the commissioner's hearing and after an appeal to the judge. Until objec-

tion was made in this case, the practice in this district had been the same without objection. This has been the practice in the District of Maine until lately, when the legality of admitting to bail after the commissioner's judgment of deportation has been mooted. Bail was taken in the case of Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; in U. S. v. Moy Yee Tai, 109 Fed. 1, 48 C. C. A. 203; and has been recently taken, I am informed, by Mr. Justice Peckham in certain cases now pending before the Supreme Court. See, also, Chow Goo Pooi (C. C.) 25 Fed. 77, 78. The admission to bail in proceedings for habeas corpus is governed by statute, and has no application to the case at bar. The exclusion acts themselves recognize by implication that bail is not altogether excluded in proceedings thereunder. Section 2 of the act of November 3, 1893, c. 14, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322], by providing that a Chinaman shall not be admitted to bail at one stage of the proceedings, impliedly recognizes that he may be admitted to bail at another stage. Even in proceedings for extradition, the Supreme Court has refused to declare that courts were wholly without an inherent right of taking bail. Wright v. Henkel, 190 U. S. 40, 63, 23 Sup. Ct. 781, 47 L. Ed. 948. It is also most convenient that bail should not be altogether excluded. Were bail never taken, the jails might be overcrowded, and the recent arrests in this city show that this danger is not imaginary. To hold bail altogether inadmissible under the act would invalidate hundreds of existing recognizances. The reported cases, the practice of many judges, the language of the statutes, and practical convenience all combine to suggest that bail should not be altogether excluded in proceedings for deportation. This court is not disposed to disregard considerations of such importance.

If bail be anywise admissible, it may ordinarily be taken pending an appeal as well as before the original hearing. Thus it was said in Hudson v. Parker, 156 U. S. 277, 285, 15 Sup. Ct. 450, 453, 39 L. Ed. 424:

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

The appeal is here to the District Judge rather than to the District Court (Chow Loy v. United States, 112 Fed. 354, 50 C. C. A. 279), but there is nothing intrinsically improper in admission to bail by a judge rather than by a court, nor does any reason appear why a respondent may not give bail to appear before a judge as well as before a court.

The government relied chiefly upon an express prohibition of bail, after sentence of deportation by the commissioner, supposed to be found in the second section of the act of 1893:

"Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail."

But this clause applies only where the order of deportation is final, and it is inapplicable while an appeal from the decision of the commissioner is pending. That an appeal from the judgment of the commissioner is analogous to an appeal from the judgment of an inferior court was said in 22 Op. Atty. Gen. 340. Pending an appeal it is not the duty of the United States marshal to deport the Chinaman with all convenient dispatch, and so there is no sufficient reason why, "pending the execution of such order, the Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail." Even after judgment of deportation by the judge, a Chinaman was temporarily discharged from custody because the marshal was without means of deporting him. Ny Look (C. C.) 56 Fed. 81. To prevent a release upon bail under those circumstances, the prohibition just quoted was inserted by Congress.

The form of recognizance hitherto used in this district in proceedings for deportation is like that used in criminal cases. Before the commissioner's hearing, he admits to bail. After his judgment of deportation and an appeal therefrom, the recognizance has hitherto been taken by the clerk of the District Court, conditioned that the respondent shall appear before the District Court of the United States "from day to day of this present term, and from day to day and from term to term thereafter, then and there to prosecute said appeal and to answer to such matters and things as shall be objected against him on behalf of the United States, and relating particularly to the said appeal now pending in said court."

The condition "to appear before the District Court" may have been improvidently adopted. Perhaps the recognizance should be entered into before the judge in person. This decision is not intended to debar the district attorney from moving to change the form of condition or otherwise to modify the existing practice.

WAGNER et al. v. CONRIED et al.

(Circuit Court, S. D. New York. November 24, 1903.)

1. CONTRACTS—PUBLICATION OF OPERA—MODIFICATION.
   A contract by the composer of an opera, ceding to certain publishers the exclusive right to publish the opera for all countries, reserving only the acting right, except with regard to concerts, was not modified, as to the publisher's right to publish the entire work, by a subsequent agreement between the publisher and the composer's heirs, by which the acting right was relinquished to the publishers as to concerts, and the right to render complete or slightly abridged performances of the work in concert style was restored to the composer's heirs.
2. SAME—RESERVATION OF ACTING RIGHT—EFFECT—WHAT LAW GOVERNS.
   The effect of the publication of a German opera, and offering the same for sale in the United States, with a reservation of the acting right to the heirs of the composer, is to be determined by the laws of the United States.
3. SAME—DEDICATION TO PUBLIC.
   Where the publishers of a German opera entitled to the exclusive publication of the same under a contract reserving the acting rights to the composer's heirs published and offered complete copies thereof for

promiscuous sale in the United States, they thereby dedicated the opera to the public, depriving them or the composer's heirs of the right to restrain theatrical production thereof.

This cause comes here upon a motion for a preliminary injunction to restrain the production on the stage of the Metropolitan Opera House, New York City, of the opera of Parsifal.

Hanes & Judge, for complainants.

Dittenhoefer, Gerber & James and Alexander & Colby, for defendants.

LACOMBE, Circuit Judge. The answers to the main questions raised by this motion are found in written documents so plainly expressed as to require no oral testimony for their interpretation.

On September 16, 1881, at Bayreuth and at Mainz a written contract was entered into between Richard Wagner and the publishing firm of B. Schott's Sons, of Mainz. By it "Richard Wagner cedes to the publishing firm B. Schott's Sons the exclusive right of publication for all countries, of his musical dramatic work Parsifal—a stage festival play—the absolute possession of the composition and the libretto of the said work having already been transferred to the firm of B. Schott's Sons on November 17, 1877." The defendants contend that the German words here translated "absolute possession" should be translated "unconditional ownership." The result is the same, whichever translation be accepted. The contract further provides that "for this transfer the firm of B. Shott's Sons pays to Herr Richard Wagner the sum of 75,000 marks in the following way: 40,000 marks after this engagement has been drawn up, 20,000 marks on December 31, 1882, 15,000 after the fiftieth performance of Parsifal. Besides, the firm of B. Schott's Sons cancels in its books the remainder of Richard Wagner's debt, amounting to 2,500 marks." The contract concludes with this clause: "The acting right of Parsifal in regard to the theatres is preserved to Herr Richard Wagner, whereas in regard to concerts he formally resigns it in favour of the firm of B. Schott's Sons."

It is unnecessary to inquire what were Richard Wagner's intentions on entering into this contract. Its language is clear, precise, and unambiguous, and it must be assumed that parties who thus express themselves in written contracts intend what they express. This contract did not make B. Schott's Sons merely the agent of Richard Wagner to introduce his "musical-dramatic work" to the world, reserving to him the power to regulate the time, place, manner, and extent of such introduction. For a valuable consideration he transferred to them the exclusive right of publication for all countries, and all that such publication implies. He did reserve the acting right in regard to theaters, and it is understood that under the law of Germany a publication of the entire work, coupled with a notice to the effect that acting rights are reserved, secures such rights to the composer's family for a certain number of years after his death. If, therefore, on the day he gave to B. Schott's Sons the exclusive right of publication coupled with this reservation, he had himself published the work in Germany with a like reservation,

he would not have lost the acting right in that country. The effect of publication of the whole work, accompanied by such reservation, in some country other than Germany, is to be determined by the law of that country. The contract gave B. Schott's Sons the right to publish in any country, giving notice at the same time of what Wagner undertook to reserve, and such publication, when made under this contract, is to be given the same effect as if it had been made by Wagner himself with like notice of reservation.

Subsequently to Richard Wagner's death, possibly before there had been any publication, even in Germany, of the entire work, this original contract, September 16, 1881, was modified by a contract between his heirs and the firm of B. Schott's Sons. This second contract is dated October 29, 1884. It recites that by the first contract "Herr Richard Wagner has formally resigned, in favour of the firm of B. Schott's Sons, the acting right of Parsifal as to concerts." The heirs relinquish 15,000 marks of the consideration named in the first contract, and the parties agree as follows:

"That this right [i. e., the acting right as to concerts], as far as it regards the complete performances of the work as an oratory [oratorio], or only little abridged performances in concert-style, is restored to Richard Wagner's heirs. On the other hand the right of disposing of the work for the performance of fragments in concerts is left to the firm of B. Schott's Sons; by this, however, the possibility that a manager is entitled to perform successively fragments, unpublished as yet, in common with fragments already published: prelude (Vorspiel), then transformation music (Verwandlungsmusic) and end of the first act and Good Friday's spell (Harfreitagszauber) must not be afforded."

This quotation has been given at length, in the translation given by complainants' witnesses, because it is contended that this second contract has so modified the first one as to restrict the right of publication therein conveyed. It is thought that the language last above quoted conveys no such meaning. It seems most clearly to be concerned solely with performances at concerts, leaving to B. Schott's Sons the right of performance of fragments, but reconveying to the heirs the right of performance of the whole work, either complete as an oratorio, or in some abridged form, which, although cut more or less, still preserves the symmetrical form and spirit of the work. There is nothing in the record which qualifies in any way the right of publication sold and transferred to B. Schott's Sons by the contract of September 16, 1881.

With B. Schott's Sons' publication of Parsifal in Germany we are not concerned. A large single-volume quarto edition of the full score, with words and stage directions, was issued and sold under certain agreements with the purchasers as to nonperformance on the stage. In 1902 the firm printed a duodecimo edition in three volumes, and sent a number of copies to their New York agent, G. Schirmer, by whom they were offered for sale to whomever would buy, and several copies were actually sold. The fact of publication of this edition is beyond dispute. There was not merely a distribution of a limited number of copies to selected individuals for a special purpose, as was the case in Press Publishing Co. v. Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353. They were so offered that

"the public, without discrimination of persons, had an opportunity of enjoying them." Upon the title-page of each copy of this duodecimo edition thus sold appears the following notice: "This copy must not be used for production on the stage"; but it is the well-settled law of this country that if the publication is complete such notice is ineffective to reserve the very right which such publication dedicates to the public.

The complainants contend that the smaller edition is incomplete; concededly the quarto contains the entire "orchester partitur," or score of the "musical-dramatic work." The testimony, however, is overwhelming to the contrary. In the 12mo there has been some mechanical condensation. For example, "the first page of the Vorspiel in the original edition has one staff for the first fagotte and another staff for the second and third fagotte, while in the smaller edition the three fagottes are condensed into one staff," and there are instances of like treatment of the score for other instruments; but this seems in no way to affect the orchestration, nor to leave out a single note or bar of music. The three volumes contain the score of Parsifal completely and fully, nothing is missing, no bar, measure, stage directions, or explanations contained in the larger edition are omitted therefrom. The orchestration is not changed or abridged, and the score is in no respect garbled or mutilated. It can be used to extract therefrom the different orchestra parts, and the parts for the artists, singers, chorus, and musicians. It also contains the libretto. In view of such a publication, neither the composer nor his heirs can insist that performance be enjoined.

It is further contended that by reason of certain transactions in which Conreid and one Goldmark, an alleged partner, participated, he should be estopped from performing Parsifal. As to that branch of the case the facts are in dispute, and it should not be decided upon ex parte affidavits.

The motion is denied.

DETROIT FISH CO. v. UNITED STATES.

(Circuit Court, E. D. Michigan. March 18, 1901.)

1. CUSTOMS DUTIES—CLASSIFICATION—FISH—OWNERSHIP.

An American corporation imported fish caught in Canadian fresh waters by a Canadian corporation, which in catching the fish used nets which were bought by the former corporation, and leased to the latter for a period covering the life of the nets, and for a sum much less than their value. *Held*, that the importing corporation "owned" these nets, within the contemplation of paragraph 571, Tariff Act Oct. 1, 1890, c. 1244, § 2, Free List (30 Stat. 606), providing for the free entry of "fresh or frozen fish (except salmon), caught in fresh waters * * * with nets or other devices owned by citizens of the United States," and that the fish thus caught were free of duty under said paragraph.

On application by the importers to review a decision (G. A. 1,271) of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of Detroit on importations made November 25 and December 7, 1891, and January 2 and 5, 1892.

C. E. Warner, for importers.
J. V. D. Willcox, Asst. U. S. Atty.

SWAN, District Judge. The entries of fish upon the dates stated in the title of this cause were made at Detroit by the Detroit Fish Company, a corporation organized May 14, 1891, and existing under the laws of the state of Michigan, for the purpose of carrying on the business of fishing, and buying and selling fish, nets, and other property used in the business. The appellant claims that the fish were entitled to free entry under the act of October 1, 1890, c. 1244, 26 Stat. 567, entitled "An act to reduce the revenue and equalize duties on imports and for other purposes." By section 2 of that act a "free list" is created, and by paragraph 571 under said section (Free List, c. 1244, 30 Stat. 606) "fish, the product of American fisheries, and fresh or frozen fish (except salmon), caught in fresh waters by American vessels, or with nets or other devices owned by citizens of the United States," are entitled to free entry. The collector of customs held otherwise, and assessed duty upon the entries, "for the reason that the ownership of the nets with which these fish were caught does not seem to be the ownership contemplated by law." The duties were paid by the appellant under protest. The Board of Appraisers found that the fish were not salmon; that they were taken with nets, boats, and other devices, all of which, with the exception of the nets, were admittedly the absolute property of the Manitoba Fish Company; that the nets were bought by citizens of the United States, who are the stockholders of the Detroit Fish Company, and although of greater value than $1,000 were leased by the purchasers or by the Detroit Fish Company for the season of the year 1891 for the sum of $1,000; that during the term of the said lease the Manitoba Fish Company had the exclusive possession and control of the nets; that the stockholders of both of said companies are substantially the same, the Detroit Fish Company receiving and disposing of the product of the Manitoba Fish Company. As conclusion from these and minor facts not herein recited, the board held as follows:

"Nets may be owned by citizens of the United States who may employ other persons who are aliens to fish with them, yet the nets would still be in the lawful possession and control of the United States citizen; but if such nets, by a contract, bargain, or lease, are put into the possession and control of an alien, so that for a given period such alien has the absolute possession and control of the same, especially if the time is a period covering the existence of the nets, in our opinion the possible reversionary interest in the United States citizen would not be the condition contemplated by a fair construction and application of the word 'owned' as used in paragraph 571. The supposed ownership by United States citizens in this case appears to us to be but a colorable one at best, adopted to evade payment of duty upon fish caught by the Manitoba Fish Company, and upon the facts we hold that the nets with which the fish aforesaid were taken were not 'owned' by citizens of the United States, within the meaning of paragraph 571 of the new tariff. The protests are overruled, and the action of the collector affirmed."

The facts in this case are not in dispute. No evidence was submitted in support of the findings and conclusion of the Board of Appraisers except that of the appellants. From this it clearly appears

that the nets with which the fish were caught were owned by the Detroit Fish Company, which had loaned them to the Manitoba Fish Company, by which the fish were caught in Ontario. The stockholders of the Detroit Fish Company, all citizens of the United States, together with Messrs. Reeves and Gautier, citizens of Canada, composed the Manitoba Fish Company. There is no evidence contradicting or impeaching the claim of the appellant that the fish imported were caught with the nets leased by the appellant to the Manitoba Fish Company, except the inference drawn by the appraisers from the fact that the stockholders of the Detroit Fish Company were also stockholders in the Manitoba Fish Company, and the further fact that the nets were leased to the latter for a rental of $1,000 per annum, though their value largely exceeded that sum, and their life was, at most, a year. Neither is there any evidence in the return of the Board of Appraisers that any other devices than these nets were used to catch the fish imported.

While it is possible that the lease of the nets was intended and executed for the purpose of exempting from duty fish caught with them by the Manitoba Fish Company, there is nothing in the language of paragraph 571 which prohibits that purpose or its accomplishment. It is patent that the lease did not divest the owner of the nets of the title to the property, but only transferred its use and possession for the term of the demise. There is nothing in the statute warranting the conclusion of the Board of Appraisers that the possession and control of the nets by an alien, under a contract, bargain, or lease, divests the reversionary interest of the owner, or in any degree impairs his title to the property.

While it is true that the Circuit Court, upon an appeal from the determination of the Board of Appraisers, should not disturb the finding of the latter upon conflicting testimony, especially in those cases where the board has seen and heard the witnesses, and had opportunity to judge of their intelligence and credibility, yet where these conditions do not exist, and the conclusion reached by the board is clearly a misconstruction of the law, or without evidence in its support, or disregards the great weight of the evidence, it is the duty of the court to disregard it. In re Van Blankensteyn, 56 Fed. 474, 5 C. C. A. 579; Morris European & Express Company v. U. S. (C. C.) 94 Fed. 643.

There is no evidence whatever that appellant's title to the nets was "colorable," or adapted to evade payment of the duty on fish caught by the Manitoba Fish Company. The construction of paragraph 571 compelled by its language acquits appellant of any purpose of evasion.

A statute must be judged by a fair construction of its language, and if that fails to suggest that the Congress intended to prohibit the lease to a foreigner of nets owned by a citizen of the United States, or to qualify the word "owned," it is not the province of the Board of Appraisers or of the court to amend the act by construction. In re Schallenberger (C. C.) 72 Fed. 491. No possible construction of paragraph 571 of the act of 1890 evinces either intent. The rule is that where there is a serious ambiguity in the language of a law imposing

duties, or it is open to vague or doubtful interpretation, the construction of the law should be in favor of the importer. American Net & Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821.

It is not necessary, however, to invoke this rule of construction. The language used admits of but one meaning. There were no limitations in the act of 1890 upon the right of free importation of fish (except salmon), other than the requirement that they must have been "caught with nets or other devices owned by citizens of the United States." By the act of July 24, 1897, c. 11, § 2, Free List, par. 555, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683], a free list is provided which includes "fish, fresh, frozen or packed in ice, caught in the Great Lakes or other fresh waters by citizens of the United States." Noting this change from the language of paragraph 571 of the act of 1890, Judge Coxe, in Lake Ontario Fish Company v. U. S. (C. C.) 99 Fed. 551, comparing these two paragraphs, said of the latter: "The nets and devices being owned by the importer, it is probable that fish taken in such nets would be entitled to free entry if the paragraphs of the previous acts were in force." This intimation is well founded, and expresses the true construction of paragraph 571, Free List, § 2, c. 1244, Act 1890, 30 Stat. 606. The finding and conclusions of law of the Board of Appraisers are reversed, with costs.

Judgment will be entered in favor of the appellant for the duties paid on these importations, with costs to be taxed.

TERRY v. NAYLOR et al.

(Circuit Court, E. D. North Carolina. September 21, 1903.)

1. REFERENCE—FINDINGS OF SPECIAL MASTER—REVISION BY COURT.
A special master to whom is referred a question of damages in an action at law is appointed in aid of the court, which is not bound by his findings, although no exceptions are filed thereto.

2. SAME—COSTS—INTRODUCTION OF IRRELEVANT TESTIMONY.
The cost of taking testimony before a referee or special master, which is irrelevant to the matter referred to him, will be taxed to the party introducing the same.

At Law. On trial to the court.
See 110 Fed. 494.

C. M. Bernard, for plaintiff.
C. M. Busbee, for defendants.

PURNELL, District Judge. This cause coming on to be heard, the parties having at the June term waived a trial by jury, and agreed the judge should hear the case and determine the facts and the law, and being heard, plaintiff representing himself, and defendants being represented by C. M. Busbee, Esq., after a full hearing, it is considered, ordered, and adjudged:

(1) That the debt declared on has been settled and paid as follows: The first note by a judgment to that effect in the state court

(Terry v. Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663), which judgment this court could not review, and the payment of the balance of said debt into this court. Terry v. Robbins, 122 Fed. 727.

(2) That judgment be entered in favor of plaintiff and against the defendants for costs, including attorney's fee, to be taxed by the clerk of this court up to the time of the payment into court of the $10,500 balance due on the debt.

(3) That judgment be entered in favor of the defendants and against the plaintiff for costs, since the payment as aforesaid, such costs to be taxed by the clerk of this court, not including attorney's fee.

And now, upon the consideration of the report of the special master to whom was referred the question of what damages defendants have suffered by reason of the restraining order, improvidently signed herein, the court placing confidence in the parties applying for the same, and supposing of course such application was based on a bill in equity filed in aid of the suit at law, it is considered and adjudged that such report, to which exceptions were not filed in apt time, be, and the same is, modified as hereinafter stated.

Plaintiff introduced no testimony on the question of damages, did not cross-examine the only witness as to this question, and the witnesses do not sign the depositions. In this and other respects the examination is loose, irregular, and unsatisfactory. Had objections been made, the whole report would have been rejected; but plaintiff being present, both before the special master and before the court, all parties appearing anxious to have the cause disposed of, does not hold to the strict rule. The allowance, however, cannot be affirmed without violence to the conscience of a chancellor; hence is disallowed.

Seventeen pages of the record, and the testimony of all the witnesses except one, relate exclusively to an attempt on the part of the defendants to prove a tender, and three and a half pages only are pertinent and germane to the question of damages, the only question upon which the special master was authorized to "ascertain and report by reason of the issuance of the restraining order." The entire hearing was at two sessions on the same day, and yet the special master renders a bill of costs for such hearing amounting to $97.85, $75 of which is for his own services. The special master merely presided at the meetings, a stenographer being present to take the testimony, passed upon no questions, and this claim exceeds by many dollars that allowed the Chief Justice of the Supreme Court of the United States.

It is for the reasons stated, and others apparent in the record, and within the knowledge of the court, considered, ordered, and adjudged that the item of $46.76 allowed to Thos. H. Robbins as a salary be and the same is disallowed. Item, copy of depositions for C. M. Busbee, Esq., $5.90, is disallowed and taxed against the defendants, for whom Mr. Busbee was afterwards attorney, original copies having been furnished plaintiff and defendants. Administering oaths, 30 cents, 20 cents for witnesses exclusively for defend-

ants upon matters not contemplated in the order of court, disallowed. Seventy-five dollars to special master disallowed; ten dollars allowed, as amply sufficient for services rendered. The witnesses subpœnaed for defendants, and examined upon matters not contemplated in the order, will be taxed against the defendants—fees, subpœnas, and depositions. The account is thus restated: Damages to defendant Lillian F. Naylor, $120.75; less amount allowed to Thos. H. Robbins as salary, $46.76—$73.99.

While no exceptions were filed, a special master is appointed to aid, not bind, the court, and there is no force in the argument that, in the absence of exceptions, the court is bound by the findings of the master, and will as a matter of course affirm such findings on motion. Especially is this practice when items in the report do violence to the conscience of the chancellor.

The restraining order was in force 11 days, and was dissolved as soon as the attention of the court was called to the facts. The special master allows $46.76 as salary to Thos. H. Robbins, father of defendant Naylor, who alone claims to have been damaged, and this claim is made through others, to whom, as appears in the record, Thos. H. Robbins conveyed the land the day after it was conveyed to him by plaintiff, and by him and his wife reconveyed as a security for the purchase money. This claim is allowed solely by the special master on the testimony of W. A. Robbins, T. H. Robbins, and Lillian F. Naylor, who are defendants not appearing or testifying, nor is the connection of W. A. Robbins with the business of defendant Naylor shown.

The following costs will be taxed against the plaintiff:

Stenographer	$1 00
Original copy of deposition	1 08
Administering one oath	10
Subpœna one witness	25
Witness ticket W. A. Robbins	1 50
One-fifth allowance to special master	2 00
	$6 03

The following costs will be taxed against the defendants:

Services of stenographer	$ 4 00
Original copy of depositions	4 72
Copy of depositions to C. M. Busbee, Esq.	5 90
Administering 2 oaths	20
Subpœna for 4 witnesses	1 00
J. H. Sawyer, witness ticket	1 50
L. S. Blades, witness ticket	1 50
Four-fifths special master's allowance	8 00
	$26 82

As thus reformed it is ordered that the report of the special master be affirmed, but no part of the amount allowed defendants shall be paid until the costs taxed against them are adjusted.

JAMES H. PARKER & CO. v. MOORE.

(Circuit Court, D. South Carolina. October 21, 1903.)

1. CONTRACTS—SALE OF COTTON FOR FUTURE DELIVERY—LEGALITY UNDER SOUTH CAROLINA STATUTE.

Code S. C. 1902, §§ 2310, 2311, which provide that contracts for the sale of cotton for future delivery shall be void unless at the time it was the bona fide intention of both parties that the cotton so sold should be actually delivered and received, and that in any action to collect a claim based on such a contract the burden shall rest on the plaintiff to prove such intention, cannot be invoked by a defendant to defeat an action by brokers to recover money advanced as margins at his request to protect contracts for the purchase of cotton made for him by plaintiffs on the New York Cotton Exchange, by the rules of which it is expressly provided that the parties to such contracts shall be bound to deliver and receive the cotton sold, even though he testifies that he did not intend to receive the cotton bought, but merely to gamble on the market price, where it is shown that in each case he was notified that the purchase was made in conformity with such rules, and made no objection thereto, and did not disclose his real intention to plaintiffs.

At Law.

C. P. Sanders and T. P. Cothran, for plaintiffs.
Stanyarne Wilson and A. H. Dean, for defendant.

SIMONTON, Circuit Judge (orally charging jury). The plaintiffs, brokers of New York City, members of the New York Cotton Exchange, bring this action against the defendant. The cause of action is an account for sums of money paid by plaintiffs in keeping good the margins on future contracts in cotton made by them, as brokers, on the account of defendant, and under his instructions at his request. The answer of defendant denies all liability, because these contracts were usurious, and, under the law of South Carolina, absolutely void.

A future contract in cotton is not usurious and void if, under the terms of the contract, one party could insist upon the actual delivery of the cotton, and the other party could insist upon the actual receipt of the cotton. Of course, if this right existed under the contract, either party could waive it, and, instead of insisting on the actual presence of the cotton, could settle on the difference of values in money. The contracts in this case were made expressly under and subject to the rules of the New York Cotton Exchange. These rules contemplate and insist on the actual delivery of cotton under such contracts. So, on their face, these contracts were legal, and money paid on account of them could ordinarily be recoverable. The testimony shows, and it is not disputed, that when plaintiffs made each of the contracts in this case they reported it to the defendant, and each report contained a notice like this:

"Mr. W. A. Moore—Dear Sir: Under your instructions we have this day bought for your account and risk, in conformity with the rules and regulations of the New York Cotton Exchange:

"Quantity and Description: Price:

"Please take notice that all orders for the purpose of sale of cotton, coffee, grain and provisions for future delivery, are received and executed with the

distinct understanding that actual delivery is contemplated, and the party giving the order so understands and agrees. It is further understood that on all marginal business the right is reserved to close transactions when margins are near exhaustion without notice."

Plaintiffs have put in evidence the rules of the New York Cotton Exchange, and the testimony of several parties, members of the exchange, as to the operation of these rules. Among other things, it appears that, when brokers make contracts on the floor of the exchange, they are personally bound, if they are not closed out, to keep them alive, on pain of suspension from the exchange. The items in the account sued upon are sums paid by plaintiffs on these contracts of defendant—keeping them alive, it is said, at his instance and under his instructions.

The defendant rests his defense on this: He swears that he never intended at any time to deliver or to accept the delivery of cotton under any of these contracts, and he relies upon an act of the Legislature of this state. This act declares every contract, bargain, or agreement of any kind for the sale at any future time of any cotton and certain other enumerated articles shall be void, unless the party contracting to sell is the owner of the cotton, or the agent of such owner, at the time of making the contract, or "unless it is the bona fide intention of both parties to the contract at the time of the making thereof that the said cotton," etc., so agreed to be sold shall be actually delivered in kind by the party contracting to sell, and shall be actually received in kind by the party contracting to receive the same, at the period in the future fixed by the contract. Code 1902, § 2310. Then comes the part of the act on which the defendant relies:

"In any and all actions brought in any court to enforce such contracts, or to collect any note, or any claim founded on such contract, the burden of proof shall be on the plaintiff to establish that at the time of making the contract it was the bona fide intention of both parties thereto that the said cotton so agreed to be sold should be actually delivered and received in kind by said parties at the future period mentioned therein." Code 1902, § 2311.

This is the law which controls us, and will decide this case, unless the defendant has so acted as to prevent him from shielding himself under the act. Pursuing the terms of this act, he, called as a witness in his own behalf, declares that he went into these contracts as a matter of speculation—gambling—and that he never at any time intended the actual delivery or actual receipt of the cotton. His object was the price in money. This declaration of his purpose has been made by the defendant at the trial. Now, you must examine this testimony, and see if defendant had given notice of this purpose to plaintiffs when these advances were made, or when the contracts were entered into. If he had given such notice to plaintiff, they cannot now recover. But if, in his dealings with plaintiffs, the defendant concealed from them this purpose—if he so acted with them and wrote to them as if he did not object to abiding by the rules of the New York Cotton Exchange—he cannot now, for the first time, set up his private purpose, to the injury of the plaintiffs. It would be a fraud for him to do so, and no man can take advantage of his own wrong. This case has been up in the Circuit Court of Appeals. They have

sent it back, among other things, to ascertain the nature of the dealings between these parties. Your conclusion upon this will determine your verdict. The defendant contends that during the correspondence he had recalled the authority to plaintiffs to keep alive these contracts. You will examine the correspondence, and, if you find this to be the fact, you will disallow any advances made after that time, in case you find the issues in favor of the plaintiffs.

S. M. LAWDER & SONS v. STONE.

(Circuit Court, D. Maryland. November 4, 1901.

1. CUSTOMS DUTIES—VALUATION—ADDITIONAL DUTIES—CLERICAL ERROR.
On entering certain merchandise the importers presented an entry and invoice together, the former of which stated only the value of the merchandise, omitting a dutiable item of packing boxes, but the latter plainly stated both items. The merchandise was appraised at the higher value, as stated in the invoice. *Held* that, in the absence of circumstances indicating an intention to evade the law, this was a case "arising from a manifest clerical error," which exempted the merchandise from the additional duty accruing where the appraised value exceeds the entered value, "except in cases arising from a manifest clerical error," as provided in section 7, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 134, as amended by section 32, Tariff Act July 24, 1897, c. 11, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1893].

Application by the importers, S. M. Lawder & Sons, for review of the decision of the Board of General Appraisers, which affirmed the assessment of duty on certain merchandise imported at the port of Baltimore.

In assessing duty, the collector considered the case one of undervaluation, under section 7 of the customs administrative act of June 10, 1890, c. 407, 26 Stat. 134, as amended by section 32 of the tariff act of July 24, 1897, c. 11, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1893], and proceeded to collect the additional duty there provided for such cases. The pertinent portion of said section reads as follows: "If the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry. * * * Such additional duties * * * shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error." The importers contended that it was a case of "manifest clerical error," within the meaning of said section.

Steele, Semmes, Carey & Bond, for importers.
The United States Attorney, for the collector.

MORRIS, District Judge. The invoice produced by the importers was as follows: "1,238 cases of preserved pineapples, containing 2,476 dozen, at 50 cents per dozen, $1,238. Cost of packing boxes for the same, $380." The entry of the merchandise was made as of a value of $1,238. The local appraisers' return on the invoice shows that he "adds $380 to make correct market value of preserved pine-

apples, being the cost of cans and packing not entered by importers." Upon the return of the local appraisers the entry was liquidated, showing, in addition to the duty imposed by law, an additional penal duty of 30 per cent., amounting to $485.40. Against the assessment of the penal duty the importers protested, alleging that the omission to add the charges at the time of making their entry was due entirely to a clerical error. On appeal to the Board of General Appraisers the decision of the collector imposing the penal duty was sustained. The ground of the decision was that it appeared from statements made by the importers in their protest that the omission to include the cost of the packages containing the preserved pineapples was not through clerical mistake, but was intentional, and for a reason disclosed by the protest.

In their protest the importers say:

"In connection with our protest, we beg leave to state that in making entry for the goods [although] merely actual cost of the merchandise was entered as the dutiable value, the charges of packing and cost of the cases and cans were plainly marked on the invoice, but through a clerical error or blunder the applicants failed to add these charges. * * * In support of our claim of clerical error, beg to call your attention to the fact that the charges mentioned were clearly set forth on the invoice, being particularly specified, so that ordinarily no error could have been made; but the entry was accepted and passed through the custom house as entered without additions for cases and cans, evidently through error, as these charges would have certainly been added before passage of the entry, had the error been detected."

The statement of the protest which is relied upon as showing that the omission to add the packing charges did not arise from manifest clerical error, but was intentional, separated from its context, is as follows:

"In fact, as stated to you in our respects of July 6th, the charges are not actually dutiable, as the cases and cans were exported from this port on the schooner Lady Shea, May 24, 1898, and the cases and cans should have been claimed as American manufacture, and the drawback, amounting to $74.65, should have been repaid the government on reimportation of the goods. * * * The omission to make the additions to the entry at the time was entirely an error, as we have these importations once a year, and have always added to the entries the drawback which was paid on the cans when exported, and gave affidavits of the American manufacture of the cases."

The affidavit of Mr. Pentz reiterates the statement of the protest, and deposes that he, "making the entry for the goods mentioned, through an error forgot to make addition for the covering of the goods. These charges are plainly stated on the invoice, and it was entirely by oversight that the addition was not made. * * * The charges for the above coverings are plainly stated on the invoice, and it is a mystery to me to know how the blunder was made by me, and how the papers should have gone so far before the error was discovered."

In Roebling v. United States (C. C.) 77 Fed. 601, the imported steel billets were invoiced and entered at a named price per ton "on trucks," which it seems indicated that something might properly be deducted from the cost of the merchandise for the cost of putting

it on trucks and cartage. The importers claimed that the inclusion of the cost of trucking in the dutiable value was such a manifest clerical error that it should be corrected on the production of a new invoice afterwards obtained and produced before the Board of General Appraisers stating the cost of the trucking. The court, against this contention, held that, although the original invoice showed that something not dutiable possibly was included, it did not show how much, if anything, was to be deducted. The court held that the manifest clerical error must be apparent upon the papers produced to the collector, and that the importers could only be relieved from any hardship arising from their mistake by application for relief to the Secretary of the Treasury.

The present case is different. The invoice itself furnished all the data required for a correct liquidation. It correctly stated the value of the preserved pineapples, and the cost of the packing boxes for the same, and, in order to arrive at the invoice value of the importation, it was only necessary to add together these two items of cost plainly appearing on the invoice. That the dutiable value was not thus ascertained would seem to be only because both the importer and the customs officials failed to notice this obvious mistake until it reached the local appraiser's office, where it was discovered and corrected by a simple inspection of the invoice. Where two items which together constitute the correct cost and value of the importation are plainly stated in the invoice, which is produced with and accompanies the entry, and only one of the items is extended on the entry, and the error is discoverable by a simple inspection of the invoice, and there is no circumstance indicating intention to evade the law, it would seem that a case is presented in which the undervaluation arises from a manifest clerical error. Doubtless this is the ruling which would have been made by the collector and by the Board of General Appraisers, but for the fact, set out in the protest, that the packing boxes stated in the invoice to be of the cost of $380 (over one-fourth of the value of the merchandise) were really not dutiable at all, having been exported from the United States.

It does not appear to me that this fact should affect the present question. It nowhere appears that the importer intended to do anything but what he did in his invoice, viz., to give the value of the importation as made up of the value of the merchandise and the cost of the packages. The fact that in his protest to the collector, and in his effort to obtain a change of ruling, he added as a make-weight that the packages were not properly dutiable at all, does not, it seems to me, affect the contention that upon the face of the invoice it was a manifest clerical error not to enter the value of the goods as stated in the invoice. It appears to me that it was proper to add $380 to the $1,238, in order to arrive at the correct market value as stated in the invoice, but that it was not proper, under section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, to penalize the importers by imposing the additional duty of 1 per cent. on the total appraised value for each 1 per cent. by which the appraised value exceeded the value given in the entry, as the value declared in the entry was a manifest clerical error.

MONUMENTAL SAV. ASS'N OF BALTIMORE, MD., v. FENTRESS et al.

(Circuit Court E. D. Virginia. November 14, 1903.)

1. INJUNCTION—AGAINST ACTION AT LAW.

A suit having been commenced to cancel complainant's subscription to stock of a corporation and to require repayment of a sum paid thereon, an action at law, in another federal court, on the subscription, commenced after the suit in equity, and in which the full and adequate remedy of an equity court cannot be afforded, will be enjoined, notwithstanding pendency of a third suit in a state court to wind up the affairs of the corporation.

E. N. Rich and D. Lawrence Groner, for complainant.

Floyd Hughes, George Whitelock, and D. Tucker Brooke, for defendants.

WADDILL, District Judge. The object of the bill of complaint filed in this cause, among other things, is to cancel and annul the subscription of the complainant to certain issues of bonds of the defendant the Norfolk Cold Storage & Ice Company, of Norfolk, Va., for $130,000, and to require the repayment to it of the sum of $20,000, heretofore paid on account of such subscription; complainant's contention being that as to $30,000 of such subscription it never authorized the same, and that as to $100,000 thereof, though the subscription was made, and on account of the same $20,000 was paid, the agreement was entered into under such circumstances as to entitle complainant to have the same canceled by a court of equity.

The cause is now before the court upon an application on the part of the complainant to enjoin the defendant Richard B. Fentress, individually, and as syndicate manager of the said Norfolk Cold Storage & Ice Company, of Norfolk, Va., from the further prosecution of a certain suit at law, instituted by him in the Circuit Court of the United States for the District of Maryland, against the complainant, to recover the calls made by the defendant company on account of the subscription aforesaid, amounting to the sum of $45,000; and this motion arises specially upon a petition filed since the institution of the original suit, and is now heard on said petition and bill and answer, and affidavits filed by the respective parties; and the conclusion reached by the court is that the temporary restraining order prayed for, enjoining the prosecution of said suit in the Circuit Court of the United States for the District of Maryland, should be awarded as asked.

In taking this action the court is not unmindful of the fact of the delicacy with which an injunction should issue to enjoin the prosecution of a suit in another court, but the duty to exercise the power in this case seems clear, the suit sought to be enjoined being one brought after the institution of this cause, and having for its object the enforcement of a contract sought to be canceled and annulled in this proceeding on account of fraud in its inception. Not only is the suit at law subsequent in date to this suit, but it cannot be said that the complainant in this cause, the defendant therein, can there receive the full complete and adequate remedy that can be afforded in this—a

court of equity—with all the parties to the transaction before it. Nor has sight been lost of the fact of the institution of the suit in equity in the circuit court of Baltimore City by the defendant Richard B. Fentress, as syndicate manager as aforesaid, against the complainant herein, and that defendant's contention is that the suit at law in the Circuit Court of the United States for the District of Maryland aforesaid, sought to be enjoined, is a mere ancillary suit to the suit in equity so instituted in the circuit court of Baltimore City. Upon a careful examination of the records in these two causes, the court is convinced that the suit at law aforesaid, sought to be enjoined, is not a mere ancillary suit to the suit in equity in the circuit court of Baltimore City, or in any manner dependent upon the last-named suit, and that said suit in the circuit court of Baltimore City is a suit in equity under the statute of Maryland, having for its object and purpose the winding up of the affairs of the complainant company as a corporation, and to which creditors of the complainant company, and stockholders, are parties; and that said suit can apparently proceed irrespective of the outcome of the issues either of this suit or of the action at law in the Circuit Court of the United States for the District of Maryland aforesaid.

A restraining order will accordingly be issued, as prayed.

In re ONG LUNG.

(Circuit Court, S. D. New York. October 16, 1903.)

1. CHINESE EXCLUSION—HABEAS CORPUS PROCEEDING—BAIL.

The provision of section 5 of the Chinese exclusion act of May 5, 1892 (chapter 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320]), that on an application to any judge or court of the United States in the first instance for a writ of habeas corpus by a Chinese person refused admission into this country no bail shall be allowed, was not repealed by Act Aug. 18, 1894 (chapter 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), which makes the decision of the immigration officer conclusive unless reversed by the Secretary of the Treasury, and governs where a Chinese person refused admission by the immigration officers and the secretary applies to a federal court for a writ of habeas corpus.

Habeas Corpus Proceeding. On motion to admit to bail.

Max J. Kohler, for petitioner.
Henry A. Wise, Asst. U. S. Atty.

LACOMBE, Circuit Judge. The fifth section of the act of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], reads as follows:

"That after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed and such application shall be heard and determined promptly without unnecessary delay."

This section was not repealed by the provision in Sundry Civil Appropriation Bill Aug. 18, 1894, c. 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303], that decisions of immigration officers, if adverse

to the immigrant, should be final. It was expressly held by this court that it was not so repealed. In re Chin Yuen Sing, 65 Fed. 571, 572, 788. Nor is there any subsequent act repealing such section.

The petitioner here sought to land in the United States. That privilege has been denied him by the immigration officers, and affirmed by the Secretary of the Treasury, and to this court in the first instance he has applied for a writ of habeas corpus. He thus comes within the provisions of the section, and bail should be refused. The cases cited on the brief, viz., Du Shen Tau v. U. S., 187 U. S. 652, 23 Sup. Ct. 843, 47 L. Ed. 350, U. S. v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. 629, 46 L. Ed. 878, Chin Bak Kan v. U. S., 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, do not overrule or modify the decision of this court in Chin Yuen Sing's Case, supra, which remains the rule for this court, although in specific instances, of which no record is found in the Reports, some individual Chinaman may have been admitted to bail.

The application is refused.

In re ONG LUNG.

(Circuit Court, S. D. New York. October 19, 1903.)

1. CHINESE EXCLUSION—RETURN OF LABORER TO UNITED STATES—EFFECT OF CERTIFICATE.

Article 2 of the treaty of 1894 between China and the United States, which provides that the general prohibition of the entry of Chinese laborers into this country contained in article 1 "shall not apply to the return to the United States of any registered Chinese laborer who had a lawful wife, child or parent in the United States, or property therein of the value of one thousand dollars or debts of like amount due him and pending settlement," has reference to the condition of the laborer at the time of his return, and it is competent for the appropriate department of the government to adopt a regulation requiring an inquiry into the matter by the immigration officers on the laborer's return, notwithstanding his possession of a collector's certificate, obtained when he left the country, as provided for by the treaty; and the adverse decision of such officers is within the terms of Act Aug. 18, 1894, c. 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303], and conclusive, unless reversed on appeal to the secretary.

Writ of Habeas Corpus to Discharge from Custody of Immigration Officers.

Max J. Kohler, for petitioner.
Henry A. Wise, Asst. U. S. Atty.

LACOMBE, Circuit Judge. The brief submitted by the district attorney contains the following statement of facts, which are not disputed:

"The petitioner, a registered Chinese laborer, desiring to make a visit to China, made application to the appropriate government officer at the port of

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¶ 1. Citizenship of Chinese, see note to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.

Malone for what is known as a 'return certificate,' and in compliance with article 2 of the treaty of 1894 between the United States and China, and sections 5 to 7, inclusive, of the act of September 13, 1888 (chapter 1015, 25 Stat. 477 [U. S. Comp. St. 1901, pp. 1314, 1315]), as re-enacted by the act of April 29, 1902 (chapter 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1903, p. 188]), he executed and delivered to the said government officer a statement purporting to show that he was then, to wit, September 2, 1902, possessed of property within the United States, and debts due him pending settlement, of upwards of $1,000. Thereafter he received from said government officer what is known as a 'return certificate,' and on or about September 29, 1902, departed for China. Thereafter, and on or about August 11, 1904, he returned to the port of Malone, the port from which he had departed, and sought to re-enter, and was then examined by F. W. Berkshire, the chief officer in charge of the enforcement of the Chinese exclusion laws for the state of New York. The petitioner then presented, as evidence of his right to re-enter, the statement verified September 2, 1902, and which statement contained the claim that the petitioner was possessed of property and debts unsettled in the United States in excess of $1,000; and thereupon said Berkshire claiming the right to examine said petitioner, and, claiming that it was incumbent upon said petitioner to show at the time of his application to re-enter that he was possessed of property and debts due and unsettled in excess of $1,000 in the United States, sought to examine the petitioner, whereupon the petitioner stood mute, and declined to answer various questions propounded to him. Whereupon said Berkshire decided that the petitioner had not proved that the necessary condition entitling him to re-enter existed, and thereupon denied him the right to re-enter. From this decision, the petitioner, pursuant to rule 8 of the Chinese regulations, approved July 27, 1903, appealed to the Secretary of Commerce and Labor from the decision of Berkshire, and said appeal was decided adversely to the petitioner, and he now seeks by writ of habeas corpus to review the action of said Berkshire, as approved by the said Secretary of Commerce and Labor."

The sundry civil appropriation act of August 18, 1894, contains the following:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." Chapter 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303].

This clause has been many times considered by the courts, and has been repeatedly construed in conformity with its plainly expressed intention. The petitioner's counsel does not question the conclusions in any of these cases, but contends that they do not apply here, because, as he asserts, the "decision" excluding Ong Lung was not made in an investigation "under any law or treaty," and because, as he further asserts, such decision was not made in the free exercise of the judgment of the officer making it. By Act Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 [U. S. Comp. St. Supp. 1903, p. 46], the duties that under the exclusion acts had previously devolved upon the Secretary of the Treasury and his subordinates were transferred to the newly created Department of Commerce, and that department, under authority conferred by section 2 of the act of April 29, 1902 (32 Stat. 176 [U. S. Comp. St. Supp. 1903, p. 189]), has recently promulgated regulations under which the immigration officials make an investigation in order to determine whether, when a returning Chinese laborer applies for readmission, the conditions recited in the

treaty, or one of them, exist. The first two articles of the treaty of 1894 are as follows:

"I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

"II. The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required."

It is contended that the production of the certificate of a right of return is sufficient to entitle the returning Chinese laborer to admission, provided such certificate is not false, and that no investigation into the conditions existing when he applies for readmission is warranted by law or treaty. Such a construction is not warranted by the language of the treaty, is contrary to its fair intent, and would be absurdly preposterous. The treaty first broadly excludes Chinese laborers generally. Next it provides for certain exceptions. The United States recognized the justice and propriety of allowing a Chinese laborer who might leave here to make a brief visit elsewhere to return if he had a wife, child, or parent living here, or $1,000 worth of property here, or a like amount of debts due him. The claim of persons so situated to especial consideration is easily appreciated. But what sense or reason would there be in making an exception in favor of a person whose father or wife or child had once lived here, but had died, or left the country six months before, or in favor of a person who once had $1,000 of property here and $1,000 of debts due him, but who had collected the debts and removed the whole $2,000 to China long before he presented himself for admission upon his return. The language used in the treaty is that the first article "shall not apply to the return to the United States" of any registered Chinese "laborer who has" a lawful wife, child, or parent in the United States, or property therein, or debts due him. The plain meaning is that the first article shall not apply to the laborer who has relatives or property in the United States at the time of his

return thereto. The provisions as to making proof of the existence of the prescribed conditions before departure are for abundant caution, and do not take the place of an examination to ascertain if such conditions exist at the time of return. The secretary therefore had authority to provide for such an examination, and the decision of the appropriate immigration or customs officers made in the course of such examination is within the terms of the act of August 18, 1894, supra.

It is further contended that the judgment of the examining officers is improperly constrained by a regulation which instructs them to give the government the benefit of the doubt in doubtful cases. This, however, is practically nothing more than an instruction that the burden of proof is on the person seeking to enter, which it undoubtedly is.

There are various objections taken to the manner in which the examination is conducted—to its being conducted only in the presence of the government inspector and interpreter, to denial of counsel to represent the applicant for admission, to the prevention of communication with outsiders until the examination shall have been had. Similar objections to the administrative details of the immigration acts have been raised before many times in this court, and have been uniformly overruled. The contention that the appointment of any official other than the collector of customs who issued the certificate on departure to investigate conditions upon return is an "attempt to override and repeal the provisions of the treaty" is wholly without merit. The argument to sustain the proposition that judicial proceedings are necessary to cancel a return certificate is immaterial, since the government makes no contention that such certificate is false. It may very well be that the petitioner had $1,000 here when he left, and had not a dollar here when he returned. The only inquiry now made is as to what were the conditions at the date of return. No question is made as to conditions at the date of departure.

The writ is dismissed.

NYE, JENKS & CO. v. TOWN OF WASHBURN et al.

(Circuit Court, W. D. Wisconsin. November 11, 1903.)

No. 101.

1. PERSONAL PROPERTY TAX—SUIT TO ENJOIN—PROPRIETY.
Both under Rev. St. § 3224 [U. S. Comp. St. 1901, p. 2088], providing that no suit to restrain the assessment or collection of any tax shall be maintained in any federal court, and on general principles of equity, an injunction suit cannot be maintained to restrain the collection by town authorities of a personal property tax; there being an adequate remedy at law to be had, by paying the tax and bringing an action to recover it, and it being contrary to public policy to tie up the collection of taxes.

2. SAME—ALLEGATIONS OF FRAUD.
The allegation in a bill to restrain town authorities from collecting a personal property tax that the town's board of review, including its assessor, "wrongfully, fraudulently, and unlawfully confederated, connived,

and colluded to injure plaintiff by placing on said assessment roll" the property in question, is insufficient to lay a foundation for equity jurisdiction.

8. SAME—EFFECT OF FRAUD.

Fraud in levying a personal property tax will not confer jurisdiction in equity to enjoin the tax, where the legal remedy remains adequate.

In Equity. On demurrer to complaint.

A. W. McLeod, for complainant.

John Walsh, for defendants.

BUNN, District Judge. This is a suit in equity to enjoin the collection of a tax upon personal property, and is in violation of the positive provision of the law of Congress (section 3224, Rev. St. [U. S. Comp. St. 1901, p. 2088]) which provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court, and also is contrary to many decisions of the Supreme Court of the United States on the same subject. If the allegations of the bill of complaint are true, it is altogether probable that the attempt to assess the plaintiff's wheat, stored in warehouses in the defendant town while in transit to other parts of the continent, is altogether unjustifiable in the law. But if so, the plaintiff has an adequate remedy in the law, by paying the tax, and bringing a suit at law to recover back the money. It is contrary to every principle of equity jurisprudence that the collection of taxes on personal property should be stayed by injunction. Whenever the party injured, or supposed to be injured, has an adequate remedy in the law, it is contrary to public policy that the collection of taxes should be tied up in that way.

The case is fairly ruled, I think, by Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65, and Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273. In these cases, as well as in many other cases decided by the Supreme Court, it was directly ruled that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant. There is no doubt that cases of fraud may sometimes constitute an exception to this general rule of law, but the allegations of the bill of complaint do not bring this case within that exception. The statement that the board of review of the defendant town, among whom was the assessor, wrongfully, fraudulently, and unlawfully confederated, connived, and colluded to injure plaintiff by placing on said assessment roll $300,000 worth of grain, valued by said assessor at $90,000, adds nothing to the bill by way of taking it out of the general rule laid down by the Supreme Court. The allegations of fraud and conspiracy are quite too general. No facts are stated. Besides, it is not every case of fraud, though properly alleged, that will confer jurisdiction in equity. Fraud is a legal as well as equitable ground of action, and, if the remedy at law is complete and adequate, equity

will not take jurisdiction. The case should be made to come within some recognized head of equity jurisdiction, as to save multiplicity of suits, call for discovery or accounting, or prevent a cloud upon title to real estate. A person may be defrauded of a sum of money by gross deceit, and yet, if an action at law will furnish a remedy, as it usually will, no suit in equity will lie. If the members of the board of review conspired together to put the complainant's grain upon the assessment roll, the injury to the complainant would be just the same, and no greater than, if the same property had been placed there without such connivance. The remedy at law would be just as adequate in the one case as the other.

The demurrer will be sustained, and the bill of complaint dismissed, with costs.

MOODY et al. v. FLAGG et al.

(Circuit Court, D. Massachusetts. November 11, 1903.)

No. 1,525.

1. TRUSTS—CONSTRUCTION.
   Where an instrument creating a trust provided that, whenever a majority in interest of the beneficiaries should vote to transfer the property to a corporation, the trustee should convey the same, discharged of the trust, and that the proceeds of such sale, after payment of liabilities of the associated beneficiaries, should be divided among the beneficiaries, and on such division, sale, and transfer, if no further property remained in the trustee, the association should be dissolved, such provision contemplated a sale by the trustee only for cash.
2. SAME—ACTION AGAINST TRUSTEE—PLEADING.
   Where a trust authorized the trustee to sell the property for cash only, a bill alleging that he threatened to transfer, or had already transferred, the property to a corporation for no consideration except the shares of such corporation, was not demurrable.
3. SAME—MULTIFARIOUSNESS.
   Where a trustee acted for the beneficiaries in the administration of a trust and as manager of the business of an association operating the trust property, a bill against such trustee alleging breaches of trust both in his capacity as trustee and as manager was not multifarious.
4. SAME—JOINDER OF ACTIONS.
   Where a bill was brought against a trustee for alleged breach of trust, for an accounting, and to restrain a transfer of the trust property, an action against members of an executive committee, appointed to manage such trust property for an association of beneficiaries, charging conspiracy with the trustee to effect the alleged transfer, was not germane to the cause alleged in the bill, and could not be joined therewith.

In Equity.

Brandeis, Dunbar & Nutter and Storey, Thorndike & Palmer, for complainants.

Dunbar & Rackemann and George A. Rockwell, for defendants.

COLT, Circuit Judge. In its essential character this is a bill brought by beneficiaries against a trustee for an injunction and an account. Each of the two defendants who are before the court has demurred to the bill for want of equity and on the further ground of multifariousness. It is clear that the bill sets forth a good cause in

equity against the defendant Flagg, if article 7 of the declaration of trust only provides for a cash sale of the property of the association. The article reads, as follows:

"Seventh. Whenever a majority in interest shall, at a meeting duly called for that purpose, vote to transfer the property and business of the association, or any portion thereof, to a corporation legally authorized to receive and hold the same, or to any other party or persons, the trustee shall convey and transfer the same free and discharged of this trust, and thereafter no member of this association shall have any claim to or right in said property, patents and business, or the beneficial results thereafter accruing from the property and patents so sold and transferred (except he may be a stockholder to such corporation or otherwise interested in the purchase); and the proceeds of such sale shall, after all debts and liabilities of the association and business are paid, be divided among the members according to their respective interests; and upon such division, sale and transfer, if no further property remains in said trustee, this association shall be dissolved."

The meaning of this article, upon careful reading of the whole paragraph, seems to be plain, unmistakable, and free from doubt. It contemplates the sale of the property for cash, and I do not think it is susceptible of any other rational interpretation. The closing words of the article fix the character of the sale. It is to be a sale in which "the proceeds," after the debts of the association are paid, are to be "divided among the members according to their respective interests." All which precedes these words is merely declaratory, and to the effect that the trustee, whenever a majority in interest so vote, may transfer or sell the whole or a part of the property to a corporation or a person. Any other construction of the article is forced, and leads to such confusion that the provisions become contradictory and unintelligible. From this construction of article 7 it follows that the bill is not demurrable for want of equity, since it alleges that the defendant Flagg, the trustee under the declaration of trust, threatens to transfer, or has already transferred, the property of the association to a corporation of the same name, for "no consideration except the shares of said corporation."

Nor do I think, as against Flagg, that the bill is multifarious, in that it seeks to join separate and independent causes of action. The bill is brought against Flagg in respect to his administration of the trust and of the business of the association. It appears that he held the legal title to the property, and it is alleged that he controlled and conducted the business of the association. Upon the state of facts set forth in the bill he occupied a fiduciary relation towards the complainants, both as trustee under the declaration of trust and as active manager of the business of the association; and he is charged with breaches of trust in respect to both these matters. Further, if there is a technical distinction in the capacities in which Flagg is sued, it may be said that all the breaches of trust complained of concern the same subject-matter, and may be conveniently tried in the same action.

As to the remaining defendants, I am of the opinion that the bill does not disclose sufficient grounds for an accounting against them as members of the executive committee, and that, so far as they are charged with conspiracy in connection with Flagg to effect an illegal

transfer of the property to a new corporation, a separate and independent cause of action is set forth, which is not in any way germane to the bill. Maynadier and Fullerton were charged with no duty with respect to the alleged transfer of the property, and any allegation that such transfer was procured with their connivance, or as the result of a conspiracy, assuming it were properly pleaded, would seem to resolve itself into an action at law for damages.

The demurrer of defendant Flagg is overruled. The demurrer of defendant Maynadier is sustained.

WALLER et al. v. COLER et al.

(Circuit Court, S. D. New York. October 19, 1903.)

1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REALIGNMENT OF PARTIES IN EQUITY.

Where a bill filed in a federal court by stockholders against the corporation and others does not conform to the requirement of equity rule 94 by showing the efforts made to secure action by the stockholders, or excuse the failure to make such efforts, the usual rule applies that the parties must be aligned according to their interest for the purpose of determining the jurisdiction of the court, and the corporation must be aligned with the complainants.

In Equity. Motion to dismiss for lack of jurisdiction.

Hotchkiss & Barber, for the motion.

Roger Foster, opposed.

LACOMBE, Circuit Judge. If the trust company defendant were aligned with the stockholders' complainant, there would be citizens of the same state on both sides of the controversy, and this court would be without jurisdiction. It is manifest from the bill that the company rightfully belongs on the complainant's side of the controversy, but it is contended that the wholesome rule which aligns parties according to interest does not apply to stockholders' actions against the corporation and other parties, founded on rights which may properly be asserted by the corporation. The case of De Neufville v. N. Y. & N. R. R., 81 Fed. 10, 26 C. C. A. 308, decided in this circuit, is authority for this proposition, but intimates that it should be applied only in cases which are brought within the ninty-fourth rule in equity. The bill in this cause does not comply with the requirements of that rule, which provides that it must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. If it be conceded that the plaintiff has set forth with sufficient particularity his efforts to induce the directors so to act, and the causes of his failure to secure such action by them, it then became necessary to set forth with equal particularity his efforts to secure action on the part of the stockhold-

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

ers, or at least to show some good reason why any such effort would be futile; as, for instance, that a majority of the stockholders are hostile to complainant's proposed action. No averments of this sort, however, are found in the bill, and the cause is therefore not brought within the ninety-fourth rule, and so not excepted from the general rule which aligns parties according to interest. Such alignment brings a citizen of New York on each side of the controversy, and leaves this court without jurisdiction.

The motion to dismiss for want of jurisdiction is granted

PEPPER v. FIDELITY & CASUALTY CO.

(Circuit Court, D. Connecticut. October 29, 1903.)

No. 537.

1. COSTS—REQUIRING SECURITY—ACTION BY RECEIVER OF NATIONAL BANK.
Rev. St. § 1001 [U. S. Comp. St. 1901, p. 713], which exempts the United States, or any party acting by direction of any department of the government, from giving bond for costs in a federal court, is applicable to an action brought by a receiver of a national bank.

At Law. Upon demurrers to two pleas in abatement; one attacking the jurisdiction of the court, and the other seeking dismissal of the suit because filed by a nonresident without furnishing bonds for costs.

Joseph R. Webster, for plaintiff.
Seymour C. Loomis, for defendant.

PLATT, District Judge. The contentions of the defendant in support of the plea attacking the jurisdiction of the Circuit Court in this district have been examined with scrupulous care. I am satisfied that, despite every consideration presented, the jurisdictional power of this court is plenary. I may be pardoned for refraining from setting forth the reasons for my action. The time at my disposal forbids, and, beyond that, I deem it unnecessary to exploit a conclusion so palpable.

The other plea also lacks merit. It is based upon a Connecticut statute which provides that, if the plaintiff in any civil action is not an inhabitant of the state, a substantial inhabitant thereof shall, before process is signed, either as surety or individually, give a bond to the adverse party that the plaintiff will make his plea good. Gen. St. 1902, § 714. The highest court of the state has decided that a writ cannot be made good by a bond given in court. Morse v. Rankin, 51 Conn. 326. In ordinary cases the rule would be followed in this court, but in the case at bar it is necessary to obey the provisions of Rev. St. U. S. § 1001 [U. S. Comp. St. 1901, p. 713]:

"Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a Circuit Court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to

prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

The defendant argues that the plaintiff does not come within the statute. The case of Platt, Rec. F. & C. Nat. Bank, v. Beach, 2 Ben. 303, Fed. Cas. No. 11,215, seems to settle that contention. Judge Benedict's decision therein was confirmed by Judge Blatchford in Stanton, Rec'r First Nat. Bank of Washington, D. C., v. Wilkeson, 8 Ben. 357, Fed. Cas. No. 13,299. Both cases, decided as they were by such eminent jurists, will repay the earnest student for a careful examination, and, when surveyed from every viewpoint, will afford the critic a light which I trust will illumine upon the entire contention before me, and furnish another reason for my reluctance to incumber records.

The demurrers are sustained. The pleas in abatement are overruled at the cost of the defendant.

AMERICAN ALKALI CO. v. BEAN et al.

(Circuit Court, E. D. Pennsylvania. December 5, 1903.)

No. 26.

1. STOCK SUBSCRIPTIONS—VARIANCE BY PAROL.
   Defendants in an action on their written stock subscription which in no way intimates that they subscribed as agents or other than as principals may not show an oral agreement with the president of the corporation that their subscription was for others.
2. SAME—DIRECTING ISSUANCE IN NAME OF ANOTHER.
   Defendants are not released from liability for an assessment on stock under their stock subscription by their direction in the subscription, and compliance therewith, that the stock be issued in the name of another, who did not own any of the shares, though the subscription provided that only the holders of shares of record on the books at the time of assessments should be liable therefor; this applying only to bona fide changes of ownership.

Burr, Brown & Lloyd, for plaintiff.
Thomas De Witt Cuyler, for defendants.

DALLAS, Circuit Judge. This action was brought to recover an installment of an assessment upon 2,100 shares of the preferred stock of the American Alkali Company, under a certain subscription agreement, of which it is at this point enough to say that it was executed by the defendants, and that prima facie it imposed the liability sought to be enforced. Stated broadly, the defense was that the subscription in question was not made by the defendants for their own account, but as brokers for others. The rulings of the court upon the trial excluded this defense, and I have not been convinced that those rulings were in any respect erroneous. Neither in the body of the

¶ 1. See Evidence, vol. 20, Cent. Dig. § 1760.

agreement nor in the signature of the defendants is there any intimation of agency, and it is quite certain that, if they were agents, their principals were not in any manner disclosed. Consequently they became personally bound, even if in fact they were authorized to bind others and intended to act only in pursuance of that authority. Moreover, as the legal effect of this contract in writing was to make the defendants a substantial, and not merely a nominal, party to it, the capacity in which they acted is not open to question; and the offer which was made to prove that the president of the company agreed with the defendants that the subscriptions made by them were made for their constituents was especially objectionable. It amounted to nothing but a proposal to substitute for the written contract with the corporation an oral agreement with its president. Pitcairn v. Philip Hiss Co. (C. C. A.) 125 Fed. 113. The liability which the defendants incurred under the subscription agreement was not released by anything which subsequently occurred. At the time they signed that agreement, and by writing immediately under their signature, they directed that the certificates for the stock should be in "the name of Geo. W. MacTague," who was their clerk, and who admittedly did not own any of the shares. This direction was complied with. But what did it import? Plainly, I think, that MacTague was to stand for the defendants; and, if this understanding be correct, it follows that he stood for them as absolute owners, since, as has been shown, it was as absolute owners they acquired the stock and assumed the obligation to pay for it. But it is contended that, even if the defendants would ordinarily have been liable upon an assessment made under such circumstances (of which I have no doubt), yet, that this particular agreement contained a provision which exempted them from that liability. The provision referred to is:

"Upon payment of the first installment of 20% the full-paid certificates of common stock and partially paid certificates of preferred stock, setting forth that 20% has been paid thereon, shall be delivered to the subscribers hereto and as subsequent installments are paid they shall be endorsed on the latter.

"Provided, however, that after the payment of the 20% provided for above, amounting to a total of $10 per share, the subscribers hereto shall no longer be liable for any balance on their subscription excepting upon such shares as shall stand of record on the books of the company in their names at the time any subsequent assessments or calls are made, but the holders of such shares of record on the books of the company at that time, and they only shall be liable for the same."

In my opinion, the construction which the learned counsel of the defendants seek to put upon the foregoing extract is an inadmissible one. It could not be adopted without holding that it was contemplated that subscribers to the stock of this corporation might evade the obligation generally and properly incident to such subscriptions by simply directing that the shares for which they subscribed should stand in the name of some financially irresponsible third person. Without pausing to consider whether any provision that would really have this effect should not be disregarded as being in conflict with the policy of the law, I content myself with saying that the particular provision in question may reasonably be, and therefore should be, so interpreted as to limit its applicability to cases of bona fide changes of

ownership. What was intended, I think, was that the liability of subscribers should cease upon the actual—not merely nominal—transfer of the shares subscribed for, and that upon such transfer the new owners would become exclusively liable.

Upon the whole case I have reached the conclusion that the verdict which was rendered by direction of the court should not be disturbed, and therefore the defendants' rule for a new trial is discharged.

JORDAN v. CITY OF PHILADELPHIA.

(Circuit Court, E. D. Pennsylvania. December 5, 1903.)

No. 90.

1. NEW TRIAL—SUBMISSION TO JURY—WAIVER OF OBJECTION.
   The question of contributory negligence having been submitted to the jury in precise accordance with defendant's request, it cannot, as ground for new trial, claim that the evidence thereon called for binding instructions for it.

Henry W. Scarborough, for plaintiff.
Harry T. Kingston, for defendant.

DALLAS, Circuit Judge. John Jordan fell from a wagon which he was driving upon a highway of the city of Philadelphia, and his death resulted from that fall. This action was brought by his widow, under the Pennsylvania statute, to recover compensation for the loss suffered by herself and the children of John Jordan, by reason of his death, which she alleged had been caused by the failure of the city to exercise due care to put and maintain the highway in question in reasonably safe condition and repair. This allegation was denied, and the issue of fact thus presented was submitted to the jury for determination upon the evidence bearing upon it, which was quite voluminous. I have understood the learned counsel of the defendant to concede that this submission was proper, and that the instructions of the court with respect to it were unobjectionable. I, at all events, have no doubt upon either point. The testimony, I still think, required that this question should be referred to the jury, and I do not perceive that the law relating to it was in any particular erroneously stated by the trial judge.

The defense of contributory negligence was set up, and it was claimed that this defense had been so conclusively established as to call for binding instructions in favor of the city. But I did not think so at the trial, and I do not think so now. On the contrary, it seems to me to be questionable whether there was any evidence upon which a finding that John Jordan had, by negligence of his own, contributed to cause the accident which occasioned his death could have been sustained. However, this question also was submitted to the jury, and in precise accordance with a request made on behalf of the defendant. It has no ground for complaint, either of the action of the court or of the conclusion reached by the jury.

I cannot say that the verdict was excessive. It was for $8,000, and, in my opinion, that sum is not greater than, under the evidence, and the measure laid down, without objection, by the court, could reasonably have been arrived at. Harkins v. Pullman Co. (C. C.) 52 Fed. 724.

The defendant's rule for a new trial is discharged.

SWIFT & CO. v. BRENNER et al.

(Circuit Court, S. D. New York. December 2, 1903.)

1. UNLAWFUL COMPETITION—GOODS—SIMILARITY OF LABELS.

Plaintiff manufactured and sold soap put up in single-cake packages, marked, "Old Mill Soap," with a picture of an old mill, and, underneath, "Made by Swift & Co., Chicago," and on each side was printed the same words. Defendant, under the name Crown Manufacturing Company, put up soap in similar packages, on the top of which was printed, "Old Stone Mill Soap," with a picture of an old mill, and, under it, "Made by Crown Mfg. Co.," with the same words on each side. The situation of the letters and the type of the names were similar in each case, and the appearance of the package was well calculated to deceive the public. *Held*, that defendant's act constituted unfair competition.

In Equity.

Appleton L. Clark and Bond, Adams, Pickard & Jackson, for plaintiff.
Henry Kuntz, for defendants.

WHEELER, District Judge. This suit is brought for unfair competition in trade in the sale of soap. The plaintiff deals in what it calls "Old Mill Soap." It is put up in cakes in single packages marked on the top, "Old Mill Soap," with a picture of an old mill, and, underneath, "Made by Swift & Co., Chicago," and on each side, "Old Mill Soap made by Swift & Co., Chicago." The defendant, under the name of the Crown Manufacturing Company, has made and put up soap in single cakes, on the top of which is "Old Stone Mill Soap," with a picture of an old mill, and under it, "Made by Crown Mfg. Co.," and on each side, "Old Stone Mill Soap made by Crown Mfg. Co." The situation of letters and the type of the names are similar in each. This similarity in the wrappers of the cakes and of the names "Old Mill" and "Old Stone Mill" presents a similar appearance of the soap of the defendant to that of the plaintiff, and it seems well calculated to make those ordinary purchasers of such articles who are familiar with the plaintiff's soap think that the defendant's soap is the same as that of the plaintiff. The insertion of the name "Stone" in "Old Stone Mill" is not marked enough to attract the attention of an ordinary purchaser looking for "Old Mill Soap," and the dissimilarity in the mills and in the name of the maker would not correct the impression. The effect of the whole would be to lead many purchasers of such articles to think that they are the same. The

¶ 1. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

testimony discloses no reason why the defendant should, under another name than his own, take up this name of "Old Mill Soap" and these packages, with so much similarity and such slight differences, to use in his business. He might as well have taken his own name, or some other than this. The impression made is that this was taken for the purpose of passing off his soap as that of the plaintiff.

These considerations entitle the plaintiff to a decree. Decree for plaintiff.

CARR v. SHIELDS.

(Circuit Court, S. D. New York. October 29, 1903.)

1. MASTER AND SERVANT—PERSONAL INJURIES—NEGLIGENCE OF FELLOW SERVANT—NEW YORK STATUTE.
   New York Laws 1902, p. 1748, c. 600, giving an action to an employé the same as if he had not been employed, in cases where he is injured by defects in the ways, works, or machinery due to the negligence of the employer or one intrusted by him with supervision, or by reason of the negligence of a superintendent, does not confer a right to recovery for the negligence of an ordinary fellow servant in failing to warn the plaintiff of the lowering of a "scale," by which he was injured.
2. SAME—COMMON-LAW DOCTRINE.
   A servant cannot recover at common law for an injury inflicted by the negligence of a fellow servant.
3. SAME—GENERAL ALLEGATION—EFFECT.
   The allegation in a servant's complaint for injuries that they were caused "without fault, neglect, or want of due care on his part, but solely and only through the fault and neglect of the defendant, his agents, servants, and employés," is too general to amount to an allegation of an act of negligence.

Charles J. Hardy, for plaintiff.
Henry L. Twichell, for defendant.

WALLACE, Circuit Judge. The complaint does not allege that the personal injuries of the plaintiff were caused by "any defect in the condition of the ways, works, or machinery connected with or used in the business" of his employer, or by reason of the negligence of any superintendent, regular or temporary, of his employer, but it sets forth in detail all the facts which enter into the cause of the action. From this detailed statement it is manifest that the plaintiff was injured by the lowering of a "scale" while he was beneath it by two of his co-employés, and because one of them (the signalman) did not give notice to him of the descending scale.

Plainly, the statute of New York of 1902 (Laws 1902, p. 1748, c. 600), to "extend and regulate the liability of employers to make compensation for personal injuries suffered by employés," does not give a cause of action to the plaintiff; and it is equally plain that for an injury so received, occurring by reason of the negligence of a fellow servant, he has no cause of action at common law unless his employer had not exercised reasonable care of selection—a fact not alleged in this case.

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 352.

The demurrer is well taken, unless a general statement made after the particular statement of facts is to be read as alleging some additional act of negligence. This statement is that the injuries aforesaid were caused to plaintiff "without fault, neglect, or want of due care on his part, but solely and only through the fault and neglect of the defendant, his agents, servants, and employés."

It would give this statement a strained and unreasonable meaning to interpret it as is urged in behalf of the plaintiff.

The demurrer is sustained, with costs.

HATZEL v. MOORE.

(Circuit Court, S. D. New York. October 28, 1903.)

1. BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASER—PAYMENT—ANSWER.
In an action on certain notes, an answer alleging that the notes were not to be paid except from the profits of the theatrical venture of which plaintiff and his predecessors in title had notice, and that there were no profits accruing from such venture, stated a good defense to the notes.

2. SAME—DEMURRER.
Where an answer in a suit on certain notes alleged that the notes were to be payable only out of the profits of a venture, and that no profits had accrued, an objection that such agreement was verbal, and could not be proved to defeat the notes, could not be considered on demurrer to the answer.

See 120 Fed. 1015.

Henry F. Lippold, for plaintiff.
Edward L. Blackman, for defendant.

WALLACE, Circuit Judge. The answers demurred to do not allege the diversion by Whitney of accommodation notes delivered to him by the defendant, but allege that the notes in suit are a part of a larger number of notes given by defendant to Whitney for the purchase price of an interest in a certain venture, and that as part of the contract of purchase Whitney agreed to accept the notes of the defendant, and apply a certain number of them to the payment of an indebtedness owing by Whitney to third parties, and retain in his hands all of the notes not so used, and apply defendant's share of the profits of the venture to the payment thereof. It is not alleged that Whitney failed to apply the requisite number of the notes to the payment of the indebtedness owing by him, or that there were any profits arising from the theatrical venture. So far as appears, the notes in suit were properly retained by Whitney, and there has never been any fund realized for their payment. But the answer avers that by the contract the notes were not to be paid in any other way than out of the profits of the venture. If that was the contract, to the extent that the profits were insufficient there has been a failure of consideration. As the answer alleges that the plaintiff and his predecessors in title to the notes had notice of the contract, the

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 1372.

defense would seem to be good. It is urged that the contract was verbal, and cannot be used to defeat the notes without violating the rule of evidence. The court cannot assume that the contract was a verbal one, or undertake to decide a question of pleading upon a rule of evidence which may be waived at the trial.

The demurrer is overruled, without costs.

MARVEL CO. v. TULLAR CO. et al.

(Circuit Court, S. D. New York. December 2, 1903.)

1. UNLAWFUL COMPETITION—PATENTED ARTICLES—MANUFACTURE—FORM OF ARTICLE.

Where a patented article was manufactured by both plaintiff and defendants, and the similarity in the article made by defendants was only such as was necessary in the making and operation of such article, and, though the form of the boxes in which the instruments of both parties were packed was similar, the circulars and labels used on defendant's boxes distinguished the origin of their instruments, and were not similar to plaintiff's labels, except as to the picture of the instrument, defendants were not guilty of any misrepresentation tending to lead the public to believe that their instruments were manufactured by plaintiff, and were therefore not guilty of unfair competition.

In Equity.

C. A. L. Massie and Philip Mauro, for plaintiff.

John P. Bartlett, for defendants.

WHEELER, District Judge. This bill is brought against alleged unfair competition in the sale of Medical Whirling Spray Syringes. There are patents concerning these syringes which have been assigned by one of the defendants to an assignor of the plaintiff, but this suit is not in any manner upon the patents. And an allusion is made in the brief and argument to some estoppel said to grow out of an assignment of good will; but the assignment referred to covers only patents and control of patents, and does not in any terms purport to assign any good will, or to in any way estop the assignor from manufacturing the article otherwise than under the patents. So the case is to be considered entirely in relation to the unfair competition in trade, stripped of all or any liability growing out of the patents or the assignment. This view of what is involved seems to be arrived at finally by the plaintiff's counsel, for, in a supplemental memorandum to the brief, at page 14, after alluding to what is to be observed in connection with unfair representations in trade, after quoting from a decision that "the imitation need only to be slight, if it attaches to what is most salient," he asks:

"What is most salient about our goods? Not the boxes or any wrappings, because the goods are displayed outside of and removed from any boxes or wrappings; and the defendants' manager, Pearl, admits that the goods are brought to the attention of the public by the appearance of the article itself."

¶ 1. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

As this case is presented, therefore, the question is whether the appearance of the article itself, as a principal thing, is a sufficient foundation for restraining the making and selling of the article. There is nothing about the article, as made and sold by the defendants, that is not necessary in the making and operation of such an instrument. It is made in the form that it must be made in order to accomplish its purpose, and, if the making in that form is any representation that the thing made came from the plaintiff, it is because of the extent to which the plaintiff had made and displayed and sold it before the defendants began. The defendants had as good a right, aside from the patents or estoppel, to make and sell these articles as the plaintiff had; and the competition, if any, as to that, would grow out of merely doing what the defendants and any others had a right to do. There are no cases, so far as has been observed, that go so far as to take away this natural right. These instruments are sold in boxes, and there would be no misrepresentation otherwise than by the article, except what might be put upon or about the boxes themselves. In this case the boxes are merely such as are suitable for containing such an article. They are in a similar shape to the plaintiff's boxes, as boxes for containing these articles must be. They are different in color, and therefore whatever might distinguish the boxes is used. The labels on the boxes and the plaintiff's and defendants' circulars are alike in so far as they show this instrument as it is supposed to be in operation. Aside from this picture of the instrument, the labels and circulars of the defendants distinguish the origin of the instrument as their own, as the plaintiff distinguishes the origin of its instruments as its own. The only similarity not necessary to the showing of the articles themselves is the inclination of the picture to one side, which is common in some instances to both. This of itself, in connection with the different-colored boxes, and the full display of the names of the makers, does not seem to be any such representation that the instruments are of the plaintiff's production and make as to amount to any misleading or unfair statement that the articles made and sold by the defendants originated with the plaintiff. Whatever rights the plaintiff may have, growing out of the patents, that are not involved here, those claimed to be involved here do not seem to amount to any unfair or unlawful competition in trade.

Bill dismissed.

ALEXANDER v. MASON.

(Circuit Court, S. D. New York. October 28, 1903.)

1. ACCOUNTING—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.
A suit in equity for an accounting, not growing out of a trust relation, cannot be maintained unless the bill discloses such a complexity in the account as to render the remedy at law unduly burdensome and embarrassing.

Simpson, Thatcher, Barnum & Bartlett, for demurrer.
John S. Wise, in opposition.

WALLACE, Circuit Judge. I am unable to discover any such complexity in the nature of the accounting sought for in the bill as justifies a resort to equity. Jurisdiction in this class of cases depends upon the inadequacy of the common-law remedy, and it is quite impracticable to lay down any hard and fast rule by which to determine in an action for an accounting not growing out of a trust relation whether the remedy at equity is more convenient than the remedy at law. Unless the bill discloses enough complexity to render the accounting in a court of law unduly burdensome and embarrassing, the court should refuse to take jurisdiction.

Demurrer sustained, without costs.

In re CARPENTER.

(District Court, N. D. New York. December 2. 1903.)

1. BANKRUPTCY—CONDITIONAL PURCHASE OF GOODS FOR RESALE—VALIDITY AS AGAINST TRUSTEE.

Goods purchased to be resold in due course of business cannot be claimed by the seller, as against the trustee of the bankrupt purchaser, where sold under a secret, unrecorded agreement that title should not pass till payment was completed.

2. SAME—CREATION OF AGENCY—CONSTRUCTION OF CONTRACT.

A buggy dealer obtained goods to be resold, under an agreement directing them to be shipped "at prices herein specified, and for which we agree to give our note on receipt of invoice, payable as per terms stated. * * * Terms 4 Mos. May 1st. Less 5% for cash in 30 days." The agreement provided that "all goods on hand and the proceeds of sale of all goods received under this contract, whether the goods are in cash, notes or book accounts, we, as agents of 'the seller,' agree to hold the same in trust for the benefit of and subject to the order of 'the seller' until we have paid in full, in cash, all our obligations of whatsoever nature now due or yet to become due to" the seller. Also, that "the sale and disposition of all goods received under this contract * * * shall be made and the proceeds held by us as agents of" the seller. *Held* not to create an agency, and that the seller could not claim title to the goods as a principal, against the trustee of the bankrupt purchaser.

3. SAME—MORTGAGE BY BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], vesting in a trustee in bankruptcy title to property transferred in fraud of creditors, an agreement by which title to goods sold to be put into the purchaser's common stock and resold in the due course of his business, and title to the proceeds of such resales are to remain in the seller until all the purchaser's obligations, existing and future, are met, is invalid as a mortgage against such trustee.

4. SAME—RIGHTS OF TRUSTEE.

A trustee in bankruptcy may take advantage of the invalidity of an agreement fraudulent as to the creditors of the bankrupt, the same as a judgment creditor might.

Petition for the review of an order made by a referee in bankruptcy adjudging the title of certain personal property claimed by the Columbus Buggy Company to be in the trustee of the bankrupt.

¶ 4. See Bankruptcy, vol. 6, Cent. Dig. §§ 273, 421.

Henry W. Smith, for trustee.
Dyer & Teneyck, for Columbus Buggy Co.

RAY, District Judge. Inasmuch as the Columbus Buggy Company asserts that this was a special reference to the referee to ascertain and report the facts to the court for its decision, with no power to make an order as to the title, this court will so treat the matter, and decide the question of title on the undisputed evidence, without reference to the decision of the referee. The notes of trial say, "Special reference to report question of title of certain property," etc.

For some time prior to the bankruptcy of Beecher E. Carpenter he had received carriages from the Columbus Buggy Company on written orders given to him. The following is a copy of one, omitting description of goods:

"Order.

"Salesman Nelson 2/22 1901
"Columbus Buggy Co.,
"Columbus, Ohio.

"On or about April 1st, 1901, please ship the following goods to B. E. Carpenter, Troy, N. Y., at prices herein specified, and for which we agree to give our note on receipt of invoice, payable as per terms stated below.

"57–R–O. This order not subject to countermand. All orders filled with steel tires unless otherwise specified.

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

"Terms: 4 Mos. May 1st. Less 5% for cash in 30 days.

"All goods on hand and the proceeds of all sales of all goods received under this contract, whether the goods are in cash, notes, or book accounts, we, as agents of the Columbus Buggy Co., agree to hold the same in trust for the benefit of, and subject to the order of Columbus Buggy Co., until we have paid in full, in cash, all our obligations of whatsoever nature now due, or yet to become due to the said Columbus Buggy Co. And the sale and disposition of all goods received under this contract it is hereby mutually agreed shall be made, and the proceeds thereof held by us, as the agents of said Columbus Buggy Co. The title to and ownership of all goods received or shipped under this contract shall remain vested in Columbus Buggy Co., but nothing in this clause to release us from making settlement and payment of our obligations as herein provided.

"We accept the same terms on all further orders we may send during the year.

"No agreement or understanding with agents will be recognized unless noted in the order.

"The conditions of guarantee published in your Catalogue are hereby recognized as binding with reference to the order. (Subject to approval of home office.)

"[Sign] B. E. Carpenter,
"Approved ————. [Town] Troy, N. Y."

The others were like this in substance, except in date and description of goods and prices. As the goods were delivered, notes were given by Carpenter for the price or value thereof. Some of these notes were paid when due, and some were paid after renewal. At the date of the filing of the petition in bankruptcy herein, Carpenter had on hand six buggies received at different times, so ordered, of the value of $689.50, and the Columbus Buggy Company held his unpaid notes to the amount of $2,300. At the time he ordered these vehicles Carpenter was running a business where he sold goods of this description, and all these goods to the knowledge

of the Columbus Buggy Company were purchased by Carpenter to be sold by him in his business as a general dealer. The claim is that the title to these buggies never passed to Carpenter, or that, if it did, the company, under these orders or agreements, has a preferred lien thereon for the amount of its claim, which is largely in excess of their value, and that the company is entitled to take the property. It is also asserted that Carpenter held this property in trust as agent for the company, and was not a vendee in possession, and had no title whatever thereto. All of these claims are made by the company and disputed by the trustee in bankruptcy.

It is plain that the company cannot maintain its claim of title on the theory of a conditional sale; that is, that the property was sold and delivered to Carpenter with a precedent condition that title should be retained by the company until the buggies were paid for. In re Garcewich, 115 Fed. 87, 53 C. C. A. 510, 8 Am. Bankr. R. 149; In re Howland (D. C.) 109 Fed. 869, 6 Am. Bankr. R. 495; In re McCallum (D. C.) 113 Fed. 393. These goods were purchased, if purchased, to be resold in due course of business; and hence In re Kellogg (D. C.) 112 Fed. 52, 7 Am. Bankr. R. 270, has no application whatever. There the molders were purchased to be kept and used by the vendee. Such was the case in Earle v. Robinson, 91 Hun, 363, 36 N. Y. Supp. 178, affirmed 157 N. Y. 683, 51 N. E. 1090. Were these goods delivered by the company to Carpenter as agent for the company, to be sold by him as such agent, and received and held by him as such agent for such purpose? This court knows of no law that will prevent the owner of personal property delivering it to a duly constituted agent to be sold by him for the principal, or for his benefit, the agent holding the proceeds of a sale as such until paid over. In such a case the unsold goods and the proceeds of all sales made, if identified, would belong to the principal. But there is not a scintilla of evidence in this case, aside from what we read in the "Order," that Carpenter ever acted or agreed to act as agent for this company. What was done by the parties negatives the idea of an agency. For the goods shipped Carpenter is to give his note or notes. Carpenter holds the goods, or the proceeds of such as he has disposed of, until he has paid his "obligations of whatsoever nature now due or yet to become due to the said Columbus Buggy Company." This is consistent with the existence of the relation of vendor and vendee, but absolutely inconsistent with the existence of the relation of principal and agent. Clearly, the obligations referred to are the notes given for the purchase price of the buggies, some due and others not due, and not the liability to pay over money received as agent for the company. Nor is it consistent with the theory of the existence of an agency that the alleged agent, Carpenter, should give his note for the value of the buggies sent him. In the order of February 22, 1901, we find the "terms" are "4 Mos. May 1st. Less 5% for cash in 30 days." Are these the "terms" on which Carpenter is authorized to sell, or are they the terms on which Carpenter purchases the goods? Clearly the latter. Again, not a word is said to the effect that Carpenter is agent in receiving or selling the goods. Indeed, the fair infer-

ence is that the goods are not received by Carpenter as agent for the company, or sold by him as such. The language is, "All goods on hand, and the proceeds of all sales of goods received under this contract, we as agents," etc. It seems plain that this is an attempt, by mere words inserted in the order, to create a lien in favor of the vendor in case of default in payment by the vendee; an attempt to transform the vendee into an agent for the holding of unsold goods and the proceeds of sales, in case of default of payment, for the mere purpose of giving security to the vendor. This does not create the relation of principal and agent, nor, as against creditors in bankruptcy proceedings, can the ownership of the vendee be transferred to the vendor for such a purpose in such a manner. "In order to create an agency, there must be an appointment of the agent by the principal and an acceptance of such appointment. This follows the fact that agency is one form of contract, and must possess the essential elements of every contract." 1 Am. & Eng. Enc. of Law (2d Ed.) 948. "The agency is to be established or disproved by the facts taken as a whole, and elements apparently characterizing the transaction as of a different nature must often be disregarded when the general intention to create an agency appears. The converse of this is true; and, if such general intention does not appear, the relation will not be created, although there exist some elements of agency." Id. 950. In this case it is apparent that there was no purpose to create an agency, except a mere executory agreement to create a so-called agency to transform the ownership of the debtor, the alleged agent, into an ownership by the creditors, the alleged principal, in case of default in payment of the debt owing for the goods sold.

Nor is the instrument valid as a mortgage. It is presumably fraudulent, and therefore void, because the vendee, alleged mortgagor, was at liberty to sell in the usual course of business. The goods went into his common stock, and were to pass to purchasers of the vendee in due course of business. If it was the purpose to create an agency, and intrust the goods to the agent, Carpenter, for sale, as such, why was not such an agreement made in plain and unambiguous terms? If Carpenter was to sell for the benefit of the company, why this large indebtedness, showing Carpenter had been allowed to retain the proceeds of sales for his own benefit? Why this absence of an accounting? The conclusion is irresistible that it was the purpose of the Columbus Buggy Company to give Carpenter apparent ownership—a false and delusive credit on the strength of his possession and apparent ownership. The lien attempted to be created extends not simply to the goods sold at a certain date under a specific order, but purports to extend to goods paid for, money and notes received for goods already paid for, and to after-acquired property and money and notes received therefor. It is a sort of an omnibus contract or agreement, so drawn as to be capable of any sort of a construction the Columbus Buggy Company might desire to have put upon it to suit the exigencies of the case or the circumstances as they might arise. It was secret, unfiled, and unrecorded. As against the creditors of this bankrupt, it is void both as a conditional sale and as a mortgage or an instrument

attempting to create a lien in behalf of the Columbus Buggy Company.

It is claimed by the company that all presumption of fraud has been overcome. But the court finds no evidence or facts to warrant any such holding or conclusion. It is apparent that Carpenter was to sell for his own benefit, inasmuch as he was only to hold the proceeds until his obligations—notes—were paid, and there is no suggestion he was to make sales for the company. The following cases are more or less in point: Hangen v. Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 5 L. R. A. 137, 11 Am. St. Rep. 691; Chemung Canal Bank v. Payne, 22 App. Div. 353, 47 N. Y. Supp. 877; Quinn Brewing Co. v. Hart, 48 Hun, 393, 1 N. Y. Supp. 388; Potts v. Hart, 99 N. Y. 168, 1 N. E. 605; Russell v. Winne, 37 N. Y. 591, 97 Am. Dec. 755; Southard v. Benner, 72 N. Y. 424. See, also, opinion in In re Garcewich, 115 Fed. 87, 53 C. C. A. 510, 8 Am. Bankr. R. 151, 152. The trustee in bankruptcy may take advantage of the invalidity of this instrument the same as a judgment creditor. It is not such a case as In re N. Y. Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133. As a mortgage it is void as against all creditors, because made in fraud of creditors. Section 70 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) says that; not because of omission to file or refile.

The court holds as matter of fact and conclusion of law that the trustee in bankruptcy of Beecher E. Carpenter has title to the buggies in question, and is entitled to the possession of same, and that as against him and the creditors of the bankrupt the said Columbus Buggy Company has no lien thereon. An order to that effect will be entered.

In re McLAREN et al.

(District Court, N. D. New York. November 21, 1903.)

1. BANKRUPTCY—PARTNERSHIP—EXISTENCE.

Where, on an application for an adjudication of bankruptcy against a firm, it appeared that both of the original partners had died, leaving their interests to certain others, some of whom were minors, and it did not appear by whom or under what arrangement the firm was subsequently conducted, except that two persons conducted the business and committed the acts of bankruptcy alleged, and the continuance of the partnership was denied by the alleged infant members, an adjudication would be denied until the existence of the partnership was proved.

Application to have an alleged copartnership adjudicated a bankrupt, notwithstanding the interposition by several of the alleged members of the firm of answers alleging their infancy and denying that they are members of the firm or copartnership.

Charles S. Aldrich, for petitioning creditors.
Chas. I. Webster, for Ida B. Howard et al.
M. F. O'Connor, for Robert L. McLaren.
Samuel Foster, for Ella McLaren et al.

RAY, District Judge. On the 12th day of October, 1903, certain creditors of the alleged firm of J. & R. McLaren filed a petition in

involuntary bankruptcy, asking to have said firm and the individual members thereof adjudged bankrupt, and alleging that the firm is composed of Sarah McLaren, John R. McLaren, Ida B. McLaren Howard, John Howard McLaren, Ella McLaren, David Grant McLaren, as to all indebtedness owing by said firm and in existence prior to January 1, 1901, and also Robert L. McLaren, to the extent of the property interests involved in and a part of said copartnership business that were devised to him by Robert McLaren. John Howard McLaren and John R. McLaren file an answer and consent, duly verified, as follows:

"In the District Court of the United States, Northern District of New York.

"In the Matter of J. & R. McLaren, Alleged Bankrupts.

"In Bankruptcy. No. 1589.

"At Sand Lake, in said district, on the 6th day of November, A. D. 1903.

"Now, the said J. & R. McLaren a co-partnership mentioned in said petition appears in this proceeding, and admits, that the said firm of J. & R. McLaren is insolvent, and that it committed the acts of bankruptcy alleged in said petition, and expresses its willingness to be declared bankrupt within the purview of the acts of Congress relating to bankruptcy.

"Thomas H. Guy,
"Attorney for said Bankrupts,
"5 Keenan Building,
"Troy, N. Y.

"The United States of America, Northern District of New York, County of Rensselaer—ss.

"John Howard McLaren and John R. McLaren, being duly sworn each deposes and each for himself says, that he is a member of the firm of J. & R. McLaren, the alleged bankrupts herein; that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge; and that these two affiants have for several years had the active management of the business and affairs of the said firm.

"John Howard McLaren.
"John R. McLaren.

"Sworn to before me this 7th day of November, 1903.
"Le Grand M. Turner,
"Notary Public, Rens. Co., N. Y.
"[Seal of Le Grand M. Turner, Notary Public, Rensselaer Co., N. Y.]"

The other alleged partners file answers, each denying that he or she is a member of such firm or copartnership, or that he or she ever has been a member of any firm or copartnership, and each denies that he or she has committed the acts of bankruptcy alleged, and all also alleging their infancy.

From the answer of Robert L. McLaren (an infant) it appears (and the facts are admitted on this application) that prior to 1889 two brothers, John McLaren and Robert McLaren, were engaged in the knit goods business at West Sand Lake, Rensselaer Co., N. Y., as copartners under the firm name of "J. & R. McLaren." September 27, 1889, said Robert McLaren died, and left a will, which was duly proved, containing the following provision:

"Fourth. I give, devise and bequeath my Factory Investment to my wife, Sarah McLaren, to John R. McLaren, to Ida D. McLaren, my daughter, to Robert L. McLaren, my second son, each to share and share alike, when they are of age. And I hereby appoint John McLaren of West Sandlake,

Rensselaer County, N. Y., and George French of North Adams, Mass., executors of this my Last Will and Testament."

These legatees, or some of them, are named in the petition as copartners in such firm. Just what was done, or what arrangement was made, does not appear, except that the business was continued by some persons under the same name. December 11, 1894, John McLaren, the surviving partner, died, and left a will containing this provision:

"I give, devise and bequeath all my right and title and interest in the knitting mill property at West Sandlake to my wife, Jane Elizabeth McLaren, and my sons, John Howard McLaren and David Grant McLaren, and my daughter, Ella M. McLaren, in equal shares to my aforesaid wife, two sons and daughter. * * * I also direct that during the minority of my son, David Grant McLaren and my daughter, Ella M. McLaren, they shall have no voice in the management of their interests in the knitting mill business, but that their interest shall be attended to solely by the executors of this my Last Will and Testament."

Thereafter the business was carried on under the same firm name, but by whom, or under what arrangement, does not appear, except that John Howard McLaren and John R. McLaren admit that they are members of said copartnership, and that they and the firm have committed the acts alleged. This admission also carries with it, by implication at least, an allegation on their part that these infants are members of this copartnership.

When Robert McLaren died, the original copartnership was dissolved, and the partnership property passed to the surviving partner for the purpose of winding up the business; and the interest of the testator, when that was done, went, under his will, to Sarah McLaren, John R. McLaren, Ida D. McLaren, and Robert L. McLaren. It does not appear that the estate of Robert McLaren was ever settled. Any firm of J. & R. McLaren subsequently existing must have been the result of some new agreement. If John McLaren became a member of the new copartnership (assuming there was one), it was dissolved when he died, in 1894, although his will seems to contemplate a continuation of the business. The business was carried on under the same name thereafter it is said. But by whom? Under what agreement? What property was involved? Ordinarily, an infant cannot be a copartner, and especially is this true in the absence of an agreement. It would seem improper to adjudicate a copartnership bankrupt because two of the alleged members admit its existence, and that they are members, all the other members denying any connection with it, and denying the acts of bankruptcy alleged. Possibly on a trial the court will dismiss as to the infants, and hold the adults to have constituted the partnership of J. & R. McLaren; but the facts must all appear, and be admitted or otherwise proved, before the court can act intelligently. It is undoubtedly true that under the present law a partnership is an entity, a person, within its meaning. (In re Meyer, 98 Fed. 976–979, 39 C. C. A. 368; In re Sanderlin [D. C.] 109 Fed. 857–859; Collier on Bankruptcy, 61, etc.), but this fact does not justify an adjudication in such a case as this as against the alleged partnership, its existence and composition as alleged being denied.

Adjudication is refused until the uncertainties are removed by a trial or by an amended petition and other necessary proceedings wherein the facts are made to appear.

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re JOHNSON.

(District Court, E. D. North Carolina. October 17, 1903.)

1. MORTGAGES—DEBT SECURED—IMPLIED AGREEMENT.
   Where a mortgage executed by a bankrupt secured a part of the indebtedness evidenced by certain notes only, and not an open account, an agreement that the account should also be secured by the mortgage could not be implied in favor of subsequent creditors of the bankrupt.
2. BANKRUPTCY—SECURED CLAIMS—APPLICATION OF PAYMENT.
   Where a bankrupt was indebted to a creditor on three notes secured by a mortgage and on an open account which was unsecured, and made payments without any instructions as to their application, the creditor was entitled to apply the payments on the unsecured indebtedness.

In Bankruptcy.

N. A. Sinclair, for bankrupt.
Jno. H. Cook, J. G. McCormick, and B. F. McLean, for creditors.

PURNELL, District Judge. The referee herein having filed his report, this cause was set down for hearing, and on September 17th was heard on the exceptions filed by creditors other than Pearsall & McNair, who file no exceptions; the exceptions being to conclusions of law, and not to findings of fact. The report of the referee as to findings of fact and conclusions numbered 1, 2, and 3, to which there were no exceptions, is affirmed. Exceptions are confined to conclusions numbered 4 and 5.

The fourth item in the report is thus stated, in substance, omitting details: The creditors contend that the rents received from the mortgaged property, $313, and which ought to have been received therefrom by the bankrupt; the proceeds of timber cut, $1,000, and tar obtained from the mortgaged land; and the amount received from insurance on a house burned located on the land, amounting to $1,586.47—"are by legal effect" payments upon the mortgage debt. The referee finds the $1,586.47 is the total amount of the said rents, timber, and insurance; that the proceeds of timber and rent of turpentine boxes on the Murphy land—$201.92—was paid to McNair & Pearsall, but the balance was not so paid, but was used in improving the mortgaged property, payment of insurance on the houses thereon, for taxes, and merchandise indebtedness generally. The three $1,000 notes bear no credits of money paid McNair & Pearsall, but the payments made to them are credited on the general account. The bankrupt never directed how the amounts paid should be credited. The referee held "that McNair & Pearsall had the privilege of applying all payments to the general merchandise account, if they elected to do so," and that the three $1,000 notes should not be credited by implication of law with the aforesaid $1,586.47.

The fifth finding is so closely allied to the foregoing that it may be considered as a part thereof, and is as follows:

"That the mortgage provides that the failure to pay either of the three $1,000 notes shall have the effect of immediately maturing the mortgage indebtedness, including the line of credit; that none of the three $1,000 notes have been paid or renewed; that on February 12, 1898, the merchandise indebtedness exceeded $800, and that at no time since that date was the said merchandise indebtedness less than $800. The undersigned ruled that, this clause in the mortgage gave to McNair & Pearsall the right to treat the whole indebtedness as due, but this right was one which McNair & Pearsall could exercise or not, at their pleasure."

On February 12, 1897, being in embarrassed circumstances, to settle an existing indebtedness and to establish a line of credit bankrupt executed a mortgage to McNair & Pearsall on six tracts of land to secure three notes of $1,000 each, payable one, two, and three years after date, and a line of credit, not to exceed three years, for $400, which might, at the option of McNair & Pearsall, be increased to $800. The provision of the mortgage is as follows:

"That whereas, said James H. Johnson, one of the parties of the first part, is justly indebted to the said McNair & Pearsall, in the sum of three thousand dollars, as evidenced by his notes of even date herewith, each in the sum of $1,000, payable, one, two, and three years after date respectively and all bearing interest from date at the rate of six per centum per annum: and whereas, the said McNair & Pearsall, by contract in writing, dated Feb. 4th, 1897, have agreed to sell to said James H. Johnson, goods, wares and merchandise of the kind kept by them to the amount of $400, and as the same are paid for by the said Johnson to sell him other goods, wares, and merchandise to said amount, that is to say, have agreed to give to said Johnson a line of credit to the amount of $400, which 'line of credit' the said McNair & Pearsall may at their option increase to an amount not at any time to exceed $800, the sale of such goods to be on a cash basis and to bear interest from dates of sales at six per cent. per annum and the total amount of such line of credit to be due and payable upon the first default in the payment of either of the notes above mentioned, or sooner upon the first failure of said Johnson to comply with the terms of his said contract of Feb. 4th, 1897, to which reference is hereby made."

It was further agreed that Johnson should have the buildings insured, and in case of loss the insurance should be paid to McNair & Pearsall, to be applied as far as it may extend to the satisfaction of the mortgage. The line of credit was not to extend beyond three years, unless otherwise agreed between the parties. Then follows the power of sale in case of default. The mortgage debt matured on the default of the mortgagor, to wit, 1900. From that time on we have a debt secured by the mortgage and an account without security, unless there was an agreement between the parties, as provided, varying the terms of the written contract. It is admitted there was no such written agreement, and no express agreement of any kind. Then the question arises, can an implied agreement vary the written agreement, or be considered as such an agreement as was contemplated in the written contract? The court feels no hesitancy in holding this question must be answered in the negative. An agreement to vary a written contract must be of equal dignity with the contract—in this case a written agreement under seal. This left a secured and an unsecured debt. The mortgage was recorded,

and never satisfied as provided for by the laws of the state. It was therefore notice to all of its existence, and no legal presumption can arise in favor of subsequent creditors of the mortgagor, as it appears those questioning the dealings between the mortgagor and mortgagee are. That a creditor has a right, in the absence of instructions to the contrary, to credit payments on an unsecured debt, and would naturally do so, rather than on a secured debt, is too well settled to be questioned. This is what the creditor did. Courts are very reluctant to disturb contracts and dealings between parties, especially at the instance of subsequent creditors, when both parties still adhere to these dealings, and there is no fraud upon the rights of third parties in a position to complain. The subsequent creditors are not in such position. They gave credit to the bankrupt without inspecting the records for liens on his property, assumed the risk, and must abide the consequences. The mortgage must be satisfied first, as decided by the referee. The questions pressed by these subsequent creditors are interesting, but they are not in a position to question dealings between the parties which occurred several years before they became creditors.

The referee is therefore affirmed.

In re OLEWINE.

(District Court, M. D. Pennsylvania. November 12, 1903.)

No. 343.

1. BANKRUPTCY—ASSETS—EXEMPTION—LIQUOR LICENSE.
A liquor license, though transferable only with the approval of the court of quarter sessions which granted it, and not subject to seizure on execution, is not only part of the bankrupt's assets, but may be claimed by him as part of his exemption.

In Bankruptcy. Exceptions to report of referee disallowing exemption.

W. C. Sheely, for bankrupt.
Donald P. McPherson, for creditors.

ARCHBALD, District Judge. A liquor license in Pennsylvania, being transferable only with the approval of the court of quarter sessions which granted it, is held to be a privilege so purely personal that it does not pass on the death of the licensee to his legal representative as an asset of his estate (Grimm's Estate, 181 Pa. 233, 37 Atl. 403), although there may be, under certain circumstances, a qualified responsibility for it (Buck's Estate, 185 Pa. 57, 39 Atl. 821, 64 Am. St. Rep. 816; Mueller's Estate, 190 Pa. 601, 42 Atl. 1021); nor will a contract for the sale of it be specifically enforced (Cronin v. Sharp, 16 Pa. Super. Ct. 76). It was nevertheless decided in Re Becker, 3 Am. Bankr. R. 412, 98 Fed. 407, that, having a recognized transfer-

¶ 1. Franchises and licenses as assets in bankruptcy, see note to Fisher v. Cushman, 43 C. C. A. 389.

able value, it goes to the trustee in bankruptcy, to be disposed of by him for the benefit of creditors; and a similar ruling was made with regard to such licenses in Massachusetts. In re Brodbine, 2 Am. Bankr. R. 53, 93 Fed. 643; Fisher v. Cushman, 4 Am. Bankr. R. 646, 103 Fed. 860. It is in this respect like a seat in a stock exchange (Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; Sparhawk v. Yerkes, 142 U. S. 12, 12 Sup. Ct. 104, 35 L. Ed. 915; Page v. Edmunds, 9 Am. Bankr. R. 277, 23 Sup. Ct. 200, 47 L. Ed. 318), a stall in a market (In re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192; In re Emrich, 4 Am. Bankr. R. 89, 101 Fed. 231), or a salable office (Ex parte Butler, 1 Atk. 210); all of which have been held to be a part of the bankrupt's estate, and to pass to the trustee. But, if a license so far possesses the character of property as to be available in this way for the benefit of creditors, it is difficult to see why it cannot be claimed by the bankrupt as part of the exemption allowed by the state law. The ground on which this right was denied in Re Myers, 4 Am. Bankr. R. 536, 102 Fed. 869, seems to be that, as the exemption is only allowed on execution or distress for rent, and with respect to property liable thereto, it cannot be made to cover a license which is not capable of being so seized. But, carried to its legitimate result, this would exclude the bankrupt from his exemption altogether, proceedings in bankruptcy not being an execution; and if, on the other hand, it be assumed that they are such in effect, as in some respects is true (Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451; In re Hoover [D. C.] 113 Fed. 136), if competent to reach and appropriate the license of the bankrupt, as they are, he ought by the same logic to be able to claim and retain it on his part by virtue of his exemption, having been so seised. Indeed, considering the character of the license, it would seem to be peculiarly fitting that he should be allowed to keep that which has been granted to him by the quarter sessions as a personal privilege, rather than that it should be turned over by the trustee to a stranger, subject to the uncertainty of approval by that court.

The exceptions are sustained, the report of the referee is set aside, and it is ordered that the bankrupt be allowed to retain his license under his exemption.

In re MORRIS.

(District Court, E. D. North Carolina. November 21, 1903.)

1. BANKRUPTCY—ATTORNEY'S FEE—SCHEDULING AS UNSECURED CLAIM—EFFECT.
Where the attorney representing a bankrupt schedules a claim for a fee as an unsecured debt having priority by agreement, it will be treated as such, and not allowed as a priority, though Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], enacts that the attorney's fee provided for is a priority to be paid in full, the allowance of which is within the discretion of the judge.

2. SAME.
The allowance of an attorney's fee in bankruptcy is in the discretion of the judge, and payments of fees in contemplation of bankruptcy are valid only in so far as subsequently approved by the court.

In Bankruptcy.

PURNELL, District Judge. This matter coming on to be heard, and being heard upon the affidavit of Donnell Gilliam, Esq., and upon the recommendation of Jas. R. Gaskill, a referee in bankruptcy, to whom the cause was referred, that an attorney's fee of $50 be allowed said attorney.

In the petition and schedules there appears an attorney's fee of $200, as an unsecured debt, having priority by agreement. A petition asking for the allowance of an attorney's fee of $200, under the act of July 1, 1898, c. 541, § 64, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], was filed, and refused by the judge. Under this section, the attorney's fee provided for is a priority to be paid in full, the allowance of which is in the discretion of the judge. It would be irregular, as the bankrupt and attorney have seen proper to schedule this claim as an unsecured debt, to take it out of the class in which they have placed it, and order it, or any part of it, to be paid as a priority. If it is a debt as scheduled, it must be so proved and allowed as other debts are proved and allowed, and claimant would be allowed the dividend declared on the class of debts to which his claim belongs, and no more, no less. He cannot schedule it as an unsecured debt, and then claim it as a priority. This court has, by rule, fixed the maximum fee in voluntary proceedings, where there is no unforeseen litigation or extraordinary services, at $50, as in this proceeding there has been none. In re Carr & Co. (D. C.) 117 Fed. 572. The entry of $200 in the schedules was in violation of this rule. Under any circumstances, the allowance of an attorney's fee is in the discretion of the judge, and payments of fees in contemplation of bankruptcy are valid only in so far as subsequently approved by the court. In re Kross, 3 Am. Bankr. R. 189, 96 Fed. 816; Collier (3d Ed.) 373. This court has had occasion in many cases to consider the question of allowance to attorneys, and, it is probable, expressed some impatience at being plagued and harassed by unreasonable requests to exercise the discretion conferred by the bankruptcy act. But the court has established rules, and adhered to them strictly. In voluntary cases, these views are expressed in Re Smith, 5 Am. Bankr. R. 559, 108 Fed. 39. In involuntary cases, in Re Carr & Co., supra, to which the attention of referees and attorneys practicing before them is again called. The application for attorney's fee in the case at bar does not comply with the rule, and the attorney having elected to schedule it as an unsecured debt in violation of the rule at this time—the dividend sheet not being before the court—it would be improper to take it out of its class and allow it as a priority.

The order asked for is refused.

In re STEVENSON.

(At Chambers, in St. Louis, Mo. November 4, 1903.)

1. COURTS—SPECIAL SESSIONS—INFORMALITY IN CALLING.
   Where a judge who had power to fix terms of court, and to hold special sessions at such times as he might deem expedient, having fixed regular terms and the limit of their duration, at the close of one of such terms, instead of adjourning court sine die adjourned to the next secular day, his action was equivalent to the convening of a special session to commence on that day, and the court had the same power to transact business thereat as though a formal order had been entered calling such session in the absence of any statutory provision requiring such order.
2. SAME—ADDITIONAL JUDGE FOR INDIAN TERRITORY—POWERS.
   The additional judge for the Indian Territory appointed under Act June 7, 1897, c. 3 (30 Stat. 62), which provides that he shall hold court at such places as shall be designated by the appellate court, and "shall have all authority, exercise all powers, perform like duties and receive the same salary as other judges of said courts," when holding a term of court under assignment from the appellate court has the same power to call and hold a special session after the close of the regular term, to dispose of unfinished business, as the judge of the district would have.
3. SAME—LEGALITY OF SPECIAL SESSION—SIMULTANEOUS HOLDING OF REGULAR AND SPECIAL TERMS.
   A special term of court may lawfully be held while a regular term is in session at another place in the same district, where there are two judges each having authority to hold court in such district.

At Chambers. On application for writ of habeas corpus.

S. C. Price, for petitioner.

James E. Humphrey, Asst. U. S. Atty., for the Indian Territory.

D. P. Dyer, U. S. Atty., for respondent.

THAYER, Circuit Judge. The above-named petitioner made application to me, at chambers, for a writ of habeas corpus to secure his release from the United States penitentiary at Ft. Leavenworth, Kan., where he is now serving out a term of imprisonment which was imposed upon him May 13, 1901, by the United States court for the Southern District of the Indian Territory, sitting at Pauls Valley, in said district. He appears to have been convicted upon his plea of guilty of the offense of selling liquor within the Indian Territory, and was sentenced to two years and six months' imprisonment in the United States penitentiary at Ft. Leavenworth, Kan., and to pay a fine of $250. In his petition for the writ he alleged that he was unlawfully restrained of his liberty by the warden of the penitentiary for the following reasons: That is to say, for the reason that the term of court at Pauls Valley, as fixed by law and the order of court, had expired before the petitioner was brought to the bar of the court and required to plead to the indictment or was sentenced, and that the judge of said court, Honorable John R. Thomas, had no authority of law for holding said court, either at the time the petitioner pleaded guilty to the indictment or at the time he was sentenced. His contention is that, as the term of court at Pauls Valley had ended at the

¶ 3. See Courts, vol. 13, Cent. Dig. § 245.

time of his conviction, the sentence, when imposed, was, and ever since has been, utterly void, and that he is entitled to his discharge by the writ of habeas corpus.

The facts upon which this contention is based are not denied, but upon hearing before me were fully admitted, and are as follows: The United States court in the Indian Territory was created on March 1, 1889, with one judge (Act March 1, 1889, c. 333, 25 Stat. 783). The seventh section of that act provided that two terms of court should be held each year at Muskogee, in said territory, on the first Monday in April and September, "and such special sessions as may be necessary for the dispatch of the business in said court at such times as the judge may deem expedient; and he may adjourn said special sessions to any other time previous to a regular term." By an act of Congress approved May 2, 1890 (26 Stat. 81, c. 182), and by the thirtieth section thereof, the Indian Territory was divided into three divisions, to be known as the first, second, and third. By the same act the United States court for the First Division was directed to be held at Muskogee, for the Second Division at South McAlester, and for the Third Division at Ardmore. The clerk of the court was required to appoint a deputy for each division in which the clerk did not himself reside, at the places in such division where the terms of court were to be held. The same section of the act further required the judge of said court to "hold at least two terms of said court each year in each of the divisions aforesaid, at such regular times as said judge shall fix and determine." By another act of Congress approved on March 1, 1895 (28 Stat. 693, c. 145), the Indian Territory was divided into three judicial districts instead of three divisions, which were to be known "as the Northern, Central, and Southern Districts," in which districts "at least two terms of the United States court in the Indian Territory" were required to be held each year at each place of holding court in each district, "at such regular times as the judge for such district shall fix and determine." This act provided that the Southern Judicial District should consist of all the Chickasaw country, "and the places of holding courts in said district shall be at Ardmore, Purcelle, Pauls Valley, Ryan, and Chickasha." The act further provided for the appointment of two additional judges of the United States court in the Indian Territory, one of whom should be the judge of the Northern District, the other the judge of the Southern District, and that the judge of the United States court in the Indian Territory then in office should, from and after the appointment of the other two judges, be the judge of the Central District, and that said judges should reside in the judicial districts for which they were appointed. The act further declared that "the judges shall have within the judicial districts for which they are appointed, all such authority both in term time and vacation, as to all matters and causes, both criminal and civil, pending or that may be brought in said districts and shall have the same superintending control over commissioners' courts therein and the same authority in the judicial districts to issue writs of habeas corpus," etc., "as is now by law vested in the judge of the United States court in the Indian Territory or in the Circuit and District Courts of the United States." The eleventh section of said

act created a Court of Appeals in the Indian Territory composed of nisi prius judges, to be presided over by the judge oldest in commission as Chief Justice of said court. By an act of Congress approved on June 7, 1897 (see 30 Stat. 62, 84, c. 3), provision was made for the appointment of one additional judge for the Indian Territory, and the act declared that "the appellate court of said territory shall designate the places in the several judicial districts therein at which and the times when such judge shall hold court; and courts shall be held at the places now provided by law and at the town of Wagner and at such other places as shall be designated by said appellate court; and said judge shall be a member of the appellate court and shall have all authority, exercise all powers, perform like duties and receive the same salary as other judges of said courts and shall serve for a term of four years from the date of appointment." In pursuance of this latter act, Hon. John R. Thomas was appointed as such additional judge on July 1, 1897. Judge Thomas appears to have been the judge who held the court at Pauls Valley when the petitioner was convicted and sentenced.

On January 20, 1900, an order was made by the United States court in the Indian Territory for the Southern District by Judge Townsend, judge of that district, fixing the terms of the United States court for the Southern District of the Indian Territory, and by that order it was directed that terms of court should thereafter be begun and held "at Pauls Valley on the eighth Monday after the first Tuesday in October and the second Monday after the first Tuesday in April, and each term may continue in session three weeks."

After the appointment of the Hon. John R. Thomas in the manner and form aforesaid, to wit, on April 4, 1901, the United States Court of Appeals for the Indian Territory made the following order: "That the Honorable John R. Thomas, additional judge of the United States court for the Indian Territory, shall, until otherwise ordered by this court, hold court in the Northern Judicial District of the Indian Territory at the places therein provided by law, at the times fixed therein by the judge of the Northern District, in pursuance of law, and in addition thereto said additional judge may hold court at Pauls Valley, in the Southern Judicial District of the Indian Territory, at a term of the United States District Court to begin on the 15th day of April, 1901." In pursuance of this order, Judge Thomas appeared at Pauls Valley on April 15, 1901, being the second Monday after the first Tuesday in April, and opened a term of court. At the expiration of three weeks, to wit, on Saturday, May 4, 1901, the court did not adjourn sine die, but arose until the following Monday morning, May 6th, and on that day resumed its session pursuant to adjournment on the previous Saturday. Thereafter, on May 7, 1901, the petitioner was arraigned and pleaded guilty to the indictment, and on the succeeding 13th day of May, 1901, the court having continued its session without interruption until that day, he was sentenced in the manner and form aforesaid.

It was also conceded that the United States court for the Southern District of the Indian Territory was convened at Ardmore in regular session on Monday May 6, 1901, the term at that place being

held by Judge Townsend while Judge Thomas was still engaged in holding a session of the court at Pauls Valley. The court was in session at Ardmore, as it seems, on Monday, May 13, 1901, when the petitioner was sentenced, and it did not adjourn at that place until July 3, 1901.

Counsel for the petitioner invoke the doctrine, which is supported by much authority, that where the length of a term of court is prescribed by statute all acts done by the court after the prescribed period has elapsed are coram non judice and void. Garlick v. Dunn, 42 Ala. 404; Wightman v. Karsner, 20 Ala. 446; White v. Riggs, 27 Me. 114; Archer v. Ross, 3 Ill. 303; Davis v. Fish, 1 G. Green, 406, 413, 48 Am. Dec. 387. See, also, Lipscomb v. State, 76 Miss. 223, 249, 25 South. 158; Horton & Heil v. Miller, 38 Pa. 270. And counsel urge that the same doctrine obtains where judges are empowered to fix the times and places for holding terms of court, and an order has been made in pursuance of such authority, fixing the time for holding a given court and the length of that term. They urge that such an order, when made, has the force and effect of a legislative enactment; citing 21 Enc. of Pl. & Pr. p. 612. The argument in opposition to the above contention resolves itself into three propositions: First, that Judge Thomas, having been duly assigned to hold the court at Pauls Valley on April 15, 1901, by order of the United States Court of Appeals made on April 4, 1901, had the right to continue the session at that place until the pending business of the court was disposed of, or, in other words, that it was a term created by the appellate court; second, that Judge Thomas was vested by law with all the powers of any other of the judges in the Indian Territory; that while assigned to duty in the Southern District of the Indian Territory he had the same powers as Judge Townsend, the regular judge of that district, and that among these was the power to call and hold a special session, and that the order adjourning court on Saturday, May 4, 1901, to Monday, May 6, 1901, was tantamount to ordering a special term to begin on the latter day; and, third, that the court so held was, in any event, a court de facto, and that, as the petitioner went to trial at such term without challenging the right of the court to sit and try him, the sentence imposed was, at most, simply erroneous, and not void, and that it cannot be successfully challenged by habeas corpus.

The order of the Court of Appeals in the Indian Territory, which was made on April 4, 1901, assigning Judge Thomas to hold the court at Pauls Valley, cannot be construed fairly as creating a new term of court at that place, to be held by Judge Thomas irrespective of the existing order fixing terms of court at Pauls Valley. The order was manifestly made in view of the well-known fact that a term of court at that place had already been fixed by an order made by Judge Townsend on January 20, 1900, the intention being that Judge Thomas should hold that court as well as the courts in the Northern Judicial District at the times which had been theretofore fixed for the holding of courts in that district. There is nothing in the order in question which indicates that the judges of the Court of Appeals intended thereby to create new terms of court or to designate new

places for holding court, although the act of June 7, 1897 (30 Stat. 84), empowered them to do so if they thought proper. They simply undertook to designate the places in the Indian Territory where the additional judge should hold court, without altering any orders previously made as to the places where courts should be held and when terms of court should begin.

Conceding, therefore, as I feel disposed to do, that Judge Thomas was assigned to hold a term of court at Pauls Valley, the time for the commencement of which had been prescribed by an order previously made in the Northern District of the Indian Territory, does it follow that all acts done by him from and after May 4 or May 6, 1901, were void? It is too plain for controversy that after he commenced the term at Pauls Valley he had all the powers of Judge Townsend, the regular judge of the Southern District. The act of June 7, 1897, under which he was appointed, leaves no room for doubt on that point, because it provided that the additional judge "shall have all authority, exercise all powers, perform like duties and receive the same salary as other judges of said courts." 30 Stat. 84, c. 3. Whatever acts Judge Townsend could lawfully do and perform Judge Thomas could in like manner perform. Their powers and functions cannot be differentiated. It was within the power of Judge Townsend to hold "such special sessions as may be necessary for the dispatch of business * * * at such times as the judge may deem expedient," for the act of March 1, 1889, supra, conferred that power on the United States judge in the Indian Territory, and it was not taken away by any subsequent act, but was expressly continued and confirmed by the act of March 1, 1895 (28 Stat. 693, c. 145), and by the second paragraph of the second section of that act. Had Judge Townsend been holding court at Pauls Valley when the 4th day of May, 1901, arrived, and the business of the court was not concluded, he could have appointed a special term to begin on the following Monday, May 6, 1901, or he could have amended the order of January 20, 1900, making the term to continue for two weeks longer. That order having been made by the judge, and not being a legislative enactment, was subject to amendment at any time by the same authority that had made it. Judge Thomas had the same power. It is said, however, that on May 4, 1901, no formal order was made prolonging the term or appointing a special session, but that the court merely adjourned to the following Monday. Such action on the part of Judge Thomas was fully tantamount, in my judgment, to ordering a special session to begin the following Monday. The law looks at the substance of things, rather than the form, and, where a court possesses the power to appoint and hold a special term of court at a future day, it matters very little whether it adjourns to that day, as in the case in hand, or adjourns the term which it is holding sine die, and at the same moment appoints a special session for such future day. In either event, the same result is accomplished, and, if litigants in cases pending before it are given notice by the order of adjournment that the court will resume its sessions on a certain future day, it would seem that they are not prejudiced, and have no just ground to complain, although the court does not

make a formal order calling a special session. If the power to appoint and hold a special session resides in the judge, it would seem that the manner and form of its exercise is not of much importance, unless a statute requires the power to be exercised in some particular manner. United States v. The Little Charles, 26 Fed. Cas. 982, 1 Brock, 380; Mattingly v. Darwin, 23 Ill. 567.

Some stress has been laid, in argument, on the fact that a regular term of court convened at Ardmore on May 6, 1901, and that the assembly of the court there necessarily terminated the sessions of court at other places in the Southern District of the Indian Territory, particularly at Pauls Valley. This might have been the effect of the Ardmore session, if there had been but one judge in the district who was empowered to hold the courts in the district and whose presence was required at Ardmore. Archer v. Ross, 3 Ill. 303. But it is not perceived that any such difficulty is encountered, or that any such consequence ensues, when there are two judges in a district or circuit, each of whom is empowered to hold its courts. In that event it is not impossible to have two courts in session in different parts of the same district. Besides, the holding of two courts in different parts of the district, or at the same place in the district, when there are two or more judges having co-ordinate power, tends to the prompt dispatch of public business, and should be encouraged. The point made by counsel for the petitioner that the term at Pauls Valley ended when the term at Ardmore commenced is not well taken, and must be overruled. The idea that one judge must discontinue the trial of cases in one part of the district because another judge has opened a term of court elsewhere in the district rests upon no substantial foundation of reason or authority.

A number of cases have been cited by counsel for the respondent, notably Smurr v. State, 105 Ind. 133, 4 N. E. 445, in support of the proposition that although the term at Pauls Valley, after May 4, 1901, was held irregularly, still the court acted under color of authority, and its acts were not void, so that a writ of habeas corpus will not lie to obtain the petitioner's release. But, without entering upon an investigation or discussion of this point, it will suffice to say that for the reasons above indicated I am of opinion that the term at Pauls Valley was held by authority of law after May 4, 1901; that it was in fact a special term at that place which Judge Thomas was authorized to convene and did convene; and that the petitioner has no just cause to complain.

The writ of habeas corpus is accordingly discharged.

MOORE v. BANK OF BRITISH COLUMBIA et al.

BANK OF BRITISH COLUMBIA et al. v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1903.)

No. 921.

1. TRUST—AGREEMENT CREATING CONSTRUED—RIGHTS OF PARTIES DETERMINED.
Complainant was the holder of certain stock of a corporation as collateral security for notes of a lumber company. At the instance of such company, and for its benefit, she transferred the stock to defendant bank to carry out an agreement of the company to give defendant a majority of the stock for voting purposes for the term of five years, the company covenanting with complainant to pay any assessments against the stock. Defendant executed to complainant a receipt reciting that the stock was not delivered as security for any debt, but in compliance with the agreement of the company, and was to be held for voting purposes only, complainant to receive any dividends paid thereon. It further provided that the stock might be reissued in any other name at the option of defendant, which should return an equal number of shares at the end of five years; that complainant should pay any assessments on the stock, but if not so paid, and paid by defendant, it should recoup itself with interest out of subsequent dividends, holding the stock in the meantime as collateral security. Defendant caused the stock to be reissued in the name of an employé, as it also did other stock which it held in pledge from the lumber company. An assessment was subsequently made on the stock, which the lumber company paid on the amount of stock it had in pledge with money lent it by defendant and charged to its account. The assessment was not paid on any other stock, and it was all sold for the nonpayment and bought in by the corporation which issued it. Defendant did not notify complainant of the assessment, nor that her stock had been reissued, and she had no knowledge of such facts. Defendant, having bought the interest of the lumber company in the pledged stock at execution sale, caused a certificate to be issued for the exact number of shares received from complainant, which it tendered to her at the expiration of the five years, conditional on her paying it the amount of the assessments paid thereon, which she refused to do, and thereupon she brought suit to recover the stock. *Held*, that the agreement under which the stock was delivered created a trust which bound defendant as trustee to return the stock unconditionally at the stipulated time, unless after notice to complainant of the assessment, and her failure to pay the same, it exercised its option to pay it and to look to future dividends for repayment; that having caused the identity of her stock to be lost and failed to notify her of any assessment thereon, or to pay the same itself it could not charge her with the amount of assessments which had been paid on the substituted stock by her pledgor.

Appeal from the Circuit Court of the United States for the Northern District of California.

For opinion below, see 106 Fed. 574.

This suit was originally brought in the superior court of the city and county of San Francisco by Frances J. P. Moore against the Bank of British Columbia, a corporation, the Moore & Smith Lumber Company, a corporation, the Sanger Lumber Company, a corporation, and Walter Young, and was thereafter removed to the Circuit Court of the United States for the Northern District of California, where, after the death of Frances J. P. Moore, a bill of revivor was filed by A. D. Moore, the duly appointed, qualified, and acting executor of her estate, in pursuance of which bill, and upon stipulation of the respective parties, the suit was revived and continued by A. D. Moore, executor of the will of Frances J. P. Moore, deceased, as complainant, against the defendants Bank of British Columbia and Walter Young, the

other defendants having been dismissed on motion of the complainant. The purpose of the suit was the recovery by the complainant from the defendant bank of 5,000¾ shares of the capital stock of the Sanger Lumber Company. A motion for the appointment of a receiver of the stock pending the litigation was made in and denied by the court below (106 Fed. 574), the court then being of the opinion that it did not appear that the complainant would probably prevail in the cause. After a trial upon the merits, however, the court below decreed that the defendant bank deliver to the complainant, A. D. Moore, as executor of the last will of Frances J. P. Moore, deceased, certificates for 5,000¾ shares of the stock of the Sanger Lumber Company, duly indorsed, upon the payment by the executor to the bank, within a stated time, of the sum of $70,231.01, with certain interest, aggregating about $98,000, and that, in case of the executor's failure to pay the whole of the principal sum and interest, all right, title, and interest of the said Frances J. P. Moore and of the said A. D. Moore, the executor of her last will, and of her estate, in the said shares of stock, be foreclosed and extinguished, and that neither the said A. D. Moore, as such executor, nor any other representative of her estate, have any further right to demand any stock of the Sanger Lumber Company from the defendant bank, nor any claim or right or demand whatsoever against the bank growing out of the matters in dispute. Neither party was satisfied with this decree, and from it both the complainant and the defendants appealed to this court, the former claiming the right to the stock in question absolutely, and without any payment or condition, and the latter contending that the complainant is not entitled to any of the stock upon any terms or conditions, and certainly not without making the payment required by the decree.

The case shows that on the 18th day of September, 1894, the following written agreement was executed by and between the Moore & Smith Lumber Company, A. D. Moore, H. C. Smith, and the defendant Bank of British Columbia:

"Agreement made this 18th day of September, 1894, between Moore & Smith Lumber Company, hereinafter called the Company, and A. D. Moore and H. C. Smith, and the Bank of British Columbia, hereinafter called the Bank.

"Whereas, the Company is indebted to the Bank in the sum of one hundred thousand dollars, secured by a mortgage of the Port Discovery Mill, and certain lumber lands in the State of Washington (which mortgage also secures the other indebtedness of the Company hereinafter mentioned), and in the sum of seventy thousand dollars, secured by pledge to the Bank of three notes of the Kings River Lumber Company each for the sum of fifty six thousand two hundred and fifty dollars, and in the sum of fourteen hundred and ninety dollars, secured by pledge to the Bank of a certificate of stock of the Pacific Pine Lumber Company, and whereas the Kings River Lumber Company is indebted to the Bank in the sum of ten thousand dollars, and whereas it is proposed among certain creditors of the Kings River Lumber Company to form a new corporation to be called the Sanger Lumber Company and that such creditors of the Kings River Lumber Company shall assign their claim against the Kings River Lumber Company to the Sanger Lumber Company in exchange for the stock of the Sanger Lumber Company:

"Now, if said new corporation is formed and said arrangement goes into effect among the creditors of the Kings River Lumber Company, the Bank hereby agrees to take stock in the Sanger Lumber Company at its par value to the amount equal to said three notes of the Kings River Lumber Company, and said $10,000 debt of the Kings River Lumber Company, and said $1,490 debt of the Company, in all amounting to $180,240; and will assign all of said notes and debts to said Sanger Lumber Company in payment of its stock, such assignment to be without recourse against the Bank or any indorsers on said notes, including the Moore & Smith Lumber Company, and the assignment of the note evidencing the $1,490 debt to bear upon its face the stipulation that the Sanger Lumber Company shall look for its payment only to the said certificate securing it; and the interest on said three notes of the Kings River Lumber Company to be indorsed

thereon as paid up to the time of their delivery to the Sanger Lumber Company, and will deliver said certificate to the Sanger Lumber Company.

"The company will convey by a deed absolute to the Bank or its nominee the said Port Discovery Mill and said lands in Washington, and the Bank will cancel and deliver up to the Company said $100,000 note and said $70,000 note.

"The Bank shall then open an account with the Company in which the Company shall be debited with said sum of $100,000 and all taxes, insurance, and expenses connected with said mill and timber lands and the sum of eighty-one thousand four hundred and ninety-one dollars, being the actual cost to the Bank of the stock of the Sanger Lumber Company, and with interest on such amounts at the rate of six per cent. per year from July 1st, 1894, and shall be credited with any dividends on said stock of the Sanger Lumber Company, and with the proceeds of any sales of said stock made under the permission hereinafter given, and with the proceeds of any sales of the said mill property or timber lands made under the permission hereinafter given, and with all sums paid to the credit of said account by the Company, and with interest on all such credits at the rate of six per cent. per year, the interest so to be charged and credited to be adjusted and charged and credited at the end of each six months.

"The Bank shall hold said stock of the Sanger Lumber Company and said mill and timber lands as security for the amount due to it as shown by said account, and may any time sell said mill or any part of the whole said timber lands for any price it pleases, provided that if at any time it can sell said mill and lands for $100,000, it shall be bound to do so; and it may at any time sell not more than one-half of said stock of the Sanger Lumber Company for any price it pleases, giving the Company, however, the preference of purchasing at the price the Bank is willing to accept.

"At any time within five years from the date thereof, the Company may pay the Bank the balance of debt shown by said account, and on such payment the Bank shall cause to be conveyed to the Company all then remaining unsold of said mill and timber lands, and shall transfer and deliver to the Company all then remaining unsold of said stock of the Sanger Lumber Company.

"At the end of five years from the date hereof the balance of debt shown by said account shall be due and payable by the Company to the Bank, and if not paid, the Bank may foreclose its lien for the same against said mill and timber lands, and in any action of such foreclosure shall be allowed a counsel fee at the rate of five per cent. upon the amount found due, and may sell any or all of said stock of said Sanger Lumber Company then remaining unsold at either public or private sale with or without notice and without any previous demand upon or notice to the Company, and at any such sale may itself become a purchaser, and shall render any surplus of the proceeds of such sale to the Company.

"The said A. D. Moore and H. C. Smith, jointly and severally, hereby guarantee to the Bank the payment by the Company at the end of five years of the balance due on said account, waiving all demand on the Company and all notice to them of nonpayment, and any defense arising out of any delay on the part of the Bank in enforcing its debt or realizing on its security, or arising out of any extension or renewal of the debt by the Bank, or the taking by the Bank of any further security for the same, and waiving notice of any such extension or renewal, meaning to guarantee the debt until paid and whether renewed or not.

"The Company will deliver to the Bank and cause to be transferred to it or its nominees on the books of the corporation, sufficient stock of the Sanger Lumber Company to give the Bank, with the stock of the corporation which it is to take as security as aforesaid, a majority of the issued stock in its possession and control. This latter stock so to be delivered to the Bank is not to be held by it as security for said account, but only in trust for the purpose of giving the Bank the power to vote it. All its dividends shall be payable in cash to the Company as soon as declared and paid, and upon the payment by the Company of its debt as shown by said account, or upon the commencement of any action for the foreclosure of the Bank's lien on the Washington property and the realization of the Bank's

pledge of the Sanger Company's stock held by the Bank as security, it shall be returned by the Bank to the Company, and in no event shall it be retained by the Bank longer than five years from the date hereof. If at any time the right of the Bank to vote the Sanger Lumber Company's stock, either that held by it as security or that held by it in trust as aforesaid, shall be for any reason successfully resisted, then, at the option of the Bank, of which no notice need be given to the Company or said Moore or said Smith, the amount shown to be due by said account shall become immediately due and payable, and the Bank may foreclose its lien on the Washington property and all the stock of the Sanger Lumber Company held by it as security aforesaid.

"This agreement is conditioned by the formation of the Sanger Lumber Company and the going into effect of the aforesaid arrangement among certain creditors of the Kings River Lumber Company for the assignment of their claims against the Kings River Lumber Company to the Sanger Lumber Company.

"In witness whereof the Moore & Smith Lumber Company has caused these presents to be signed by its president and secretary, and its corporate seal to be affixed hereto, and the said A. D. Moore and H. C. Smith have subscribed their names hereto, and the said Bank of British Columbia has caused these presents to be signed by Walter Powell, its manager in San Francisco, all in due duplicate the day first above written.

"[Seal.] Moore & Smith Lumber Company,
"By A. D. Moore, President.
"By Chas. A. Moore, Secretary.
"A. D. Moore.
"H. C. Smith.
"Bank of British Columbia.
"By W. Powell, Manager."

The Sanger Lumber Company was thereafter incorporated with a capital stock divided into 24,000 shares of the par value of $25 each, of which the Moore & Smith Lumber Company became the owner of 19,552¼ shares. 7,209½ of these shares the Moore & Smith Company pledged to the bank prior to December 19th, 1894, in pursuance of the provisions of the agreement of September 18, 1894. Between those dates, to wit, on the 17th of November, 1894, the Moore & Smith Lumber Company executed three promissory notes in favor of Frances J. P. Moore, who was the wife of A. D. Moore, the president of the company, each for the sum of $19,374.43, bearing interest at the rate of 6 per cent. per annum; and, as collateral security for the payment of the principal and interest of one of the notes, the company delivered to Mrs. Moore 1,875 shares of the capital stock of the Sanger Lumber Company, evidenced by two certificates numbered, respectively, 45 for 1,250 shares and 46 for 625 shares, both issued in the name of A. D. Moore, trustee for the Moore & Smith Lumber Company, and so indorsed by him. As collateral security for the payment of another of the notes, the company delivered to Mrs. Moore 1,875 shares of the stock of the Sanger Lumber Company, evidenced by two certificates, one numbered 44 for 1,250 shares, and the other numbered 47 for 625 shares, both of which were also issued in the name of A. D. Moore, trustee for Moore & Smith Lumber Company, and by him so indorsed; and as collateral security for the other of the notes, the company delivered to Mrs. Moore 1,875¾ shares of the stock of the Sanger Lumber Company, evidenced by two certificates, one numbered 43 for 1,250 shares, and the other numbered 48 for 625¾ shares, both issued in the name of A. D. Moore, trustee for the Moore & Smith Lumber Company, and by him so indorsed. Each of these notes and collaterals was accompanied by a written agreement on the part of the Moore & Smith Lumber Company, expressly declaring and providing, among other things, that "This Company will pay all assessments levied on above stock, and failing to do so, the payee may pay same and add amount with interest to above note, and in latter case the above note and interest become at once due and payable."

Subsequently, at the request of the Moore & Smith Lumber Company, and to enable it to carry out its agreement with the defendant bank made September 18, 1894, Mrs. Moore delivered to the bank at different

times, and in three installments, 5,000¾ shares of the 5,625¾ shares of the Sanger Lumber Company's stock held by her as collateral, the first of which installments was so delivered on the 19th day of December, 1894, upon and in consideration of which delivery the bank at the time executed to her this receipt and agreement:

"San Francisco, December 19th, 1894.

"Received from Frances J. P. Moore thirty-one hundred and twenty-five (3,125) shares of the capital stock of the Sanger Lumber Company issued under certificates number 45 for twelve hundred and fifty (1,250) shares, number 43 for twelve hundred and fifty (1,250) shares, and number 48 for six hundred and twenty five (625) shares, to A. D. Moore, trustee from (for) Moore & Smith Lumber Company, and so indorsed in blank, by him as such trustee, and held by her as collateral security for debts due to her by the Moore & Smith Lumber Company and delivered by her to this Bank, with consent of the Moore & Smith Lumber Company, and which stock may, at the option of this bank, be re-issued in such other name as this bank may elect. and said stock to remain in the hands of this bank for five (5) years, from September 18, 1894, and with the obligation of this bank at the end of said time to hand back to Frances J. P. Moore, her heirs or assigns, said stock, or an equal number of shares of said stock, and to pay over to her, her heirs and assigns, all dividends declared and paid during said five (5) years on said stock, as same are declared and paid, it being understood that all assessments on said stock during said time shall be paid by said Frances J. P. Moore, and if not so paid and paid by this bank, then this bank to recoup itself, with interest at six per cent. per annum, out of subsequent dividends, holding the stock in the meantime as collateral security.

"It is understood that this stock is not delivered to this bank as collateral security for any debt, or claim due to it by said Frances J. P. Moore or any other person or company, but to enable the said Moore & Smith Lumber Company to carry out its agreement with this bank of September 18th, 1894, to give to this bank a majority of the stock of said the Sanger Lumber Company, for the purpose of voting.

"[Seal] "For the Bank of British Columbia, San Francisco.
"W. Powell, Manager.

"With our consent: Moore & Smith Lumber Company.
"By A. D. Moore, President.
"By Chas. A. Moore, Secretary."

A similar receipt and agreement was executed by the bank to Mrs. Moore upon the delivery to it of the other installments of stock mentioned.

Before consummating this arrangement, certificate No. 44, for 1,250 shares, was canceled, and, in its stead, two certificates were issued in the name of A. D. Moore, trustee for the Moore & Smith Lumber Company, numbered, respectively, 91 for 450 shares, and 92 for 800 shares, the certificates received by the bank from Mrs. Moore being as follows:

Number.		Shares.
43	for	1250
45	for	1250
46	for	625
48	for	625¾
91	for	450
92	for	800
		5000¾

These certificates, so delivered to the bank, were thereafter, at its request, canceled and replaced by certificates in the name of the defendant Walter Young, trustee, as follows:

Number.		Shares.
72	for	3125¾
94	for	800
109	for	1075
		5000¾

At the time of the respective deliveries of the stock by Mrs. Moore to the bank, aggregating 5,000¾ shares, indorsements were respectively made by the Moore & Smith Lumber Company, through its president and secretary, on the notes of that company held by Mrs. Moore, of similar import, the first of which reads as follows:

"At the request and by the advice of this company, the payee of this note, Frances J. P. Moore, has this day placed in trust with the Bank of British Columbia, of this city, one (1) of the certificates of stock of the Sanger Lumber Company, to-wit, number 45, for twelve hundred and fifty (1250) shares, pledged for collateral to this note in order to help this company to carry out a certain agreement between it and said Bank, dated September 18th, 1894.

"Dec. 19, 1894. Moore & Smith Lumber Co.,
"By A. D. Moore, President.

"By Chas. A. Moore, Secretary."

On the 9th day of January, 1896, the subscribed and issued stock of the Sanger Company was 23,849¼ shares. Of these the Moore & Smith Lumber Company owned 19,552¼ shares, 7,209½ of which were then pledged to the defendant bank as collateral security for money owed it by the Moore & Smith Lumber Company; 5,625¾ of which stood pledged to Mrs. Moore as collateral security for money due by the Moore & Smith Lumber Company to her, 5,000¾ of which 5,625¾ shares were then in the hands of her trustee, the defendant bank, for the purpose and under the agreement above set out; 6,495½ of which shares stood in the name of A. D. Moore, trustee; and 222 shares of which stood in the name of the Moore & Smith Lumber Company.

Of the 23,849¼ shares of the stock of the Sanger Lumber Company outstanding on the 9th day of January, 1896, the defendant bank thus held 12,210¼ shares, and, therefore, the controlling interest. On that day an assessment of $2.50 per share was levied by the Sanger Company. The assessment was paid on the 7,209½ shares held by the defendant bank as collateral security for moneys due it from the Moore & Smith Lumber Company, but was not paid either upon the 5,000¾ shares theretofore delivered to the bank by Mrs. Moore and by it placed in the name of one of its employés, the defendant Walter Young, as trustee, nor upon the 625 shares of the 5,625¾ shares pledged to Mrs. Moore by the Moore & Smith Lumber Company and retained by her. All of the stock that was pledged to Mrs. Moore, and all of the other stock of the Moore & Smith Company except the 7,209½ shares pledged to the bank, was thereafter sold for the assessment and bought in by the Sanger Lumber Company at the delinquent sale. A. D. Moore was president both of the Moore & Smith Company and of the Sanger Lumber Company, presided at the directors' meeting at which the assessment was levied, and voted for it. No notice was given by the defendant bank to Mrs. Moore of the levy of the assessment or the sale thereunder, nor was she informed that the stock delivered by her to the bank had been, at its request, put in the name of the defendant Walter Young, trustee. At the time of the assessment, and at the time of the sale of the stock, the Sanger Lumber Company was indebted to Mrs. Moore in the sum of about $40,000.

The five years provided for in Mrs. Moore's agreement with the defendant bank expired September 18, 1899. A year or more prior to the expiration of that period, the Bank of California sued the Moore & Smith Lumber Company for a debt, levied upon the interest of the Moore & Smith Lumber Company in the 7,209½ shares of the stock of the Sanger Company held by the Bank of British Columbia in pledge, and, under an execution sale based upon a judgment recovered by the Bank of California in that action, purchased the interest of the Moore & Smith Lumber Company in and to those shares of stock, and thereafter assigned all of its interest therein to the defendant Walter Young in consideration of $100. Subsequently Young, still acting for the defendant bank, caused the certificate for the 7,209½ shares which stood in his name, as trustee, to be canceled, and in its stead two certificates to be issued in his name, one of which, numbered 142, was for 5,000¾ shares. The evidence shows that this proceeding was taken at the request and in the interest of the defendant Bank of British Columbia, and that one of its purposes was to have sufficient of the Sanger Company's stock available for delivery to Mrs. Moore at the expiration of the five-year term provided for in

the agreement between her and the bank. When that time expired she demanded of the bank the return of the 5,000¾ shares delivered to it by her. In response to that demand, the bank replied in writing, as follows:

"Mrs. Frances J. P. Moore—Dear Madam: Whereas, on December 19th, 1894, the Bank of British Columbia received from you thirty-one hundred and twenty-five and three-quarters shares of capital stock of the Sanger Lumber Company, issued under certificates number 45, 43, and 48; and whereas on February 14th, 1895, said bank received from you eight hundred shares of said stock, being certificate number 92; and whereas on June 28th, 1895, said bank received from you ten hundred and seventy five shares of said stock, being certificate number 46; and whereas all of said stock was received by said bank from you with the obligation of said bank at the end of five years from September 18th, 1894, to hand back to you said stock, or an equal number of shares of said stock

"Now, therefore, the said Bank of British Columbia hereby and herewith tenders to you and offers to deliver to you certificate number 142 for five thousand and three-quarters shares of the Sanger Lumber Company, in the name of Walter Young and duly endorsed by him.

"As a prerequisite to and condition of the delivery of said five thousand and three-quarters shares to you under this offer and tender, the said Bank hereby demands that you pay to it the sum of ninety-eight thousand seven hundred and fifty dollars, being the amount of the assessments upon the said stock which have been levied and paid since the delivery of said shares by you as aforesaid to said Bank.

"Upon the payment by you of said sum of said five thousand and three-quarters shares of stock will be delivered to you.

"September 19th, 1899.

"For the Bank of British Columbia, San Francisco.

"W. Powell, Manager."

Mrs. Moore, having declined to pay the bank the $98,750 demanded of her as a condition to the delivery of the stock, or any other sum of money, brought the present suit. Before doing so, however, and after the receipt of the bank's reply of September 19, 1899, she canceled the indebtedness of the Moore & Smith Lumber Company to her in consideration of the assignment by that company to her of all of its interest in the 5,625¾ shares of the Sanger Company's stock theretofore pledged to her. Since the submission of the case, A. D. Moore died, and on the 20th of May, 1903, an order was entered substituting Percy P. Moore, administrator with the will annexed of the estate of Frances J. P. Moore, in the place and stead of A. D. Moore, executor.

Garber, Cresswell & Garber and Smith & Pringle, for appellant.

Bishop, Wheeler & Hoefler and Pringle & Pringle, for appellees.

Chas. S. Wheeler, for executor.

Sydney V. Smith, for Bank of British Columbia.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

We regard the case as a plain one. The delivery by Mrs. Moore of 5,000¾ shares of the Sanger Company's stock, held by her as collateral security for the indebtedness of the Moore & Smith Company to her, was made to the defendant bank at the request of the Moore & Smith Company, and in fulfillment of one of the covenants contained in the agreement between it and the bank of September 18, 1894; and they were so delivered to the defendant bank, not as an ordinary bailment, but in trust. It is so declared in express terms, not

only in the receipt and agreement executed by the bank to Mrs. Moore at the time of the delivery to it of the stock, but also in the contract of September 18, 1894. One of the conditions of the trust agreement was that whatever dividends might be paid during the period of five years therein mentioned on the stock so delivered should be paid over by the bank to Mrs. Moore, her heirs or assigns, it being therein expressly declared that the stock was not delivered to the bank as collateral security for any debt or claim due to it by Mrs. Moore, or any other person or company, but only to enable the Moore & Smith Company to carry out its agreement with the bank of September 18, 1894, to give to it a majority of the stock of the Sanger Lumber Company "for the purpose of voting"; in other words, to give the bank the control of that corporation. By the agreement of the parties it was further stipulated, in express terms, that the bank should not be required to return to Mrs. Moore the identical shares of stock so delivered to it by her, but might, at its option, cause those certificates to be canceled and other certificates of stock to be issued in lieu thereof in such other name as it might choose, and at the expiration of the five years return to her an equal number of shares of the stock of the Sanger Company.

The stock pledged to Mrs. Moore by the Moore & Smith Lumber Company was accompanied by an express agreement on the part of that company to pay all assessments levied thereon, with a provision to the effect that, if not paid by the company, Mrs. Moore should have the right to pay the same, and add the amount thereof, with interest, to the notes for which it was held as security, and the further right, in that event, to treat the notes and interest as immediately due and payable.

As between Mrs. Moore and the defendant bank, the agreement was that she should pay all assessments levied on the stock delivered by her to the bank during the five-year period, with a provision that "if not so paid, and paid by this bank, then this bank to recoup itself, with interest at six (6) per cent. per annum, out of subsequent dividends, holding the stock in the meantime as collateral security." It will be observed that under this provision no money paid by the bank as assessments upon the stock delivered to it by Mrs. Moore could be recovered by it from her, but only out of subsequent dividends upon the stock; until the payment of which, however, the bank should have the right to hold the stock as collateral security for assessments so paid by it. Perhaps this provision may have had something to do with the failure of the bank to avail itself of the privilege of paying the assessment upon the 5,000¾ shares of stock delivered to it by Mrs. Moore; for, however promising the outlook may have been at the time of entering into the agreements in question, it is quite evident from the record that "dividends" on the stock of the Sanger Lumber Company, during the period for which the stock in controversy was placed with the defendant bank, were impossible. It is not claimed that the bank ever notified Mrs. Moore that it had caused the stock delivered to it by her to be reissued in the name of one of its employés, the defendant Young, as trustee, nor that the bank ever notified her of the assessment levied by the Sanger Lumber

Company, or of the fact that the assessment upon the 5,000¾ shares of stock then standing in Young's name was not paid.

Considering the 5,000¾ shares delivered by Mrs. Moore to the bank as being represented only by the certificate afterwards issued at the bank's request in the name of Young, trustee, we think the bank is, in equity, bound to return to the complainant an equal number of shares, unconditionally, unless it has paid some assessment or other charge thereon. The testimony of Mrs. Moore is distinct and positive that she did not know of the assessment, and that she was financially able to have paid it. It is earnestly insisted on the part of the bank that, in view of the relationship existing between her and A. D. Moore (in whose interest and for whose benefit she manifestly delivered the stock to the defendant bank), it is incredible that the husband did not inform the wife of the assessment. We do not think so. The assessment under which the 5,000¾ shares standing in the name of Young, trustee, were sold, was levied January 9, 1896. The undisputed evidence is that A. D. Moore made strenuous efforts to induce the defendant bank to loan the Moore & Smith Lumber Company sufficient money with which to pay the assessment upon all the Sanger Lumber Company's stock owned by it. It further shows that he was in London—the home office of the defendant bank—endeavoring to accomplish that result at the time of the delinquent sale. While striving and hoping to bring about that end, and thus to comply, among other things, with the obligation of his company to his wife to pay the assessment upon the stock it had pledged to her, we do not think it incredible that he failed to inform her of the assessment, or of the inability of the Moore & Smith Company to pay it as it had agreed to do. Husbands do not always tell their wives of their troubles and shortcomings. As a matter of course, in this instance A. D. Moore should have done so; but the testimony of Mrs. Moore is positive that he did not, and we see nothing in the circumstances of the case to justify the rejection of her testimony as being untrue.

As the defendant bank held the stock in question in trust for Mrs. Moore, for its own purposes, with the right to place it in the name of another of its own selection, and with the privilege of paying—in the event its cestui que trust did not do so—all assessments thereon during the trust period, recouping the amount thereof, with interest, out of the contemplated dividends, and as the bank, in the exercise of the right conferred upon it, did cause the stock of its cestui que trust to be placed in the name of one of its own employés, thereby giving it the control of the corporation, it was, upon the most obvious principles of fair dealing, bound to give its cestui que trust notice, not only of the assessment, but also of the fact that the stock which had been turned over to it in trust then stood in the name of its employé Young. Otherwise how, in any event, would its cestui que trust know upon what stock to pay? We know of no principle of equity under which a trustee of stock so placed and held, and with the stipulated right in itself to pay the assessments thereon and recoup the amount thereof with interest, can permit the same to be sold for delinquency and bought in by the corporation, other stock of which it holds, without notice to its cestui que trust either of the fact of the assessment

or of the person in whose name it has caused the trust stock to be placed. But we are of the opinion that it does not appear that any of the trust stock was ever sold for any assessment. As has been seen, under the trust agreement the bank was not required to hold or to return the specific shares it received from Mrs. Moore, but was expressly authorized to convert them into other shares, and was only required to return, upon the expiration of the five-year period, an equal number of shares of the stock. The record shows that the bank commenced to exercise the rights thus conferred almost immediately upon entering upon its trust, and wiped out the identity of the shares it received from Mrs. Moore by causing the certificate therefor to be canceled, and the stock to be issued in the name of its employé Young. But the bank all the time retained in its possession an equal number of shares, and more. It held continuously the 7,209½ shares it received from the Moore & Smith Lumber Company as collateral security, and more than a year before the expiration of the trust period undertook to acquire all of the interest of the Moore & Smith Company therein, and thereafter caused the certificate for those shares to be broken up and one of the certificates issued in lieu thereof to be issued in the name of the defendant Young for 5,000¾ shares. All of this was done, according to the testimony of the officers of the bank, for the distinct purpose of being ready to return to Mrs. Moore an equal number of shares of the same stock it had received from her, when the proper time should arrive. And these 5,000¾ shares it did actually tender her in writing, upon the expiration of the five-year period, in response to her demand for her stock. Having thus treated 5,000¾ of the shares pledged to it by the Moore & Smith Lumber Company as "the equal number of shares" it had bound itself to return to its trustor, the bank cannot now be allowed to change the position it has all along assumed, and to successfully contend that, in fact, its trustor's stock was sold while standing in the name of one of its own employés, in which it had caused it to be placed without notice to its trustor, and without notice to her that any assessment thereon had been levied. Equity does not so regard the rights and obligations of trustee and trustor.

While the defendant bank failed to exercise the right, reserved to it by its agreement with Mrs. Moore, of paying the assessment on the stock delivered to it by her, and recouping the amount with interest out of subsequent dividends thereon, it did advance the money for the payment of the assessment upon the 7,209½ shares that were held by it as collateral security for the indebtedness of the Moore & Smith Lumber Company. The assessments upon that stock were paid; but they were paid by the Moore & Smith Lumber Company, to which the bank loaned the money for that purpose, and to which company the bank charged the money so advanced upon its books, with interest. This fact is distinctly testified to by two of the principal officers of the bank, and is further shown by the record of a suit brought by the bank to recover of the Moore & Smith Lumber Company, and from A. D. Moore and H. C. Smith individually, a large sum of money, including the moneys loaned by it to that company with which to pay the assessments upon the 7,209½ shares of

stock of the Sanger Company. And those loans, it must be noted, were made in pursuance of the agreement between the defendant bank and the Moore & Smith Company, of date September 18, 1894, hereinbefore set out, wherein, in consideration of certain securities given it by that company and certain agreements on its part, the bank agreed to

"Open an account with the company in which the company shall be debited with said sum of $100,000, and all taxes, insurance, and expenses connected with said mill and timber lands, and the sum of eighty one thousand four hundred and ninety one dollars, being the actual cost to the bank of the stock of the Sanger Lumber Company, and with interest on such amounts at the rate of six per cent. per year from July 1st, 1894, and shall be credited with any dividends on said stock of the Sanger Lumber Company, and with the proceeds of any sales of said stock made under the permission hereinafter given, and with the proceeds of any sales of the said mill property or timber lands made under the permission hereinafter given, and with all sums paid to the credit of said account by the company, and with interest on all such credits at the rate of six per cent. per year, the interest so to be charged and credited to be adjusted and charged and credited at the end of each six months."

That agreement further provided that:

"The bank shall hold said stock of the Sanger Lumber Company and said mill and timber lands as security for the amount due to it as shown by said account, and may any time sell said mill or any part of the whole [of] said timber lands for any price it pleases, provided that if at any time it can sell said mill and lands for $100,000, it shall be bound to do so; and it may at any time sell not more than one-half of said stock of the Sanger Lumber Company for any price it pleases, giving the company, however, the preference of purchasing at the price the bank is willing to accept. At any time within five years from the date thereof, the company may pay the bank the balance of debt shown by said account, and on such payment the bank shall cause to be conveyed to the company all then remaining unsold of said mill and timber lands, and shall transfer and deliver to the company all then remaining unsold of said stock of the Sanger Lumber Company. At the end of five years from the date hereof, the balance of debt shown by said account shall be due and payable by the company to the bank, and if not paid, the bank may foreclose its lien for the same against said mill and timber lands," etc., etc.

It thus appears by the written agreement of September 18, 1894, not only that the bank contemplated making advances upon the credit of the Moore & Smith Lumber Company, but that such sums of money as it should be willing to loan that company during the continuance of that agreement should not become due and payable until the expiration of five years from the date of the agreement, unless "the right of the bank to vote the Sanger Lumber Company's stock, either that held by it as security, or that held by it in trust as aforesaid, shall be for any reason successfully resisted," in which event "at the option of the bank, of which no notice shall be given to the company, or said Moore, or said Smith, the amount shown to be due by said account" should become immediately due and payable, and the bank have the right to foreclose its liens on the Washington property, and also on the stock of the Sanger Lumber Company held by it as security. The bank may have made a bad bargain, but, if so, it constitutes no just ground for contending that money it loaned to the Moore & Smith Lumber Company at inter-

est, for the purpose of paying assessments upon the Sanger Lumber Company's stock, should be treated as a payment by itself of those assessments. The bank never having paid any assessment upon the stock in question, so far as appears, the payment demanded by it as a condition to a return of the 5,000¾ shares was wholly without right.

It results that the judgment must be so modified as to decree that the defendant bank deliver to the complainant certificates for 5,000¾ shares of the stock of the Sanger Lumber Company, properly indorsed, unconditionally and without the payment of any money or other thing, and costs of suit; and, as so modified, it will stand affirmed.

HARRISON v. HUGHES et al.

(Circuit Court of Appeals, Third Circuit. September 1, 1903.)

No. 38.

1. NAVIGABLE WATERS—OBSTRUCTION BY UNFINISHED BREAKWATER—DUTY OF CONTRACTOR TO MAINTAIN LIGHTS.

Contractors with the United States for the construction of a breakwater near the mouth of Delaware Bay, who were required by the contract to erect and maintain at their own expense a stake light at the end of the new structure while the work was in progress, in accordance with the instructions of the engineer officer in charge, or his agent, and also such other lights as the engineer might direct, were bound not only to maintain lanterns in the required positions, but also to see that they were kept trimmed and brightly burning during the hours of darkness, and they are liable for injury to a vessel stranded on the new construction by reason of the extinguishment by the wind of the stake light, where they had knowledge that it was liable to be so extinguished, and had been a number of times previously.

2. SAME—CONSTRUCTION OF CONTRACT.

The provision of the contract requiring them to maintain such other lights as the engineer should direct did not necessarily measure their obligations to third persons to whom they owed the duty of maintaining such lights as were necessary or proper in view of the dangerous character of the structure, whether directed by the engineer or not.

3. SAME—ACT OF GOD.

The extinguishment of the stake light by the wind due to its improper adjustment cannot be attributed to the act of God or vis major, so as to relieve the contractors from liability, being something which might reasonably have been anticipated, and could have been guarded against in the exercise of reasonable care and vigilance.

4. SAME—CARE REQUIRED OF CONTRACTOR.

Reasonable care and vigilance required the contractors to guard against the probable consequences of the extinguishment of the light or its failure to burn at night, and, if it was impracticable to properly relight the lantern whenever the light was blown out in a storm or high wind, they should, in view of the great danger to navigation resulting from darkness at that point, either have erected an electric light which could have been operated from the shore, or made such disposition of their floating plant as to warn vessels away from the new breakwater.

5. PILOTS—QUALIFICATIONS—CARE AND SKILL REQUIRED.

Pilots whose vocation is to control the course of vessels into and out of Delaware Bay and River and their anchorage therein, are required to exercise the care and skill of river and harbor pilots, and are chargeable with knowledge of natural objects on shore and the obstacles to navigation, and of the significance of fixed and permanent lights.

6. ADMIRALTY—FAULTS ATTRIBUTABLE TO VESSEL—NEGLIGENCE OF COMPULSORY PILOT.

By the American admiralty law, the fault or negligence causing a collision with another vessel or a structure is imputable to the vessel, although it was that of a compulsory pilot.

7. NAVIGABLE WATERS—INJURIES FROM OBSTRUCTION—CONTRIBUTORY FAULT OF VESSEL.

The injury of a steamship by running into a partly constructed breakwater in Delaware Bay in the night *held* due in part to the fault of the contractors in failing to maintain lights and in part to the negligent navigation of the vessel by the pilot, which precluded her from recovering full damages.

Appeal from the District Court of the United States for the District of Delaware.

For opinion below, see 110 Fed. 545.

John F. Lewis and Francis C. Alder, for appellant.

H. G. Ward, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. A careful review of the testimony, as disclosed in the record in this case, convinces us that the decree of the court below should be affirmed. The opinion of the learned judge of that court so entirely, and satisfactorily to us, covers all the points in controversy, that we adopt the same as the opinion of this court. It is as follows:

"The libel in this case is in personam and was filed by Albert Harrison, master of the British steamship Glenochil, against Eugene Hughes, James Hughes, Charles Hughes and Ansom Bangs, trading as Hughes Bros. & Bangs, to recover damages for injuries sustained by that vessel through running upon the new breakwater off Lewes, near the mouth of Delaware Bay, about 1 o'clock in the morning of November 30, 1897. At the time of the accident the new breakwater, extension to the breakwater, or harbor of refuge, as it is indifferently termed, was in course of construction by the defendants, under a contract between Major C. W. Raymond of the corps of engineers of the United States Army, acting for and in behalf of the United States, as party of the first part, and the defendants as parties of the second part. The contract was in writing, bore date February 5, 1897, was approved by the chief of engineers February 20, 1897, and provided among other things as follows:

" 'The said Hughes Brothers and Bangs shall furnish the necessary plant and material and do all the work required for the construction of a stone breakwater in Delaware Bay, Delaware, in strict accordance with, and subject to all the conditions and requirements of the specifications hereunto attached and forming a part of this agreement.'

"Among the conditions and specifications are the following:

" '(3) Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.'

" '(42) Description of the Locality. The site of the proposed breakwater is about 2¼ miles north of the Delaware Breakwater Harbor, about 3 miles from the Government Pier at Lewes, Delaware, and about 10 miles from Cape May. * * *'

" '(56) * * * The work shall be conducted in strict accordance with instructions given from time to time by the engineer officer in charge. * * * All operations connected with the work will be under the immediate supervision of assistant engineers, inspectors or other agents of the engineer officer in charge, and their instructions shall be strictly observed by the contractor and his employees.'

" '(59) The work will be commenced by the construction of the substructure at the upper or northwest end of the breakwater, where the mound will be raised to the level of mean low water as rapidly as possible, and over a length at mean low water at least 100 feet. Upon this mound a stake light will be erected, which must be thoroughly protected from ice and storms by depositing very large stones around it. This light will be erected and protected in accordance with the instructions of the engineer officer in charge, or his agent, and it will be maintained by the contractor as long as required by the engineer officer in charge.'

" '(62) Plant. The plant shall be adapted to the work and shall be kept in good condition at all times.'

" '(65) Lights. During the progress of the work, the contractor must keep suitable lights, every night from sunset to sunrise, upon all his vessels at or in the vicinity of the work. He must also maintain on the work such lights as the engineer officer in charge may direct. These lights will be mantained at the expense of the contractor. The United States will not be responsible for any accident that may occur to the contractor's plant, to passing vessels, or to any property whatever during the progress of the work.'

" '(70) Bidders shall further state, on the form hereto appended, and in accordance with the directions thereon, whether they are now or ever have been engaged on any contract or other work similar to that which is proposed, giving the nature and location of the work, the year or years in which it was done, the manner of its execution, and such other information as will tend to show their ability to vigorously and successfully prosecute the work required by these specifications. Any bid not complying with these instructions will be rejected.'

"The defendants in their proposal for the work, dated November 24, 1896, among other things said:

" 'We are now engaged in constructing a stone breakwater at Point Judith, R. I., and a stone breakwater, also at entrance at harbor at New Haven, Conn. Both for the U. S. Government. * * * We make this proposal with a full knowledge of the work. * * *'

"On or about May 3, 1897, work was commenced on the new breakwater and about the same time a stake light was placed on a mound or stone pile constituting its northwesterly end. On the night of the accident the breakwater had been partially constructed for a distance of about 1,925 feet at low water extending from the end provided with the stake light southeastwardly; no other light having been provided for the work prior to that time. The libel, among other things, contains the following averment:

" 'That the stranding of the said steamship upon the new breakwater as aforesaid was caused by the carelessness, negligence and recklessness of the said respondents, in that the said new breakwater so under construction by said respondents, as contractors as aforesaid was at and before the time of the said stranding of said steamship, entirely without lights to mark its position and was, at its then stage of construction, thereby rendered a dangerous obstruction to navigation, which said absence of lights and dangerous obstructions were at the time known, or with proper diligence ought to have been known to the said respondents.'

"It is admitted that at the time of the accident the stake light was not burning. The fact that it was not then burning undoubtedly caused or contributed to the disaster. There is, indeed, a conflict of evidence on the question whether the lantern was at that time attached to the stake or mounted on any portion of the breakwater. On careful examination of the evidence I am satisfied that it was at the time attached to the stake, properly trimmed and furnished with oil, but that the light had been extinguished, probably by the strong wind then prevailing from the northwest in connection with the defective and negligent manner in which the lantern was mounted on the stake. It was a Funck lantern, with a red lens from six to eight inches in diameter, calculated to burn, without refilling, from eight to ten days, hung in the open air, by means of a ring at its top to a bracket or cross-piece at or near the top of the post or stake at the height of about twenty-five feet above high water. The lantern was furnished to the defendants for use on the stake directly or indirectly by the engineer in charge. When the lantern was suspended from the

bracket or cross-piece its bottom did not rest on any platform, nor was it otherwise prevented from swinging in the wind. When so swinging the lantern was liable to present itself to the wind at such an angle as to allow the wind, through deflection from its dome-shaped top, to blow down against and extinguish the flame. It appears from the evidence that prior to the disaster the lantern was on a number of occasions extinguished, while it should have been burning. The witness Hasskarl who was government inspector in charge of the work on the new breakwater, testified as follows: 'X 87. About how many times did you notice the light on the upper end of the new breakwater out before the Glenochil went ashore? A. I found it out, and noticed it out, but I cannot tell you how often. I do not know that I kept any track of it. * * * X 93. Do you know what the difficulty was with that old lantern? A. Difficulty? X 94. Yes. Didn't it smoke and show very dimly, and sometimes go out? A. Yes, it did all that, I think.' Hasskarl, in an official communication to the engineer in charge, dated October 17, 1898, says of the stake light in question or a lantern similar to it in position, size, construction and adjustment: 'The light at the upper end of the work frequently goes out, or is blown out during storms, and therefore cannot be considered a reliable light.' The insufficiency of the stake light as originally adjusted was, after the accident, recognized by the government, and steps were taken to remedy the evil. The chairman of the lighthouse board in an official communication to the chief of engineers, dated December 6, 1898, says in part: "The board then reached the conclusion, after careful examination, that the temporary lights on the extension to the breakwater should be standard lens lanterns of the lighthouse board known as "Funck Tubular Lanterns" with pressed glass lens, red in color, and that they should be set upon rigid platforms on posts which should be strongly braced laterally at the present height of 25 feet.' The engineer in charge December 19, 1898, indorsed the communication as follows: 'The temporary lanterns now and heretofore shown on the extension to the breakwater are standard lens lanterns of the lighthouse board, known as the "Funck Tubular Lanterns" with pressed glass lenses, red in color, as within recommended. It is proposed to set them on rigid platforms as soon as possible.' Hasskarl in an official communication to the engineer in charge, dated January 3, 1899, says: 'I have the honor to report that the lights on the Harbor of Refuge were to-day changed from their former positions on brackets to rigid platforms on posts 25 feet above high water, and their present positions comply in every respect with the recommendations made by the lighthouse board contained in a letter addressed to the chief of engineers under date of December 6, 1898.'

"All of the correspondence above mentioned was admitted in evidence without objection. There is no evidence that after the lanterns had been attached to rigid platforms the light was extinguished by winds or storms. But the question to be decided on this branch of the case is, not whether the officers of the government charged with the duty of properly lighting the new breakwater during the progress of the work or of furnishing means to that end, were guilty of actionable negligence in failing, before the accident and after Hasskarl had become aware of the liability of the original stake light to be extinguished during storms or high winds while the lantern was swinging in the open air, to guard against such a result by adopting the obvious precaution, so tardily resorted to, of placing the original stake light on a rigid platform not subject to lateral motion. Nor is it necessary to go into the vexed question how far contractors, entering into government contracts prescribing or authorizing subordinate officers to prescribe negligent and dangerous methods or instrumentalities for the making of a public improvement, can be held liable by third persons injured by the employment of such methods or instrumentalities. The question now to be decided is whether the defendants were guilty of actionable negligence toward the libelant, causing or contributing to the accident. The new breakwater in course of construction when not properly lighted was an obstruction extremely dangerous to shipping, and in the language of one of the official communications in evidence, 'a greater menace to navigation than it can ever be in the future, from the fact that it is unknown to strangers and not delineated on charts generally of that locality.'

"The defendants, without qualification or condition, undertook in their contract to maintain the original stake light at the northwesterly end of the work.

properly burning. Specification 59 of the contract provides: 'This light will be erected and protected in accordance with the instructions of the engineer officer in charge, or his agent, and it will be maintained by the contractor as long as required by the engineer officer in charge.' Specification 65 also provides with respect to the duty of the defendants, therein termed the 'contractor': 'He must also maintain on the work such lights as the engineer officer in charge may direct. These lights will be maintained at the expense of the contractor.'

"Under these provisions the duty of the defendants was not merely to maintain lanterns in the required positions, but lanterns properly trimmed and brightly burning during the hours of darkness. It is contended, however, on the part of the defendants, that the extinguishment of the stake light by the wind on the night of the accident was an act of God for the consequences of which they are in no manner liable. As between the parties to an express contract the act of God or vis major furnishes no excuse for the nonperformance of what one has by the contract unconditionally bound himself to do. But the stranding of the Glenochil on the new breakwater was in no legitimate sense attributable to the act of God or vis major. It is true that the stake light, improperly adjusted, was extinguished by the wind as a burning and unprotected candle would be blown out in a draught, but it cannot in its relation to the accident be held the act of God. The accident was not 'one which could not have been prevented by human effort, sagacity and care' (The Majestic, 166 U. S. 375, 388, 17 Sup. Ct. 597, 603, 41 L. Ed. 1039), nor was it one arising from purely natural causes impossible by the exercise of reasonable diligence and circumspection to have been perceived and therefore unreasonable to guard against. The contractors were chargeable under their contract with knowledge of 'the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies,' and made their proposal 'with full knowledge of the work.' They also had knowledge or are presumed to have had knowledge before the accident that the stake light was liable to be extinguished during storms or high winds. It had gone out several times during the progress of the work and while it was unquestionably their duty to observe whether it continued to burn. It is further contended on the part of the defendants that they had no authority under their contract with the government to erect and maintain other lights on the work than those directed by the government officers in charge, and that it would have been improper for them so to do. But this court is not prepared to hold that the measure of their contractual obligation to the government necessarily limited or defined the precise measure of their duty to third persons, whose lives and property would be exposed to extreme peril, in case of failure to indicate at night the northwesterly end of the breakwater by the maintenance of the stake light, or some other light at that point, or by other means. They owed a duty to such third persons independently of their contractual obligations. They could not in reckless disregard of the lives and property of others shield themselves from accountability for destruction of life or property on the ground that the stake light was extinguished by a force of nature over which they had no control, if by the exercise of reasonable care and precaution they could have adopted proper means to avert the calamity. There is no provision in or implication to be drawn from the contract that, when necessary for the protection of navigation, the defendants should not place on the work in course of construction other lights than those mentioned in the contract or prescribed by the government officers in charge. Such a prohibition would have been inconsistent with the manifest purpose of the contract that to avoid disaster to persons or property the upper end of the breakwater should be properly lighted. For this purpose the defendants undertook to maintain the stake light at that point. As before stated, they were before the accident chargeable with knowledge of 'the uncertainty of the weather' and of the fact that the stake light was liable to be extinguished during storms or high winds. Reasonable care and vigilance required them to guard against the probable consequence of the extinguishment of the light or its failure to burn at night. While owing to the condition of the wind or water it may have been impracticable promptly to relight the lantern whenever the light was blown out in a storm or high wind, no reason is perceived why the defendants should not, in view of the great danger resulting

from darkness at that point, have either there erected an electric light enclosed in a red lens which could have been operated from shore in case of the extinguishment of the stake light, or have made such disposition of their floating plant as to warn vessels away from the new breakwater. In omitting to resort to such or other precautions they failed to exercise the degree of care which the law demanded of them, and were guilty of fault proximately causing or contributing to the accident.

"The question remains whether the Glenochil was not also in fault. She was in charge of a Pennsylvania pilot for the Delaware River and Bay. There is a broad distinction between an ocean pilot, who is compelled to direct the course of a ship mainly by compass, reckoning and astronomical observations, and a river pilot who relies not so much upon the compass as his familiarity with the natural objects and lights along the river. In Atlee v. Packet Co., 21 Wall. 389, 396, 22 L. Ed. 619, Mr. Justice Bradley, delivering the opinion of the court, said: 'The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently erected in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be injured. * * * It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses this very class of skill, we do not think we fix the standard too high.' This language clearly is applicable to pilots whose vocation is to control the course of vessels into and out of the Delaware Bay and River and their anchorage therein. Like river and harbor pilots, they are chargeable with knowledge of natural objects on shore and the obstacles to navigation, and of the significance of fixed or permanent lights. The pilot in charge of the Glenochil had large experience in his calling. For some fifteen or sixteen years he had been engaged in piloting steam and sailing vessels of all sizes into and out of the Delaware Bay and River. He was thoroughly familiar with the relative positions of the old and new breakwater, with their distance apart, with the stake light on the latter, and with the range and other lights visible in that locality. He boarded the Glenochil a short distance outside of the capes about or shortly after midnight; that vessel being bound to the old breakwater for orders and intended to anchor there for that purpose. When the proposed anchorage was reached, 'just outside of the old breakwater,' the master ordered that the starboard anchor be let go. This order was not carried out owing to the jamming or fouling of the windlass. At this time and until the accident there was a strong wind from the northwest. The night, however, was clear, not only the stars, but the range and other fixed lights capable of being seen in that locality, being distinctly visible. Upon the failure of the starboard anchor to drop, owing to the defective condition of the windlass, the master directed

that the Glenochil be put to sea, in order that preparations might be made for the use of the port anchor. The pilot forthwith ordered the helm ported and the Glenochil swung to starboard under a full head of steam; and being light and the direction of the wind being against her starboard bow, she failed to swing to starboard with sufficient speed to clear the new breakwater, with the result that she ran against and on the same, thereby receiving the damage complained of. There is some expert evidence to the effect that, owing to her lightness and the direction and force of the wind, it was impracticable for her to swing under a port helm from the proposed anchorage clear of the new breakwater. If this be a fact, of which I have considerable doubt on the evidence as a whole, the pilot was chargeable with knowledge of it, and, knowing the position of the new breakwater relatively to the old and the distance between them, he should have so regulated her movements as to avoid the disaster, there being an abundance of sea room for that purpose, as hereinafter stated. Although aware of the fact that the upper end of the work was provided with a stake light it does not satisfactorily appear from his evidence or from any other evidence in the case, when he first looked for that light or ascertained it was not burning. On his own showing the pilot convicts himself of gross negligence or incompetency directly contributing to the accident. He testifies in part as follows: 'Q. Was the place selected by you to anchor the Glenochil a proper place? A. Yes, sir. Q. Was it a place in which you have anchored other vessels? A. Yes, sir; many a time. * * * Q. Well, when he told you to put the Glenochil to sea again, what did you do? A. I put the wheel to port and rung her up. * * * Q. Well, now, then what happened? A. Well, I stranded on the breakwater. I thought I was closer to the old breakwater than I was. * * * Q. Please state whether there was any light on the upper end of the breakwater or not? A. No light at all. Q. Are you positive about that? A. Yes, sir. Q. What kind of a night was it with respect to seeing lights? A. Why, it was a right nice night to see lights. * * * Q. Please state whether there was anything in the character of the night that night, which would have prevented you seeing a light upon the upper end of the breakwater had one been there? A. Nothing at all, sir. * * * Q. Had you been by the new breakwater frequently or not? A. Yes, sir. Q. Did you know where it was? A. Yes, sir. Q. Well, if you knew where the new breakwater was, why didn't you avoid it? A. Well, if there had been a light there, we could have avoided it, but there was no light at all. * * * XQ. Have you any recollection as to how long that light had been showing on the new breakwater before you had this accident? A. Yes, sir. Well, it was there quite a while off and on. * * * XQ. How near to the old breakwater do you judge you were, when you gave the order to let go the anchor? A. About three-quarters of a mile, probably a little further, I judge. XQ. And it was that distance which you say you were mistaken in? A. Mistaken? XQ. Didn't you say you thought you were mistaken in supposing that you were so close to the breakwater when you gave the order to let go the anchor? A. No, sir. XQ. Then, do you still state you were about three-quarters of a mile from the old breakwater when you gave the word to let go the anchor? A. Yes, sir. XQ. That is your present judgment? A. Yes, sir. XQ. That was your judgment at the time you gave the order? A. Yes, sir. XQ. Do you know of any reason to change that judgment? A. No, sir. * * * XQ. Mr. Bennett, how far is it in a straight line from the old breakwater to the new breakwater, as far as the new breakwater was sticking up above the surface at low tide in November last? A. I should judge about two miles. * * * XQ. When you gave the order to port the wheel, I judge from the distance that you have told me that you were off, you had about a mile and a quarter of clear water to turn around in; is that about right? A. Yes, sir; but I was deceived in my judgment. XQ. Now, think about it, and tell me how near you were actually to the new breakwater when you gave the order to port the wheel? A. Well, I couldn't. I judge I was that distance from the old breakwater, and I judged wrong. * * * XQ. That was a mistake, wasn't it, Mr. Bennett, that you had as much as a mile and a quarter of clear water to turn around in? A. Oh, certainly, it was a mistake. * * * XQ. Are you able to make a judgment how far

off, in your best judgment, you were from the new breakwater when you gave the order to port your wheel? A. No, sir; I couldn't, because I don't know. XQ. Now, when you heard that hail from the forecastle you didn't suppose you were anywhere near the new breakwater, did you? A. No, sir. XQ. Didn't you think the new breakwater was half a mile or so over to your port side? A. I thought the breakwater was further off. I judged that I could come out clear. * * * XQ. You hadn't any more expectation of hitting the new breakwater, the stone pile, that night than you have to-day? A. No, sir; not a bit. XQ. You didn't suppose that you were within half a mile of it? A. I didn't suppose I was within a mile of it. XQ. Well, had you been looking for that red light on the stone pile? A. I had been previous. I had been looking for it that night. * * * XQ. Do you recollect looking for that red light on the stone pile? A. Yes, sir. XQ. When did you look for it? A. I looked for it as I was turning the ship around. XQ. You did not see it? A. No, sir. XQ. You didn't think that was anything remarkable? A. Yes, sir; because it was published to be put there. XQ. You didn't see it; didn't that make any change in your navigation? A. No, sir. Why how could that make any change? Then it was too late to make any change. I didn't see it. XQ. You mean it was too late when you thought to look for the light? A. I looked for the light as I tried to turn the steamer. I was too close to the breakwater. XQ. You didn't think to look for the light until you were that near, that it was too late? A. Oh, yes, sir; I looked for the light. If a light had been there, I could have reversed the engines and wouldn't have hit. XQ. Now, Mr. Bennett, what I am asking you is whether you recollect looking for that light when you first started to turn around the Glenochil? A. Yes, sir. XQ. Well, now you told me it was ten minutes before you hit, wasn't it? A. I suppose it was; somewheres around there. * * * XQ. And you didn't see it? A. No, sir. XQ. And it was a good night for seeing lights, and you saw all the other lights around you? A. Yes, sir. * * * XQ. Well, Mr. Bennett, didn't you think your judgment was good enough to keep clear of that stone pile, even if you didn't see the light? A. Well, if I had known there was no light there. XQ. You knew that there was no light there that night? A. I didn't know until I got in there. XQ. You knew that you didn't see any light there that night? A. Yes, sir. XQ. For ten minutes before you hit? A. No, sir; I didn't say that. XQ. Didn't you say that you were looking for that light when you gave the order to port the wheel? A. No, sir; I did not. XQ. You don't remember saying that? A. No, sir. XQ. Well, now, how long after you gave the order to port the wheel, do you think, that you did look for that lantern? A. I couldn't tell you. It was before I struck. I know the light was gone. I looked for the light and I thought I had plenty of room to come around. XQ. Did you look for the light before you heard the hail from the forecastle? A. Yes, sir. XQ. How long before? A. Why, it wasn't no time. I hadn't gotten my glasses down. XQ. You were just looking for the light when you heard the hail from the forecastle? A. No, sir. Hold on, I am going too fast. No, I looked for the light, and afterwards I heard the hail, because I thought I had plenty of room. XQ. You had been looking for the light through your glasses? A. Yes, sir. XQ. And just as you took your glasses down, you heard this hail? A. Oh, no; it was a little while afterwards I heard the hail. XQ. Well, as much as two seconds? A. Oh, yes, sir; it was a long while. I couldn't tell you how long it was. * * * XQ. What I understand you to say now, Mr. Bennett, that you looked for the light once, a little or some while before you heard the hail from the forecastle? Oh, yes; quite a while before I heard the hail. XQ. And you looked through the glasses? A. Yes, sir. XQ. And you didn't see it? A. No, sir. XQ. But you thought you were giving the stone pile a good berth, anyhow? A. Yes, sir. XQ. So you went ahead? A. Yes, sir. Certainly if the light had been there, there would have been no trouble at all. * * * XQ. How long before you struck the stone pile, in your best present judgment, was it that you noticed that there was no light on the stone pile? A. Quite a while, as I said before. * * * XQ. Do you think it was as much as three minutes? A. I think it was as much as four minutes. XQ. That is your best judgment? A. Yes, sir. XQ. Four minutes? A. Yes,

five minutes. XQ. Will you stick to five minutes? A. Yes, sir. XQ. Then it was five minutes before you hit, that you satisfied yourself that there was no light on that stone pile? A. Yes, sir.' It thus appears from the testimony of the pilot that, notwithstanding the range and other fixed lights which should fully have informed him, he was in substantial error as to the distance of the proposed anchorage from the old breakwater; that, knowing the Glenochil was light and the wind on her starboard bow, he ported her helm in an attempt to swing her to starboard and clear the new breakwater on his way to sea for the purpose of gaining time to prepare for the lowering of the port anchor; that he knew the distance of the new from the old breakwater; that at the proposed anchorage the stake light on the upper end of the new breakwater if burning would have been distinctly visible; that had he known at the time that the stake light was not burning he could have avoided the new breakwater; that he did not look for that light or ascertain that it had been extinguished until several minutes after the helm was ported or until very shortly before the accident; that he knew a light should have been burning there; that if the light had been burning, the Glenochil could have been put full speed astern and the accident prevented; and that he had satisfied himself five minutes before the Glenochil struck that the stake light was not burning, yet instead of reversing, kept her on a port helm under a full head of steam. * * *

"Further, there is no evidence that after it was discovered that the windlass was jammed or fouled there was any necessity to put to sea or execute the maneuver attempted. The Glenochil at the time in question drew only fifteen feet of water and the tide was about high water slack. The official charts used in evidence show that for a distance of about three miles west northwestwardly from the proposed anchorage there was an ample depth of water for the navigation of the Glenochil even at mean low tide, and that this inner basin had a width of equal depth for about two miles. No reason is disclosed or perceived why the Glenochil under these circumstances should have attempted to go to sea. She could, while preparing the windlass for the lowering of her port anchor, have proceeded slowly up this basin and when proper have returned to the proposed anchorage either by going astern or by turning and heading for it. The evidence abundantly shows that there were sufficient range and other fixed lights to enable her to accomplish her ultimate purpose without resorting to the improper movements resulting in the disaster. It was further the duty of those in charge of the Glenochil when entering the bay for the purpose of anchoring, with the wind so strong as repeatedly to extinguish her binnacle light, to see to it that she was in proper order to anchor, and guard against the fouling or jamming of her windlass. While the last point may not of itself be sufficient to inculpate the Glenochil, I am satisfied by the evidence as a whole that she was in fault, and that it proximately contributed to the accident. Counsel for the libelant have referred to Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582, as establishing the proposition that there was no fault on the part of the Glenochil, and counsel for the defendants have referred to the same case as establishing the proposition that the defendants are not liable. I am satisfied on careful examination that the facts disclosed in that case were so unlike those in this, that it cannot be treated as an authority supporting either proposition. As the Glenochil as well as the defendants was in fault she is entitled to recover only one-half of the damages and costs. Let a decree be prepared accordingly."

The point made by the appellant, presumably not raised in the court below as it is not covered by the opinion of the learned judge, just quoted, that, inasmuch as the Glenochil was obliged by law to take a pilot, his negligence cannot be imputed to the ship, requires from us only a brief notice. It is admitted that, at common law, no action can be maintained against the owner of a vessel, for the fault of a compulsorily taken pilot, as, in such case, the pilot is in no sense the agent or servant of the owner; but, although the same doctrine holds in

England, both at common law and in admiralty, a different view of the liability of the ship is taken in admiralty cases in this country. The China v. Walsh, 7 Wall. 53, 19 L. Ed. 67; Ralli v. Troop, 157 U. S. 386, 402, 15 Sup. Ct. 657, 39 L. Ed. 742; The John G. Stevens, 170 U. S. 113, 120, 18 Sup. Ct. 544, 42 L. Ed. 969; The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954; Homer Ramsdell Co. v. Compagnie Generale Trans Atlantique, 182 U. S. 406, 411–413, 21 Sup. Ct. 831, 45 L. Ed. 1155. The theory of the admiralty law in this country in such cases, is that the collision impressed upon the wrongdoing vessel a maritime lien, which the vessel carries with it into whosesoever hands it may come. The vessel is treated, according to this theory, as the guilty thing. It is the res, to which fault is imputable, and which is held to respond in damages. The responsibility of the owners, as owners, and the law of agency, as applicable to the employment of a pilot, do not come into consideration. "This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself." Ralli v. Troop, supra. It is true that in the present case, the libelant, as the master of the ship Glenochil, proceeded against the defendants in personam; but the suit is in admiralty, and the defense inculpates the vessel and not the owners, so that the law of agency, as applicable to their liability, is not involved in the consideration of the case.

The decree of the court below is affirmed.

THE BELGIAN KING.

HUNTER et al. v. DAMPSKIBSSELSKABET TELLUS et al. SAME v. DAMPSKIBSSELSKABET TELLUS. CALIFORNIA & ORIENTAL S. S. CO. v. SAME.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1903.)

No. 930.

1. COLLISION—STEAM VESSELS IN FOG—SPEED.

A steam vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as will enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog.

2. SAME—EVIDENCE CONSIDERED.

Evidence considered in a cause for collision between the steamships Tellus and Belgian King in the Pacific Ocean at night, in a dense fog, and the Belgian King *held* solely in fault for violation of the navigation rules in failing to go at a moderate speed after entering the fog, or to stop her engines on hearing the fog signals of another vessel nearly ahead and whose position was unknown; and also for misunderstanding the signals of the Tellus, which was in all respects navigated with care and in conformity to the rules, having come to a stop before the collision.

¶ 1. Collision rules—Speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.

See Collision, vol. 10, Cent. Dig. § 170.

Appeals from the District Court of the United States for the Northern District of California.

For opinion below, see 113 Fed. 525.

The several libels herein set forth, arising out of one event, namely, a collision between the Norwegian steamship Tellus and the British steamship Belgian King, were consolidated by order of the court below, and tried upon one hearing. Several decrees were entered by the District Court, and, by stipulation of the respective parties, appeals from the several decrees were presented to this court upon one record.

It is alleged, in the amended libel of G. B. Hunter and the Wallsend Slipway Company for salvage services rendered to the steamship Tellus, that they are the sole owners of the British ship Belgian King, a vessel of about 2,170 tons register, and at the time mentioned of the value of about £25,000 sterling; that on the 17th day of July, 1900, the Belgian King, then being in ballast, left the port of San Francisco, bound to the port of Seattle, in the state of Washington; that between 10 and 11 o'clock p. m. of that day, when about 25 miles to the southward and westward of Point Arena, on the coast of California, and 7 miles distant from land, dense fog then prevailing, a collision took place between said Tellus and the ship Belgian King, the former being laden with a full cargo of coal, and bound from Comox, in British Columbia, to the port of San Francisco; that the collision occurred without any negligence on the part of the officers and crew of the Belgian King; that both ships sustained damage by reason of said collision, the Tellus having a large hole made in her port bow between her collision bulkhead and bulkhead No. 1, through which the water in large quantities entered, and, fearing that the ship would sink almost immediately, of which there was great danger, her entire company went on board the Belgian King; that the Belgian King remained by the Tellus until the following day; that on the morning of that day, the Tellus being still afloat, but having a great deal of water in her, and still leaking, and in danger of sinking, the master of the Tellus requested the master of the Belgian King to take the Tellus in tow for the purpose of assisting her to the port of San Francisco as speedily as possible; that thereupon the Belgian King made fast to the Tellus with 120 fathoms of a 4-inch steel hawser, and towed her until she arrived at a point about three miles distant from the entrance to the Bay of San Francisco, when the hawser parted; that, the sea being then smooth, the master of the Tellus did not deem it necessary for the Belgian King to again make fast to her, and started the Tellus ahead under her own steam; that the Belgian King accompanied her in order to render any assistance needed, and so continued until about 8 o'clock p. m. of said 18th day of July, when the vessels arrived at an anchorage in the said harbor, at a point six or seven miles from where said hawser parted. It is alleged that the Tellus was and is in her damaged condition of a value of £18,000 sterling, or thereabouts, and the value of her cargo of coal not less than $21,000; that the said ship was so seriously injured and damaged as to render her liable to sink at any moment, and, together with her cargo, become a total loss before she could, by her own unaided efforts, reach a place of safety, and that it would have been extremely dangerous to the lives of her officers and crew to remain on board of her, for the purpose of attempting to navigate her to a place of safety, without the immediate presence and aid of the Belgian King; that by reason of the premises the libelants are entitled to recover against the said Tellus and her cargo a reasonable salvage reward for the services alleged to have been rendered.

The owners of the Belgian King also libel the steamship Tellus, her tackle, apparel, and furniture, for the amount of damages sustained by the Belgian King in said collision, in the sum of $14,000. It is alleged in the libel that "at about 45 minutes past 10 o'clock on the night of said 17th day of July, a long blast of a steamer's whistle, which afterwards proved to be that of the steamship Tellus, was heard, apparently about three points off the starboard bow of the ship Belgian King, whereupon the engines of said Belgian King were immediately put to slow, and she proceeded ahead at a rate of about three knots an hour, which was as low a rate of speed as was

consistent with good steerageway, which speed was maintained until her engines were reversed as hereinafter mentioned. In a few minutes thereafter, two blasts in quick succession of the whistle of the approaching vessel were heard, which were interpreted by those on board of the Belgian King to mean: 'I am directing my course to port.' Then the helm of the Belgian King was immediately put to starboard, and two blasts of her whistle were sounded, indicating: 'I am directing my course to port.' In a short time after, the approaching vessel again gave two blasts of her whistle, which appearing to be close by, the engines of the Belgian King were stopped and reversed full speed, and three blasts of her whistle, indicating, 'My engines are going at full speed astern,' were sounded. Shortly after, the masthead light of the approaching vessel was sighted about two points off the starboard bow of the Belgian King, and then her red light came in view, and then, in a time so short thereafter as to render it impossible for those navigating the Belgian King to adopt any measures to avoid it, a collision took place between the two vessels, the Belgian King coming in contact with the port bow of the Tellus, which was then being navigated across the bow and course of the Belgian King, in consequence of which the Belgian King was extensively damaged, that is to say: Eighteen plates on her bows broken, bent or cracked; eight frames broken; breast hooks bent; stringers broken; collision bulkhead bent, and the bulkhead frame crushed and broken; some of the plates were cracked below the water line so that the forward compartment filled with water; and doing other and extensive damage."

The California & Oriental Steamship Company also libel the steamship Tellus, her tackle, apparel, and furniture, for the amount of damages sustained by it, as charterer of the Belgian King, in the loss of contracts and delay of the ship for repairs after said collision, in the sum of $18,694. The navigation of the Belgian King is described in the same terms as those employed in the libel filed by the owners of the Belgian King.

In answer to each of these libels the Tellus Steamship Company admits that the collision occurred, that the Tellus was damaged thereby, and that it was towed by the Belgian King to San Francisco. It denies that the Tellus was in a sinking condition at any time, but avers that as water was coming into the ship, and it being nighttime and foggy, they were not satisfied that it was safe to remain on board; but that in the morning, when the true condition of the ship could be ascertained, they found the ship in no danger, and returned to her. It is denied that the Tellus was in serious danger at any time, except in the event that she should meet with heavy weather. It is denied that the Tellus was navigated in violation of the rules of navigation, or otherwise than with the greatest care and skill, and avers that the officers of the Belgian King were solely to blame for the collision, by reason of the high speed which was maintained almost to the moment of collision, and by reason of their lack of knowledge of the meaning of signals or their correctness in interpreting them. It is prayed that the various libels against the Tellus be dismissed.

At about the time of the filing of the libels against the Tellus, the Tellus Steamship Company filed a libel against the Belgian King, her tackle, apparel, and furniture, for the amount of damages sustained by the Tellus by reason of said collision, and for the loss resulting from the deprivation of the use of the vessel while being repaired, in the total sum of $45,000. The libel describes the movements of the Tellus on the night of the collision, as follows: "At half past 10, the fog having then settled down, the master ordered that the engines be run at slow speed, the said vessel then making about three knots an hour. About this time a long blast from a steam whistle was heard about ahead of the Tellus, and at some distance away, which whistle was immediately answered by a long blast from the Tellus. A similar long blast was again heard and again answered, and like signals were kept up, all at an interval of about two minutes between blasts, and all indicating an approaching steamship. That as soon as the master of the Tellus discovered from the said whistles that the said approaching steamship was still ahead of the Tellus, and that she could not be far away, he ordered the helm to port, and gave a short blast on the steam whistle to indicate to the approaching ship the fact that the Tellus was being directed to the starboard.

That the approaching steamer again gave a long blast, which as before was answered, and was, after about 30 seconds, followed by a short blast from the Tellus indicating a continued turning by her towards the starboard. That thereupon the engines of the Tellus were stopped, and so continued until the approaching steamer, which afterwards proved to be the steamship Belgian King, of about 2,000 tons, bound from San Francisco to Seattle, gave two short blasts, and immediately three longer blasts. Immediately the engines of the Tellus were reversed at full speed, so that said vessel's way was actually stopped. In a short time the lights of the Belgian King came into view, said vessel bearing about one and one-half points on the bow of the Tellus, and in about one-half of a minute the Belgian King struck the Tellus on the port bow, cutting deeply into the same down to and below the water line, and breaking her frames, beams, plating, and decks from the afterpart of the collision bulkhead to the corner of No. 1 hatch, a distance of about 10 feet, and otherwise seriously injuring her. * * * That for a long time prior to the collision aforesaid, and up to the occurrence of the same, the master and officers of the said Belgian King, notwithstanding the fact that a thick fog was prevailing, and that the said steamship was all of the time in said fog, and that it was impossible to see more than a very short distance ahead, were proceeding at a high rate of speed, and, notwithstanding that they knew from the signal blasts that were blown by the Tellus that another vessel was in close proximity to her, and that there was risk of collision unless due precaution should be had on her part, they failed to stop the engines of said ship until they could ascertain the location of the Tellus, by reason whereof, although the Tellus had been and was stopped, the said Belgian King came into collision with said Tellus; all of which acts on the part of the said master and crew of the Belgian King were negligently done, and with lack of proper care and skill in navigation."

The District Court held that the collision must be attributed to the fault of the Belgian King in not stopping when she became aware that she was in close proximity to the Tellus, instead of moving ahead at a low rate of speed. The libels against the Tellus were therefore dismissed, and a decree entered for the Tellus Steamship Company in its cross-libel against the Belgian King in the sum of $32,622.14. From these decrees appeals have been taken to this court.

Milton Andros, for appellants.

Page, McCutchen & Knight, Chas. Page, E. J. McCutcheon, and Samuel Knight, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The assignments of error relate to the various findings and conclusions of the court, upon which its holding was based that the legal responsibility for the collision in which the injuries were received was upon the Belgian King. As an appeal in admiralty causes brings both the law and the facts before the appellate court for review, the principal question for consideration is whether either vessel was solely in fault in causing the collision upon which the libels in controversy are based.

It is undisputed that the steamship Belgian King left the port of San Francisco, in ballast, on the afternoon of July 17, 1900, bound for the port of Seattle, in the state of Washington; that the steamship Tellus was laden with coal, and was nearing the end of her voyage from British Columbia to San Francisco; that a dense fog set in about 6 o'clock in the afternoon, and continued until after the collision; that the steamships collided at some time between 10:40 and 11 p. m. of that day, at a point some 16 to 26 miles south of Point Arena;

that the lights on both steamers were in proper place and condition; that proper lookouts were on duty, and that both steamers were properly manned as to the number and degree of officers in charge; that the Belgian King struck the Tellus on the port bow, piercing the hold of the Tellus to the distance of 16 feet, and cutting her down to about 10 feet below the water line; that the Belgian King was but slightly injured, her sharp stem not being damaged at all.

The main controversy turns upon the speed of the two vessels just prior to the collision, the interpretation of signals given by the respective steamers, and the maneuvers of the steamers upon those signals. The captain of the Tellus was on the bridge at and for some time before the occurrence of the collision. He testifies that at about half past 10 of that evening the fog became very thick, and he slowed his engines down to "slow speed," or about three knots an hour; that he had been sounding his regular fog whistle, a long blast every two minutes, all the evening; that at 10:32 p. m. he heard a long whistle right ahead, a good way off; that he answered it with a long whistle; that he heard three long whistles from the other ship at intervals of two minutes, and, being then sure of the bearing, he ported the helm 45 degrees, with the object of turning his vessel to starboard, at the same time giving the direction signal that he was going to starboard, consisting of the regular fog whistle of one long blast followed in 30 seconds by a short whistle; that he received one long whistle from the other ship after that, about half a point on the port bow; that he heard nothing for three-quarters of a minute after that, so stopped his engine and repeated the signal of one long blast with a short one 30 seconds thereafter; that he counted the seconds between the blasts; that he then heard two short whistles from the other ship, followed almost immediately by three short ones, which he understood to mean that the other ship was starboarding its helm and reversing its engine; that at this time the Tellus had been drifting under a stopped engine for about five minutes; that as soon as he heard the two short blasts from the other ship he reversed the engines of the Tellus, and in about two minutes sighted the masthead light of the other ship, about two points off the port bow; that the green light came in view immediately after, and the collision took place about one minute afterwards. He testifies that the Tellus was "about dead" when the two ships met, but that the other ship must have had a good motion on. This testimony was corroborated by Olsen, the lookout on duty on the Tellus at the time, and by Berger, the second mate, who was on the bridge with the captain, and attended to the whistle. The testimony of the engineer on duty at the time corresponds with that of the captain, as to receiving orders for the slowing and stopping of the engines, and soon after reversing them.

The captain of the Belgian King was also on the bridge of his vessel at the time of the collision, and for some hours before. He testifies that at about 6:45 p. m., and again at 7:45 p. m., they had heard the whistles of another vessel, and in each instance had stopped the engines until the sound of the whistles was definitely located, when he put the vessel at half speed again; that he kept the vessel at half speed until 10:45 p. m.; that "half speed" was 8½ knots, in ballast; that at 10:45

p. m. he heard another steamer's whistle off the starboard bow about three points; that he then put the engines to "slow," and continued sounding the regulation fog whistle every two minutes; that he then heard two blasts from the other vessel, both appearing to him to be pretty long and of about the same length; that he imagined from these whistles that the other vessel was putting its helm to starboard and directing its course to port; that he then stopped the engines of the Belgian King, put the helm to starboard, and blew two whistles; that he then heard another two blasts from the other vessel, in the same direction, but much nearer; that he then reversed his engines full speed, and gave three blasts of the whistle; that shortly after that he sighted the masthead light of the other vessel about four or five hundred feet away, about two points on the starboard bow, and then saw the red light; that he gave an extra ring in the engine room to increase the sternway, if possible, and blew three blasts of the whistle again; that in about two minutes after the light was sighted the vessel struck the Belgian King on the starboard bow and heeled her over to port; that the momentum of the other vessel coming against the starboard bow of the Belgian King lifted her bow up a certain distance, and in recovering herself the Belgian King came down upon the Tellus, smashing into her hull. He testifies that the Belgian King had about come to a standstill when the vessels came together; that she backed away, and cleared the Tellus in about two minutes after striking.

The third officer, Lord, who was on the bridge with the captain, testifies that he heard the long blast of the other vessel three or four times on the starboard bow, and then heard the regulation two short blasts, signifying that the vessel was going to port; that his own vessel then stopped and starboarded, giving two short whistles, and after that he heard two blasts again, very close on the starboard bow; that they then put their ship full speed astern, giving three blasts of the whistle; that about two minutes after hearing the last two short blasts he saw the masthead light, and a few seconds later the port light.

The lookout on the Belgian King was a Chinaman, who testifies that he went on duty at 10:30 p. m., and five, six, or seven minutes after that he heard a whistle on the starboard side of his vessel; that he heard nothing else for five or six minutes, when he heard two short whistles, and at the same time saw the masthead light of the vessel; that when he heard the first whistle he reported it to the officers, and they then blew the whistle of the Belgian King three times; that when they saw the lights they blew the whistle again three times, and three more right after that.

The quartermaster on duty at the time was also a Chinaman. Soon after 10:30 p. m. he heard one long whistle, which was answered by the Belgian King. He heard nothing more for five or six minutes, when at the same time, practically, he saw the lights of the other vessel, heard two short whistles, heard the Belgian King give three short whistles, and received orders from the captain to put the helm hard astarboard; that the course of the Belgian King was not changed until the lights of the other ship were seen, and only a minute or two then elapsed before the collision.

The chief engineer of the Belgian King testifies that the engines were at half speed at 9:15 p. m., slow at 10:45, stopped and full astern at 10:50, and the ship stopped entirely at 10:55, according to the log slate kept by him; that the engine was going astern for two minutes before the collision, and continued going astern for three minutes thereafter.

Article 16 of the act of August 19, 1890, as amended May 28, 1894 [U. S. Comp. St. 1901, p. 2868 (see 28 Stat. 1250)], prescribing regulations for preventing collisions at sea, provides as follows:

"Every vessel shall, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

"Steering and Sailing Rules.

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass-bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

"Article 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

Did the vessels act in accordance with these regulations? There is evidence tending to show that the Belgian King had been going at a greater rate of speed than "half speed" prior to the hearing of the fog whistle of the Tellus at 10:45 p. m. But accepting the testimony of the captain of the Belgian King that his vessel was proceeding on her course at half speed, or at the rate of 8½ knots per hour; that between 10:25 and 10:30 p. m. the fog had become dense and "had shut in thick"; and accepting the testimony of the captain of the Tellus that at half past 10 o'clock his vessel also encountered the fog, and that the engines of his vessel were brought down to "slow speed," or three knots per hour, which speed, the captain testified, was the lowest at which steerageway of the ship could be maintained; and that seven or eight minutes later, according to the engineer of the Tellus, the engine was brought to a stop—we have this situation: From the time the dense fog set in at 10:30 p. m. until the Belgian King was made aware of the approach of the Tellus, at about 10:45 p. m., the Belgian King was going at 8½ knots per hour, and the Tellus at 3 knots per hour, the slowest rate consistent with the maintenance of steerageway; that this speed was maintained for 7 or 8 minutes, when the engine was stopped. It is evident from this statement of the testimony that the Belgian King was not during this time going at a moderate rate of speed, having careful regard for the existing circumstances and conditions. This is determined partly by the inference to be drawn from the fact that the Tellus under the same conditions reduced her speed to 3 knots per hour, and after 7 or 8 minutes stopped her engine, while the Belgian King maintained a speed of 8½ knots per hour; but it is also determined by the fact that, while the Tellus was being navigated at the moderate rate of speed required by law, the speed of the Belgian *King* was maintained at such a rate that she could not and did not

stop in time to avoid a collision after the Tellus came in sight. The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog. The Colorado v. The H. P. Bridge, 91 U. S. 692, 702, 23 L. Ed. 379; The Nacoochee v. Moseley, 137 U. S. 330, 339, 11 Sup. Ct. 122, 34 L. Ed. 687. That the Tellus observed this rule, and that the Belgian King did not, is established by the testimony as to the rate of speed each vessel maintained prior to the collision, and the fact that at the time of the collision the Tellus had stopped and the Belgian King had not; also, by the character of the wound inflicted upon the Tellus. This was the finding of the court below, and is supported by the evidence. not only did the officers and crew of the Tellus testify that the engines of the Tellus had been stopped for some time, but the testimony of other parties, entirely disinterested, supports this presumption. Capt. C. M. Goodall, of large experience in the steamship business, examined the Tellus as soon as she was discharged at San Francisco, as a matter of general interest, and states positively that in his opinion the Tellus must have been still when the collision occurred, from the nature of the injury received. Capt. Thayer, inspector of the Bureau Veritas, inspected the Tellus as soon as she was discharged, and reaches the same conclusion. Capt. Turner, marine surveyor for the Fireman's Fund Insurance Company and for the Bureau Veritas, examined the Tellus with a view to estimating the repairs necessary to put her again in her class, and testifies that in his judgment she was lying still, or nearly so, when collided with by another vessel. Capt. Metcalfe, surveyor to Lloyd's Register of British and Foreign Shipping, surveyed the Tellus and reported upon her condition as to necessary repairs, and afterwards attended while the repairs were being made, and says, "The indications, I think, pretty conclusively point to the fact that the Tellus had no headway on her at the time," also stating that the other vessel must have had some motion. We are of the opinion that had the Belgian King when she encountered the dense fog, reduced her speed as did the Tellus, the collision would not have occurred.

The next inquiry relates to the interpretation of signals given by the respective steamers, and the maneuvers of the vessels upon those signals. When the whistle of the Belgian King was first heard, the position was sufficiently ascertainable by the Tellus to permit her to continue on her course at slow speed, and give the direction signal that she was going to starboard. Not receiving a proper response to that signal, the engines were stopped and the signal repeated, the ship drifting for some minutes before the collision. The Belgian King was going at half speed until the fog whistle of the Tellus was heard. Her engines were then put to "slow." Two blasts were heard from the Tellus, which the captain of the Belgian King understood to be of the same length, signifying that the Tellus was directing its course to port. The engines were then stopped, and the signal answered. Hearing two more blasts of the whistle much nearer, the engines were reversed, but it was too late, as in about two minutes the vessels came together. The regulations pre-

scribe one long blast, of from four to six seconds' duration, sounded at intervals of two minutes during a fog, and the signal that a vessel is directing her course to starboard is one short blast of about one second's duration. The Tellus claims to have given one long blast, followed at an interval of 30 seconds by a short blast. The captain of the Belgian King claims to have heard two rather long blasts of about the same length. It is our opinion that the captain of the Belgian King misunderstood the signals of the Tellus. He states that he understood the signals to mean that the vessel was directing its course to port. Had the blasts been long, as he stated, such an interpretation would have been incorrect. Two long blasts indicate a steam vessel under way, but stopped, while the direction of a vessel's course to port is signaled by two short blasts. When this fact was called to his attention by counsel upon cross-examination, the captain stated that such was not his understanding of the regulations, and in other particulars showed that he was not familiar with the distinctions made in the regulations between the different signals. Had the course of the Belgian King been directed to starboard, in response to the signal of the Tellus, no collision would have occurred between them.

It is charged against the Tellus that she changed her course after the fog signals of the Belgian King indicated that the two vessels were drawing together, and that she notified the Belgian King of this change of course by sound signals. This charge appears to be based upon the theory that the two vessels were on parallel courses, or nearly so, and that, without any change of course on the part of the Tellus, and signals to that effect, the two vessels would have passed each other starboard to starboard. But this view of the situation is not supported by the evidence. The course of the two vessels, when each became aware of the presence of the other, was not parallel, but crossing. The course of the Belgian King was N. W. ¼ W. magnetic, and the course of the Tellus was S. E. ½ E. magnetic. These courses were similar to the courses of the Umbria and the Iberia in The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053. In that case the captain of the Iberia heard the whistle of the Umbria two points on the port bow, and apparently a long distance away. He ported his helm and directed his course to starboard, signaling the Umbria to that effect. This course was in fact across the path of the Umbria, but the captain of the Iberia appears to have determined that by porting his helm he could cross the path of the Umbria before the latter vessel could reach the point of intersection, assuming, of course, that the Umbria was going at a moderate rate of speed. In the present case the captain of the Tellus heard the whistle of a steamer right ahead. The sound appeared to be a long way off. It was a long whistle. The Tellus answered with a long whistle. The captain of the Tellus heard three long whistles from the Belgian King at intervals of two minutes. Then, being sure of the bearings, he ported his helm and went to starboard, giving one short blast to notify the Belgian King that the Tellus was going to starboard. The Belgian King, he says, was "right ahead." It was certainly not a fault on the part of the Tellus to turn

away from an approaching vessel right ahead, and in going to starboard he took the course required of approaching vessels in sight of each other. In the case of The Umbria, the Supreme Court, commenting on the action of the Iberia in changing her course under circumstances less favorable under the apparent conditions, said:

"Under such circumstances, and in view of the fact that the exact position and course of the Umbria could not be determined, we think it would have been more prudent on the part of the Iberia not to have changed her course until the position and course of the approaching steamer had been definitely ascertained, although we should be reluctant to hold that such change of course was a fault on her part which should condemn her in a moiety of damages. There are undoubtedly authorities and some expressions of this court to the effect that a change of the helm, in ignorance of the exact position and course of an approaching vessel, is a fault, although we have never held that it would be a fault in every case presenting these conditions." (Citing cases.)

The majority of the court were of opinion that the Iberia was not in fault, while the other members of the court rested their conclusion upon the view that, even if she were at fault, such fault did not contribute to the collision. The court held that the Umbria was alone at fault.

Applying the rule of that case to the present one, we have no difficulty in reaching the conclusion that the Tellus was not at fault. The responsibility for the collision, and the damage resulting therefrom, must therefore be laid upon the Belgian King.

The decree of the District Court is affirmed.

CRISSEY v. MORRILL et al.

(Circuit Court of Appeals, Eighth Circuit. November 2, 1903.)

No. 1,725.

1. CORPORATIONS—LIABILITY OF STOCKHOLDERS UNDER KANSAS STATUTE—LIMITATION.

Under the provisions of Gen. St. Kan. 1889, § 1192, relating to the liability of stockholders as construed by the Supreme Court of the state, a right of action in favor of a corporate creditor against a stockholder accrues one year after the corporation ceases to transact any business except for the purpose of liquidation, and an action against the stockholder is barred in three years from that time whether the debt as against the corporation is matured or not, and in whatever form of proceeding the creditor undertakes to enforce the liability; but the rule applies only to an indebtedness of the corporation which is absolute, and where it is merely a guarantor on an unmatured obligation of another limitation does not begin to run in favor of a stockholder until the liability of the corporation has become fixed by the default of the principal debtor.

2. SAME—PROCEEDING AGAINST STOCKHOLDER.

The fact that a number of demands held by a creditor against a Kansas corporation were merged in a single judgment before proceed-

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¶ 1. Stockholders' liability to creditors in equity, see notes to Rickerson Roller Mill Co. v. Machine Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.

ings were instituted against a stockholder thereon does not preclude the creditor from showing that the liability of the corporation on one of the original demands was contingent only, and the date when it became fixed, to meet the defense of limitation pleaded by the stockholder.

3. LIMITATION OF ACTIONS—RIGHT OF DEFENDANT TO INVOKE—BURDEN OF PROOF.

When the defense of limitation is properly pleaded, the burden rests on the plaintiff to prove, if such is the fact, that by reason of concealment or absence from the state defendant is not entitled to the benefit of such defense.

4. SAME—PROCEEDING AGAINST STOCKHOLDER—KANSAS STATUTE.

A proceeding against a stockholder by motion for execution against him after recovery of a judgment against the corporation, and return of execution nulla bona, as provided for by the Kansas statute, is a civil action, within the fair meaning of the statute of limitations, and the defense of limitation may be invoked therein.

5. CORPORATIONS—PROCEEDING AGAINST STOCKHOLDER—EQUITABLE DEFENSES.

In a proceeding against a stockholder in a federal court, by motion for execution against him after the recovery of a judgment at law against the corporation and return of execution nulla bona, as provided for by the Kansas statute, the stockholder cannot interpose as a set-off a claim against the corporation, which does not constitute a legal defense as against the plaintiff, and can only be availed of by a suit in equity.

In Error to the Circuit Court of the United States for the District of Kansas.

This is a proceeding which was begun by E. B. Crissey, the plaintiff in error, against E. N. Morrill and Alexander Caldwell, the defendants in error, who were stockholders of the Interstate Loan & Trust Company, to enforce a liability imposed upon them as stockholders under and by virtue of the laws of the state of Kansas, where the Trust Company was incorporated and had its domicile. The lower court made a special finding of facts, from which we have extracted such facts as are deemed material to the correct decision of the questions that we have to determine. The Interstate Loan & Trust Company (hereafter termed the "Trust Company") was incorporated under the statutes of the state of Kansas on July 22, 1885. Its business consisted principally in loaning money on real estate security, taking from the borrower bonds which the company would transfer to purchasers guaranteeing the prompt payment of the interest thereon as it matured, and the payment of the principal of the bonds within two years from the date of their maturity. E. N. Morrill, one of the defendants in error, became the owner of 20 shares of stock in the Trust Company on June 29, 1887, and remained a stockholder at all times thereafter, until this proceeding was begun against him on December 16, 1898. Alexander Caldwell, the other defendant in error, became a stockholder in the company on June 6, 1887, by the purchase of 20 shares of stock, and remained such stockholder from that time forward until this proceeding was instituted on December 16, 1898. The Trust Company became financially embarrassed as early as the month of July, 1887, and on October 27, 1888, a special meeting of the stockholders was called to be held on November 12, 1888. At this meeting the by-laws of the company were amended, reducing the number of trustees from 13 to 5, any 3 of whom should constitute a quorum for the transaction of business; and on November 14, 1888, the trustees being of the opinion that it was impracticable to transact other business besides that of winding up its affairs, adopted a resolution to the effect that the Trust Company proceed to wind up its business with the least possible delay and expense, with a view to its final dissolution, and that it should not seek any new business, but pay and adjust its debts as soon as possible, and that when such debts were paid should make such dividends as might be practicable among its stockholders.

¶ 3. See Limitation of Actions, vol. 33, Cent. Dig. §§ 713, 714.

From that time forward the Trust Company transacted no business whatsoever save such as tended to wind up its affairs. In the year 1898 the property and assets of the company were, by order of court, placed in the hands of a receiver, for further administration, who appears to have been appointed by the Circuit Court of the United States for the District of Kansas.

Among the bonds secured by mortgage, which the Trust Company had obtained and negotiated with a guaranty on its part to pay the interest as it accrued and to pay the principal of the bond within two years from maturity, was one executed by August Sire and wife, dated July 1, 1887, for the sum of $2,000, due in seven years from date, with interest at the rate of 7 per cent. per annum, represented by interest notes attached thereto. The Trust Company also acquired and negotiated, with the same guaranty of payment, another bond secured by a mortgage which was executed by James W. Wells and wife, February 1, 1887, for the sum of $700, and was due five years after date. It also acquired and negotiated in the same manner another bond executed by Shuble Y. Seeds and wife, dated February 1, 1887, for $1,450, due five years after date; also another bond executed by Robert Dawson and wife, for $700, dated April 1, 1887, due five years thereafter. The several bonds last mentioned, executed by Sire and wife, Wells and wife, Seeds and wife, and Dawson and wife, were acquired and became the property of E. B. Crissey, the plaintiff in error, who brought an action thereon in the Circuit Court of the United States for the District of Kansas, and recovered a judgment against the Trust Company, which had negotiated the same, on December 31, 1897, for the sum, in the aggregate, of $6,792.20. Execution was duly issued upon this judgment, and was returned nulla bona on January 6, 1898. Thereafter, on December 16, 1898, Crissey, as the owner of said judgment, filed a motion for execution against the defendants, Morrill and Caldwell, to enforce their liability as stockholders. The laws of Kansas (Gen. St. Kan. 1889, par. 1192) contain the following provision, in pursuance of which the present proceeding appears to have been inaugurated: "If any execution shall have been issued against the property or effects of a corporation except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

While the Trust Company was in process of liquidation its acting board of trustees from time to time, subsequent to November 14, 1888, passed resolutions making assessments on stockholders for an amount in addition to the par value of their stock. In response to one of these attempted assessments the defendant Morrill, on June 25, 1892, paid an assessment of 15 per cent. upon his stock, amounting to $300, which was used by the secretary of the Trust Company in paying the current debts of the Trust Company. In the year 1893 the defendant Caldwell, at the solicitation of persons who then had the affairs of the Trust Company in charge, advanced the sum of $1,000, which was used in meeting demands against the company, and to secure the repayment of the money so advanced the officers in charge of the company caused to be delivered to said Caldwell two bonds, for the sum of $500 each, dated June 1, 1893. At the conclusion of the trial below the motions for execution were denied, and a judgment was awarded against the plaintiff below for costs. He has brought that judgment to this court for review on writ of error.

L. A. Stebbins (Clinton J. Evans, on the brief), for plaintiff in error.

C. F. W. Dassler (O. H. Dean, on the brief), for defendants in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question that is presented by the plaintiff in error for our consideration is whether the statute of limitations had run in favor of the defendants in error as respects so much of the unpaid judgment for $6,792.20, in favor of the plaintiff in error, as was made up of the bond which was executed by Sire and wife on July 1, 1887, in the sum of $2,000. The trial court seems to have decided this question in the affirmative, holding that the entire judgment was barred, but it is insisted that such decision was erroneous.

In view of the foregoing statement, it is apparent that the Sire bond was due, on its face, seven years after July 1, 1887, or on July 1, 1894. The guaranty on the part of the Trust Company was a guaranty to pay the principal of the bond "within two years from maturity," so that the guaranty matured July 1, 1896, and this proceeding by motion was inaugurated December 16, 1898, or within three years thereafter. It seems to be conceded on both sides that the period of limitation applicable to the case is three years, so that the bar of the statute was not complete as respects the Sire bond on December 16, 1898, unless it began to run prior to the maturity of the guaranty.

In behalf of the defendants in error it is contended that the statute of limitations began to run in favor of the stockholders, as respects all outstanding debts of the Trust Company, whether matured or unmatured, at the expiration of one year after November 14, 1888, when the resolution to go into liquidation was adopted and the corporation ceased to transact further business, and that such debts, so far as stockholders are concerned, became fully barred at the end of three years thereafter, to wit, on November 14, 1892. This contention is based on certain decisions of the Supreme Court of Kansas, notably Cottrell v. Manlove, 58 Kan. 405, 49 Pac. 519; First National Bank of Atchison, Kansas, v. King, 60 Kan. 733, 57 Pac. 952; and Brigham v. Nathan, 62 Kan. 243, 62 Pac. 319. Inasmuch as these decisions deal with the construction of local statutes, they are binding, as a matter of course, upon this court in so far as they affect the question which we have to determine. In the first of these decisions (Cottrell v. Manlove) it was held, in substance, that the three-year limitation period begins to run in favor of stockholders from the date of corporate dissolution, and that where a corporate creditor had the right, by virtue of a local statute (vide Gen. St. Kan. 1889, par. 1204), to bring an action against stockholders because the corporation had become dissolved, leaving its debts unpaid, and also had the right, under another local statute heretofore quoted (vide Gen. St. Kan. 1889, par. 1192), to proceed by motion for an execution against stockholders after recovering a judgment against the corporation and issuing an execution thereon, and he adopted the latter remedy in place of the former, that the operation

of the statute of limitations was not thereby suspended until he had procured a judgment against the corporation, but that the statute began to run from the date of corporate dissolution. In the same case it was held, in substance, that the statute of the state permitting stockholders of a corporation to be sued for corporate indebtedness if the corporation becomes dissolved, leaving debts unpaid, applies to corporate debts maturing after the dissolution as well as to those which had become due and payable at the time of the dissolution. In the second of the above cases (First National Bank of Atchison v. King) it was held, in substance, that the right of action in favor of the creditors of a corporation, as against stockholders, accrues, and that the statute of limitations begins to run in favor of stockholders, at the expiration of one year after the corporation has ceased to transact business, and not after such suspension of business has been shown or determined in some judicial proceeding. In the third case above cited (Brigham v. Nathan) it was held, in substance, that, within the meaning of section 1268 of the General Statutes of Kansas for 1899, a corporation becomes dissolved for the purpose of enabling creditors thereof to bring actions against stockholders, provided it has ceased for one year to transact all business for which it was organized, and in the meantime has confined itself to the doing of such acts as were incidental and necessary to the final closing up of its affairs. It appeared in that case that the corporate creditor, at the time the corporation became dissolved, had no matured obligation against the corporation, having surrendered the matured obligation, and taken a new one, which had not become due at the date of the dissolution. It was held, however, that, notwithstanding the immaturity of his demand against the corporation, he had an immediate right of action against the stockholder, and that the statute of limitations began to run in favor of the stockholder at the expiration of one year after the company suspended business. See, also, the cases of Sleeper v. Norris, 59 Kan. 555, 53 Pac. 757, and Fox v. Bank, 9 Kan. App. 18, 57 Pac. 241, which enunciate substantially the same doctrine.

It is clear, therefore, that under the laws of the state of Kansas, as construed by its highest court, the fact that a debt of a corporation has not become due at the time it becomes dissolved (that is, after the expiration of one year from the time it ceases to transact business and goes into liquidation) does not prevent the creditor from pursuing stockholders. It is due by force of the statute permitting them to be sued, so far as stockholders are concerned, as soon as the corporation becomes dissolved, although not due as respects the corporation, and the statute of limitations begins to run immediately in favor of stockholders, and becomes a bar at the end of three years. Since these decisions were rendered, however, and since this case was decided by the learned trial judge, another question that is wholly analogous to the one which arises in the case at bar has been decided by the Supreme Court of the state of Kansas in McHale v. Moore, 71 Pac. 522, 524. In that case an action was brought to compel a stockholder to pay a corporate debt which consisted in part of notes that had been executed by the corporation

itself, and in part of a note the payment of which the corporation had guarantied. This latter note was executed May 1, 1890, but did not mature until May 1, 1900. The corporation suspended the transaction of business in March, 1892, and never thereafter resumed business. Proceedings against the stockholder were begun on March 21, 1901. As respects the guarantied note, the court held that the statute of limitations had not run in favor of the stockholder. It remarked that the corporation "had guarantied payment of the obligation when it became due, but whether it would become a debt against the [corporation] could not be known until the time of payment had arrived, and either payment or default had been made by the [maker of the note]. Until that time the holder of the obligation was not a creditor of the [corporation], but was a creditor of the [maker of the note]. The statute did not contemplate that stockholders should be required to respond for anything short of a debt of the corporation, and certainly until the relation of debtor and creditor arose between the claimant and the corporation no right of action accrued against the stockholder." It follows, as a matter of course, that the same may be said of the Sire bond which figures in the case at bar. The holder of that bond did not become a creditor of the Trust Company until the guaranty matured, on July 1, 1896. It was not a debt of the corporation until that time, and the statutory bar was not complete on December 16, 1898, when this action against the stockholder was inaugurated.

Counsel for the defendants in error suggest that because the plaintiff in error saw fit to recover a judgment against the Trust Company on the Sire bond, and the other bonds heretofore mentioned, there can be no inquiry, in this proceeding by motion against the stockholder, into the origin of any part of the indebtedness upon which the judgment is founded, for the purpose of showing that this proceeding against the stockholder is not barred by limitation. With respect to this contention we observe that it may be conceded that the corporation cannot go behind the judgment for the purpose of establishing a defense which it did not make when the judgment was recovered, but we perceive no substantial reason why the judgment creditor in this collateral proceeding against the stockholder should not be permitted to show that a part of the indebtedness, now merged in the judgment, became a corporate debt at such a late day that the statute of limitations cannot be invoked by the stockholder in a proceeding against him, especially when the stockholder seeks to avail himself of the statute of limitations as a defense. The question whether the demands now merged in the judgment against the corporation were recoverable from stockholders was not one of the issues which was tried in the action brought against the Trust Company, nor could such an issue have been tried in that case; nor do we perceive that evidence tending to show the precise dates when the respective demands became debts of the corporation has any tendency to impeach the judgment. We are of opinion, therefore, that the suggestion of counsel to the effect last stated is without merit, and that the trial court properly found when the respective demands did become debts of the corporation for

the purpose of making a proper application of the statute of limitations. Ward v. Joslin, 186 U. S. 142, 152, 22 Sup. Ct. 807, 46 L. Ed. 1093.

We entertain no doubt that the lower court correctly held, as respects the other demands which entered into and formed a part of the judgment for $6,792.20, that they were barred by limitation. These other bonds, which were executed by Seeds and wife, Wells and wife, and Dawson and wife, matured against the makers in the early part of the year 1892. The guaranty thereon matured in the early part of the year 1894, and they became corporate debts at that time. The statute of limitations accordingly began to run as soon as they became corporate debts, and the bar of the statute became complete in favor of the stockholders in the early part of the year 1897, long before this proceeding was inaugurated, inasmuch as the Trust Company, under the facts as found by the trial court and under the Kansas decisions, became dissolved as early as November 14, 1889, by virtue of its having ceased to transact any business for a year previous thereto. The decisions heretofore cited leave no room for doubt that these debts were effectually barred as against stockholders of the Trust Company before this proceeding was commenced, and the lower court was right in so holding.

The point appears to have been made on the trial below, but it has not been pressed by the defendants in error on appeal, that the principal debt, in consequence of the nonpayment of the interest thereon, became due long prior to July 1, 1894, and that the guaranty thereon matured long prior to July 1, 1896, because the Sire bond contained a provision, in substance, that, if default was made in the payment of any interest thereon for the space of 10 days after the same became due and payable, then the principal of the bond, "at the option of the payee," should at once become due and payable without further notice. This contention, in our opinion, is untenable for the reason that the finding of facts does not show that the owner and holder of the Sire bond exercised his option to declare the principal due before July 1, 1894, the day specified in the bond. Moreover, this court has recently held in Keene Five Cent Savings Bank v. Reid et al. (C. C. A.) 123 Fed. 221, that when a note or bond contains a provision that the principal thereof shall become due and payable if the interest thereon is not paid when due, such a provision is not self-operative, but is intended for the benefit of the payee, and that he must take some affirmative action to mature the obligation in advance of the period of maturity specified on the face of the obligation. No such affirmative action on the part of the payee of the Sire bond is shown in the present case, and it does not appear, therefore, that the bond became due prior to July 1, 1894.

Learned counsel for the plaintiff in error make the following additional contentions in opposition to the judgment: First, that the defendants below failed to prove that they were residents of Kansas during the statutory period of limitation, so as to be entitled to the benefit of the statute; second, that this proceeding is a motion for execution against a stockholder, and that in such a proceeding the plea of limitation is not available; and, third, that the set-offs which

the special finding of facts tends to establish in favor of Morrill and Caldwell are not available in this proceeding.

Concerning the first of these contentions, it is sufficient to say that when the defendants invoked the statutory bar of three years as a defense it was the duty of the plaintiff below, if the bar was not applicable because they had concealed themselves or been absent from the state, to establish that fact by competent evidence. When it appears on the trial of a case, where the statute of limitations is pleaded, that the indebtedness became due beyond the statutory period, the courts do not presume, in favor of the plaintiff who seems to have been negligent, that the defendant has concealed himself to avoid the service of process or has been absent from the state, but require the plaintiff to make such proof. If the defendant proves a state of facts which brings him within the operation of a general rule, he need not prove further that his case does not fall within an exception that would deprive him of the benefit of the rule, but may call upon the plaintiff to prove affirmatively that his case is within the exception and that the general rule is not applicable. This is the general doctrine (State of Missouri, to the use of Ladd, v. Clark et al., 42 Mo. 519, 523; McMillan v. Cheeney, 30 Minn. 519, 521, 16 N. W. 404); and it seems to be a doctrine which is fully recognized by the Supreme Court of Kansas (Young v. Whittenhall, 15 Kan. 579, 581). In that case the court observed "it has always been the duty of the plaintiff, both in courts of law and in courts of equity, to plead the exceptions where the question of the statute of limitations has been properly raised by the defendant. And it never was the duty of the defendant, in such a case, to negative the exceptions. Zane v. Zane, 5 Kan. 137."

With reference to the second contention mentioned above, we observe that it is a highly technical view that because the statute of Kansas provides that "civil actions can only be commenced within the period prescribed in this article after the cause of action shall have accrued" therefore this proceeding, which the statute above quoted denominates a "motion," is not an action in which the party proceeded against can avail himself of the statute of limitations. It is obvious that if he cannot plead the statute in defense to such a motion he is deprived of the benefit of the statute altogether, since when an action is brought against a corporation to reduce a demand to judgment no stockholder is entitled to intervene and defend on the ground that the demand cannot be enforced as against stockholders if a judgment is recovered. Such a defense would not be tolerated, and for that reason when a judgment is recovered against the corporation, and an execution has been returned unsatisfied, the stockholder, according to the plaintiff's theory, would be left powerless to invoke the statute. We are of opinion that the point urged is not tenable; that a proceeding by motion against a stockholder after the recovery of a judgment against the corporation is, within the fair purview of the statute, a "civil action," although it is otherwise termed a motion. The proceeding possesses all of the characteristics of a civil action. The stockholder is given reason-

able notice to appear and defend, and disprove, if he can, the facts stated in the motion, and the trial proceeds as in ordinary cases.

The third contention, that the defendants below are not entitled to interpose set-offs in this proceeding, is entitled to more weight. It seems to be the practice in Kansas to permit stockholders to avail themselves of any set-offs which they happen to have as a defense to motions of the present character (Pierce v. Topeka Commercial Security Co., 60 Kan. 164, 55 Pac. 853; Van Pelt v. Strickland, 60 Kan. 584, 57 Pac. 498; Abbey v. Long, 44 Kan. 688, 24 Pac. 1111; Campbell v. Reese, 8 Kan. App. 518, 56 Pac. 543); but when this right of set-off is asserted in the federal courts other considerations present themselves. The demands which the defendants below respectively seek to offset are not demands against the plaintiff on account of which he could be sued in an action at law, but they are claims against the judgment debtor, to wit, the Trust Company, for which reason they cannot truly be said to be legal defenses to the plaintiff's cause of action, but are rather demands against the Trust Company, which the defendants are equitably entitled to have deducted from the amount of their ascertained stockholders' liability. Being themselves creditors of the corporation, they are equitably entitled to be first paid before they are called upon to discharge the claims of other creditors that are founded upon no higher equity.

It is a well-settled doctrine in the federal courts that defenses which are essentially of an equitable character cannot be interposed by the defendant in an action at law. In the federal courts the practice in equity is regulated by rules of procedure such as may be formulated from time to time by the Supreme Court of the United States, and such rules of procedure are not subject to modification by the legislatures of the several states nor by the action of state courts. Missouri, Kansas & Texas Tr. Co. v. Krumseig, 77 Fed. 32, 23 C. C. A. 1, 9; Bennett v. Butterworth, 11 How. 669, 674, 13 L. Ed. 859; Thompson v. Railroad Company, 6 Wall. 134, 137, 18 L. Ed. 765; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358.

We are of opinion, therefore, that the set-offs in favor of the defendants below, which the finding of the lower court tends to establish, and, as we think, does establish, were not admissible as a defense in favor of the respective defendants, the same being set-offs of an equitable character, and this being an action at law. To avail themselves of these set-offs, the defendants must seek the aid of a court of equity. A court of equity undoubtedly possesses adequate power to render them effective by ascertaining the amount of the respective set-offs, and decreeing that they be deducted from the liability of the respective stockholders, and that the plaintiff in this proceeding only recover such balance, if any, as may remain after the set-offs are discharged.

The judgment below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to ascertain the amount which the plaintiff is entitled to recover from the respective defendants on account of his ownership of the Sire bond in the sum of $2,000, and to enter judgment in the plaintiff's favor against the respective defendants for such amounts when duly ascertained. The

defendants will have leave to apply to the Circuit Court by a bill in equity to have the amount of their respective set-offs adjudicated and deducted from the amount of their liability as stockholders, provided the amount thereof cannot be fixed by agreement of the parties.

NATIONAL SURETY CO. v. LONG.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1903.)

No. 1,883.

1. CONTRACT—ACTION FOR BREACH—CARE OR NEGLIGENCE OF OBLIGOR.
   The care or negligence with which an obligor, who failed, sought to perform his contract, is no defense to an action for its breach. The only test of the right to recover is the existence of the breach of the covenant upon which the action is based.
2. SAME—CONSTRUCTION.
   Under an agreement that a contractor shall complete a building by the 1st day of September, 1901, and that in case of a failure to finish it by September 15, 1901, he shall pay damages at the rate of $5 for each day after that date until the building is finished, the time for the completion of the structure is September 1, 1901.
3. SAME—IMMEDIATE NOTIFICATION.
   "Immediately" means before the happening of other events—forthwith. A covenant to notify a surety of the default of his principal immediately is not performed by mailing a notice 11 days after the known default.
4. SAME—WARRANTIES AND CONDITIONS PRECEDENT—EFFECT OF BREACH.
   The immateriality of a warranty or of a condition precedent made by the agreement of the parties, and the innocuousness of a failure to perform it, do not nullify or mitigate the fatal effect of such a failure prescribed by their agreement.
5. PRINCIPAL AND SURETY—RELEASE OF SURETY.
   A surety is discharged if a condition known to the obligee, upon which the surety agreed to be bound, is not complied with.
6. CONTRACT—PARTY IN DEFAULT CANNOT RECOVER.
   He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform it.

(Syllabus by the Court.)

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

On May 23, 1901, Thomas Lee Humphreys made a written contract with E. A. Long, the plaintiff below, to construct and complete a brick building for him by September 1, 1901, for the sum of $6,600. On May 28, 1901, Humphreys, as principal, and the National Surety Company, a corporation, the defendant below, as surety, executed and delivered to Long a bond whereby they covenanted that Humphreys should perform his contract, and save the obligee and the property from liens and loss, on the condition that the liability of the surety should be limited by, and be subject to, the conditions precedent written into the bond. The principal failed to complete and abandoned the building on September 9, 1901, and on the same day he left for parts unknown. The plaintiff notified the surety company of this fact on September 12, 1901, and demanded that it should finish the building, and pay the damages which he had sustained by the default of the contractor. The surety company declined to do this. Thereupon the plaintiff finished the building at a cost of $3,037.44 more than the contract price. He then sued the surety company for its alleged breach of the condition of the bond, and recovered a

verdict and judgment against it in the court below for $3,126. The writ of error in this case has been sued out to reverse this judgment.

Robert A. Holland (J. E. McKeighan and M. F. Watts, on the brief), for plaintiff in error.

E. A. McCulloch (S. H. Mann, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and HOOK, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

One of the defenses of the surety company, and the only one that it will be necessary to notice in this court, was that the plaintiff below failed to comply with the third and fourth paragraphs of the bond, which by its terms constituted conditions precedent to the liability of the defendant. In so far as these paragraphs are material in this case, they read in this way:

"If, at any time, the above-named principal shall, in any manner, fail, neglect or refuse to keep, do or perform, any matter or thing at the time and in the manner in said contract set forth and specified to be by said principal kept, done or performed, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company, at its principal offices in the City of New York."

"If, at any time, it appears that the above-named principal has abandoned the work, or will not be able, or does not intend, to carry out or perform the contract, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the Company, at its principal offices in the City of New York, and the company shall have the right at its option, to assume such contract and to sublet or complete the same, and, if it so elect, all moneys due, or to become due thereafter, under said contract, including percentages agreed to be withheld until completion, shall, as the same shall become due and payable under the terms of said contract, be paid to the company, regardless of any assignment or transfer thereof by the principal."

The contract contained this stipulation:

"The said party of the second part agrees to complete said building by the first day of September, 1901, and the said party of the second part further agrees that in case he fails to complete said building by the fifteenth day of September, 1901, shall pay to the said party of the first part, as liquidated damages, the sum of five dollars for each and every day or part of a day that said building remains incompleted after the said time, that sum being the actual loss occurring to the said party of the first part by said delay."

The uncontradicted evidence was that on September 1, 1901, the plaintiff knew that the contractor, Humphreys, would not be able to, and that he had already failed to, perform his contract in the time and manner specified therein. He knew that the building then lacked roof, doors, windows, plastering, and floors. Nevertheless he never notified the surety company of any of these facts until September 12, 1901, three days after Humphreys had abandoned his contract and absconded.

In one of the paragraphs of the bond, which precedes the conditions that have been quoted, this stipulation is found:

"This bond is executed by the company as surety on condition that its liability shall be limited by, and subject to, the conditions and provisions here-

inafter contained, which shall be conditions precedent to the right of the obligee to recover hereunder, anything in said contract to the contrary notwithstanding."

Moreover, the eleventh paragraph of the bond reads:

"The failure, neglect or refusal of the obligee to keep, strictly observe, and fully perform, any matter or thing in this bond or in said contract stipulated and agreed to be done, kept or performed by the obligee, at the time and in the manner specified, shall relieve the company from all liability under this bond."

In this state of the case, the circuit court refused to instruct the jury to return a verdict for the defendant, and charged them that the time fixed by the contract for the completion of the building was September 15, 1901; that, if the plaintiff gave the notice of the inability or failure of the contractor to perform his contract to the surety company in such time as a man of ordinary prudence would have given it under similar circumstances, they might return a verdict in his favor, but that, if he was guilty of negligence in this matter, their verdict should be for the defendant. The surety company excepted to these rulings, and it has assigned them as error.

The care or negligence with which an obligor, who fails, seeks to perform his contract, is no defense to an action for damages for his failure. The only test of the right to recover in such an action is the existence of the breach of the covenant. It is no answer to an action for a failure to pay a promissory note that the maker, although he paid no part of it, exercised all the care to pay it that a person of ordinary prudence in similar circumstances would have used. It is no defense to an action for the breach of a contract that, although the obligor failed to perform it, yet he exercised ordinary care to do so. The very purpose of a promise or of a covenant is to relieve the obligee of all inquiry relative to the care or negligence with which the obligor acts in its fulfillment, and to impose upon the latter the absolute obligation to perform it. Nothing less than full performance satisfies the undertaking. The obligation of a promise or of a covenant to pay a debt or to do an act is not to use ordinary care to comply with the terms of the agreement, but it is to perform it; and, in an action for its breach, it is not material what care the obligor used, or what negligence he was guilty of, in his endeavor to fulfill it. The only question is, did he perform his contract? Guarantee Co. v. Mechanics', etc., Co., 183 U. S. 402, 421, 422, 22 Sup. Ct. 124, 46 L. Ed. 253. The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract, and the question was not whether or not, although he failed to give the notice, he had exercised ordinary care to do so, but whether or not he had actually given the notice immediately upon the appearance of the known inability and failure of the contractor to perform his agreement. The circuit court fell into an error when it instructed the jury that the care or negligence of the plaintiff conditioned his right to recover here.

By the stipulation in the contract between Humphreys and the plaintiff which has been set forth above, the contractor agreed "to complete said building by the first day of September, 1901," and that if he failed to complete it by September 15, 1901, he would pay to the plaintiff damages to the amount of $5 for every day from that time until the building was finished. The former date was clearly the time fixed for the completion of the performance of the contract, while the latter was the stipulated day from which the time that measured the liquidated damages which the contractor agreed to pay in case he failed to finish the building by September 15th should commence to run. The two subjects—the time for the completion of the building, and the day from which the time that measured the liquidated damages should be reckoned—were distinct and separate. There was no rule of right or of law that required these times to fall upon the same day. The parties had the undoubted right to agree upon what date each should fall. They exercised this right, and agreed that the performance of the contract should be completed on September 1, 1901, and that the time which measured the liquidated damages should be computed from September 15, 1901. The courts have no power, by construction or otherwise, to change either of these dates, and thus to make a new contract for the parties, to the effect that the date for the completion of the work shall be on September 15, 1901, or on any other date than on September 1, 1901, where the parties to this agreement placed it by their stipulation. It was error for the court below to charge the jury that the time fixed by the contract for the completion of the building was on September 15, 1901.

The agreed time for the completion of the building was September 1, 1901. At that time the contractor had failed and was unable to perform his agreement in the time and manner there specified, and the plaintiff knew it. The latter had agreed, in such a case, to immediately notify the surety company of these facts, but he failed to do so until September 12, 1901. This failure was a clear breach of his covenants. "Immediately" means without the intervention of other events; forthwith; directly. A notice 11 days after the known failure of a contractor to complete the performance of his agreement is not an immediate notice thereof, and it is not a compliance with the covenant and condition embodied in this contract. Streeter v. Streeter, 43 Ill. 155, 165.

It is said that the question whether or not this notice given 11 days after the known failure of the contractor was an immediate notice was a question for the jury, and was properly submitted for their consideration. There may be cases where the question of the sufficiency of a notice in time and manner of service should be submitted to the consideration of the jury. Cases where the evidence is contradictory—where facts and circumstances are established which render doubtful the question whether or not there has been a fair compliance with the provisions of the contract in this regard—may authorize this course of procedure. But there is nothing of this character in the case in hand. The act of giving the notice was a simple one. Its performance required nothing but the mailing

of a writing containing the notice. It could have been performed as well on September 1, 1901, as upon any later day, and its performance would have required less than one hour of time. No facts or circumstances are established to excuse the delay. Under these circumstances, there is no question for the jury, because the evidence conclusively shows that the plaintiff did not immediately notify the surety company of the failure of the contractor when he first learned that fact.

It is earnestly contended that the failure to give this notice, to the effect that the contractor "will not be able * * * to carry out or perform the contract," has no reference to the time of performance, and is immaterial in this action, because by another provision of the bond the surety company is exempted from liability for any delay in the completion of the building unless this delay was caused by the contractor without reasonable excuse, purposely, and premeditatively, and there is no evidence in the record of any such delay. There are, however, other reasons than liability for delay, simply, which rendered this stipulation, and its evident application to the time of performance of the contract for the construction of the building, important and beneficial to the surety company. The bond provided that this company should have the right upon receipt of this notice to immediately take possession of the building, to complete the work, and to receive all moneys due or to become due under the contract of construction. It is neither impossible nor improbable that a notice of the failure of this contractor given to the defendant on September 1, 1901, eight days before he absconded, and its exercise of this right, or its opportunity to confer with the contractor before he fled, might have enabled it to complete the undertaking of its principal with much less expense than that which has now been entailed by a renewal of the work after the contractor had gone, and after the work had been necessarily interrupted. Moreover, it is not indispensable to the validity or to the enforcement of this plain covenant of the obligee—this condition precedent to the liability of the defendant under the bond—that the latter should either establish its beneficence or its materiality, or that it should show that it has sustained injury from the failure to fulfill it. Parties to agreements have the right and the power to contract that things immaterial as well as things material shall be the subjects of their warranties, or of conditions precedent to their respective liabilities, and their contracts in the one case are as legal and binding as in the other. The all-sufficient, the conclusive, answer to the suggestion that the subject of the warranty or of the condition precedent is immaterial, and its breach without effect, is that the parties had the right to agree and they have contracted otherwise. The immateriality of a warranty or of a condition precedent made by the agreement of the parties, and the innocuousness of a failure to perform it, do not nullify or mitigate the fatal effect of the failure prescribed by their contract. Rice v. Fidelity & Deposit Co., 103 Fed. 427, 430, 432, 43 C. C. A. 270, 273, 275; Indemnity Co. v. Wood, 19 C. C. A. 264, 73 Fed. 81, 84; American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 36 C. C. A. 671, 95 Fed. 111, 113; Jeffries v.

Insurance Co., 22 Wall. 47, 54, 22 L. Ed. 833; Insurance Co. v. France, 91 U. S. 510, 512, 23 L. Ed. 401; Anderson v. Fitzgerald, 4 H. L. Cas. 483, 487; Cazenove v. Assurance Co., 6 C. B. (N. S.) 437, 450, 451, 6 Jur. (N. S.) 826; Price v. Insurance Co., 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166.

The parties to this bond agreed that the failure, neglect, or refusal of the obligee to fully perform any matter or thing in this bond stipulated to be done, kept, or performed by him, at the time and in the manner specified, should relieve the company from all liability under it. On September 1, 1901, the principal of the bond was not able to carry out or perform the contract of construction which he had made with the plaintiff, and he had neglected and failed to complete the building upon that day, when, by the terms of his contract, he had agreed to finish it. The plaintiff had covenanted with the surety company in the bond that in the event of such inability or failure he would immediately notify the defendant, in writing, of that fact. He failed to fulfill this condition precedent to the liability of the company. That company was the surety of the contractor. If a condition of the liability of a surety known to the obligee is not complied with, the surety is discharged. Rice v. Fidelity & Deposit Co., 103 Fed. 427, 432, 433, 43 C. C. A. 270, 276; 2 Brandt, Sur. § 403; Jones v. Keer, 30 Ga. 93, 95; Cunningham v. Wrenn, 23 Ill. 64, 65; Lynch v. Colegate, 2 Har. & J. 34, 37; Holl v. Hadley, 4 Nev. & M. 515, 520; Bonser v. Cox, 4 Beav. 379, 384; U. S. v. Hillegas, 3 Wash. C. C. 70, 76, Fed. Cas. No. 15,366; Whitcher v. Hall, 5 Barn. & C. 269; Combe v. Woolf, 8 Bing. 156, 161.

Again, this bond contains the mutual covenants of the parties—covenants by the surety company that Humphreys, the principal, should construct the building, and keep it free from liens; covenants by the plaintiff that, if Humphreys was unable or failed to perform the contract in the time and manner therein specified, he would immediately notify the surety, and that the latter might then take the contractor's place. The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform. Guarantee Co. v. Mechanics', etc., Co., 183 U. S. 402, 421, 22 Sup. Ct. 124, 46 L. Ed. 253; Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 463, 467, 14 Sup. Ct. 379, 38 L. Ed. 231; Hubbard v. Association, 100 Fed. 719, 40 C. C. A. 665; Seal v. Ins. Co., 59 Neb. 253, 80 N. W. 807; Brady v. Association, 66 Fed. 727, 9 C. C. A. 252; Rice v. Fidelity & Deposit Co., 103 Fed. 427, 433, 43 C. C. A. 270, 276; Cattle Co. v. Martindale, 63 Fed. 84, 89, 11 C. C. A. 33, 38; Norrington v. Wright, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; Rolling Mill v. Rhodes, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; Beck & Pauli Lith. Co. v. Colorado Milling & Elevator Co., 52 Fed. 700, 3 C. C. A. 248; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Smith v. Lewis, 40 Ind. 98;

Hoare v. Rennie, 5 Hurl. & N. 19; Pope v. Porter, 102 N. Y. 366, 371, 7 N. E. 304; Dwinel v. Howard, 30 Me. 258; Robson v. Bohn, 27 Minn. 333, 344, 7 N. W. 357; Reybold v. Voorhees, 30 Pa. 116, 121; Stephenson v. Cady, 117 Mass. 6, 9; Branch v. Palmer, 65 Ga. 210; Fletcher v. Cole, 23 Vt. 114, 119.

The plaintiff failed to comply with the conditions precedent upon which he knew and upon which he had agreed that the defendant contracted to be bound, and he committed the first substantial breach of the contract between them. On account of these facts, he was not entitled to recover anything of the defendant, under the evidence in this record, and the jury should have been instructed to return a verdict in favor of the surety company.

The judgment below must be reversed, and the case must be remanded to the court below with instructions to grant a new trial, and it is so ordered.

NEW YORK CENT. & H. R. R. CO. v. DIFENDAFFER.*

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 958.

1. TRIAL—QUESTIONS FOR COURT—EVIDENCE TO AUTHORIZE SUBMISSION TO JURY.
The rule in the federal courts is that it is not proper to submit a cause to the jury merely because some evidence has been introduced, unless that evidence be of such character that it would warrant the jury in finding a verdict in favor of the party introducing it.

2. CONTRACTS—GROUNDS FOR AVOIDANCE—FAILURE TO READ.
The mere fact that a person on entering the employment of the Pullman Company as porter on one of its sleeping cars failed to read the contract which he was required to sign, and which contained a provision that he assumed all risk of injury from railroad travel while engaged in such employment, does not afford ground for his avoidance of such provision, in the absence of any evidence of fraud or misrepresentation.

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

This is a writ of error sued out by the plaintiff in error (defendant below) to reverse a judgment in favor of the defendant in error for personal injuries sustained by him by reason of a collision occurring on the line of railway of the plaintiff in error at East Buffalo, in the state of New York. The plaintiff below was a porter in a sleeper, and in the service of the Pullman Company. The collision occurred by reason of an open switch, a freight or switch engine leaving the track and plunging into the sleeper in which the plaintiff below was riding.

To the declaration the defendant below filed a plea of the general issue, with two special pleas, setting forth the contract between the defendant in error and the Pullman Company, dated July 21, 1900, being the date upon which Difendaffer entered into the service of that company. This contract is entitled, "Contract of Employment," and, so far as is material to the case in hand, is as follows:

"Be It Known, That I the undersigned hereby accept employment by and enter into the service of The Pullman Company upon the following express

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* Rehearing denied November 18, 1903.

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 169.

terms, conditions and agreements, which in consideration of such employment and the wages thereof, I do hereby make with said The Pullman Company, to-wit:

* * * * * * * * * *

"Fourth: I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge The Pullman Company and its officers and employés, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"Fifth: I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employés of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay or liability it may be subject to under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

* * * * * * * * * *

"I have read and understand every word of this paper.

"Joshua Difendaffer. [Seal.]

"Signed, sealed and delivered in the presence of

"E. H. Schall."

To the special pleas the plaintiff below replied "that, at the time of the execution of the said contract mentioned in said second plea, the said Pullman Company, through its agents and servants, with intent to deceive and deprive the plaintiff of his legal rights, falsely and fraudulently represented to him (the plaintiff) that said contract was a document or paper relating simply to the routine business connected with the plaintiff's duties as porter in the employ of the said Pullman Company, and was a paper of no significance other than the mere registration and facts connected with the trip as porter about to be made by the plaintiff for the Pullman Company, and that said contract did not in any way tend to deprive the plaintiff of his rights to recover in case he suffered injury through the negligence of the said Pullman Company, or of any one or more of the various railroad lines over which its sleeping cars were run; and that thereupon, being deceived and misled by the statements and representations of the said Pullman Company's agents and servants, this plaintiff then and there signed his name to the said contract or document, and that at the time the same was not read by the plaintiff, and was not read by any one to the plaintiff, and this plaintiff had no idea that the provisions of the said document were of the nature now claimed to be by the defendant, until after he had suffered the injuries set forth in his declaration and had brought suit to recover therefor, and that no consideration moved from the said Pullman Company or from the New York Central & Hudson River Railroad Company, or from any one for either, to this plaintiff, and that said signature of the plaintiff to the said document was obtained through fraud and misrepresentations. And this the plaintiff is ready to verify."

There was rejoinder to the replication, denying the allegations of the replication. At the trial the facts of the collision and the resulting injury were not seriously disputed, the case turning upon the contract introduced in evidence by the defendant below. There were but two witnesses testifying upon the subject—the plaintiff in his own behalf, and Schall, the subscribing witness. The plaintiff testified, with respect to the contract, that the signature thereto was his, but he did not know when he signed it, whether it was on the day he went to work for the company or after that, or whether it was before he went to work for the company. He also said he never signed any paper before he went to work; that he signed papers every

trip in and every trip out, and signed whatever was put before him to be signed. At another stage of his testimony he said that he handed in his application for employment, and the president of the Pullman Company said to him, "'Go to work.' * * * I do not know how long after that it was when I signed this. It was just the first thing"; that the paper was not read to him, nor was he told what it was. Mr. Schall, the chief clerk in the district office of the Pullman Company, testified that he remembered signing the paper as a witness; that the paper was given the plaintiff below right after he had filled out his application for employment; that the witness asked Difendaffer to read it carefully, and if he did not understand any parts of it to come back and it would be explained to him, and asked him to sign the document in the presence of the witness; that Difendaffer took the paper, went into the outer office, and remained about half an hour; that he does not know whether Difendaffer read the paper or not. He returned, and the witness asked Difendaffer if he understood the paper. He said that he did, and he then signed his name, and Schall signed it in his presence as a witness, and thereupon he went into the service of the company.

At the conclusion of the evidence, the defendant below requested of the court a peremptory charge to the jury to return a verdict for the defendant, which motion was denied, and to which due exception was taken.

Francis B. Daniels, for plaintiff in error.

Cyrus J. Wood, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The court correctly charged the jury that the burden of proving fraud rests upon the party asserting it; that fraud must be proven by clear evidence; that if the contract in question was executed without fraud or misrepresentation on the part of the Pullman Company, that contract constitutes a valid defense to the action; that mere failure on the part of the plaintiff to read the contract which he signed would not amount to fraud on the part of the Pullman Company, if the plaintiff at the time had opportunity given to him to read and his failure to read was his own negligence.

In Baltimore & Ohio Southwestern Railway Company v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, it is ruled, in a somewhat similar case, that one occupying a like position to that of the defendant in error here, and under a like contract, was not a passenger, and that such a contract did not contravene public policy, and exonerated the railroad company from liability, if the contract was entered into freely and voluntarily and without fraud. So that the question here is whether there was evidence proper to be submitted to the jury to sustain the plea of fraud in the execution of the contract in question. The rule in the federal courts is "that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed"; and that it is not proper to submit the cause to the jury merely because some evidence has been introduced, unless that evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Commissioners of Marion County v. Clark, 94 U. S. 278, 24 L. Ed. 59.

We are of opinion, considering alone the testimony of the plaintiff below, that there is absolutely no evidence of fraud upon which the cause should have been submitted to the jury. There was no representation, true or false, made to him with respect to the contents of the paper. Giving to his testimony the fullest effect to which it is entitled, the case is simply that of one who could read, but did not read, the paper before he signed it. Assuming that he was an illiterate man and unable to comprehend from the language employed the nature of the contract which he was requested to sign, he neither asked the officers of the company for an explanation, nor did he seek the advice of any other person. It is merely the case of one executing a contract without reading it; and in such case, where no imposition has been practiced upon him, the omission to read is no defense to the contract. The plaintiff below was in health and vigor. He was not prevented from reading it, and there was no misrepresentation to him of the nature of the document. He deliberately elected to sign and did sign the document without reading it. Under such circumstances the contract is binding.

Chief Justice Gibson, with his usual clearness and terseness, in Greenfield's Estate, 14 Pa. 496, states the rule thus:

"If a party who can read will not read a deed put before him for execution, or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law."

The rule has been abundantly sustained by the courts. Thus, in Upton, Assignee, v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, the court says:

"It will not do for a man to enter into a contract and, when called upon to respond to his obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written; but such is not the law. The contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission."

And in Andrus v. St. Louis Smelting & Refining Company, 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054, it is said:

"The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity."

See, also, Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 28 C. C. A. 358, 83 Fed. 437; Chicago & N. W. Ry. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913; Insurance Co. v. Hodgkins, 66 Me. 109; Pennsylvania Railroad Co. v. Shay, 82 Pa. 198; Keller et al. v. Orr, 106 Ind. 406, 7 N. E. 195; Albrecht v. Milwaukee & Superior Railroad Company, 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30. In the latter case, the party seeking to avoid his contract was a German. He did not read the paper he signed, and said he could not read it, and did not know whether it was read to him or not, and did not know the contents of it; and the court said that it cannot be tolerated that a man shall execute a written instrument and, when called upon to abide by its terms, say merely that he did not read it, or did not know what it contained. It is needless to pursue

the subject. The rule has been established time out of mind. 1 Shep. Touch. 56 (30 Law Lib. 121). The plea of fraud was not sustained by any evidence whatever. The plaintiff below was a free man, with liberty to contract or not, as he saw fit. It was his duty to read and to understand the contract of employment which the Pullman Company required. He does not pretend that there was any misrepresentation to him, or, in fact, any representation whatever of the contents of the instrument. He deliberately elected to sign the document without reading or understanding it, and he must take the consequence of his own negligence. The paper signed is the highest evidence of the agreement of the parties. Except in case of fraud or mistake, it speaks conclusively the contract which the parties have made, and it may not be impugned by one party, where the other party has acted upon it, upon the ground that he misunderstood it, or that he refrained from reading it, or that he neglected to have the document explained to him. Where fraud or imposition or misrepresentation has intervened, the party is not bound; but, in their absence, failure to read or have it explained will not avail to annul the deliberate writing of the party.

The judgment is reversed, and the cause is remanded with a direction to the court below to award a new trial.

KORN v. CHESAPEAKE & O. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1903.)

No. 1,173.

1. CARRIERS—EJECTION OF PASSENGER—DEATH—LIABILITY OF CARRIER—EVIDENCE.

Plaintiff's intestate boarded a passenger train about 7 o'clock at night, apparently under the influence of liquor, but sensible of his surroundings and capable of controlling his movements. After the train started, he refused to state his destination or pay his fare, and was ejected at a point about 300 yards from the station, with lighted houses near. The next morning he was found near the track, dead, either from exposure or cocaine poisoning. *Held*, the conductor was justified in ejecting him from the train under the circumstances.

2. SAME—STATION AGENT—NEGLIGENCE—SCOPE OF AUTHORITY.

Plaintiff's intestate passed a part of the afternoon, before he boarded the passenger train, in the station, apparently in a stupor resulting from the use of liquor or drugs. The station agent knew this, but did not inform the conductor of the train. *Held*, that the knowledge of the station agent could not be imputed to the company, because it was no part of his duty to pass upon the intestate's fitness to travel, or give the conductor information upon that point.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action brought by the administrator of John J. Korn, deceased, to recover damages for the death of Korn through the negligence and

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¶ 1. Liability of carrier for injuries to passengers caused by negligence or torts of servants, see notes to Texas & P. Ry. Co. v. Williams, 10 C. C. A. 466; The Anchoria, 27 C. C. A. 651.

See Carriers, vol. 9, Cent. Dig. § 1454.

wrongful act of the defendant railway company. The trial judge instructed the jury to return a verdict for the defendant, on the ground that he was unable to find, on the uncontroverted facts, that there was any wrongful act on the part of the trainmen representing the defendant which was the proximate cause of the death of Korn. A motion for a new trial having been overruled, the case has been brought here for review.

The facts shown by the plaintiff's evidence are stated with substantial accuracy in the opinion of the court below overruling the motion for a new trial:

"The deceased came to the station of the defendant in South Portsmouth about 2 o'clock in the afternoon of the 28th day of January, 1898, and remained there until about 7 o'clock in the evening, when he entered one of the trains of the defendant going East, as a passenger. When he came to the station, he was in an almost helpless condition. His manner and appearance indicated that he was under the influence of drugs or intoxicating liquor. He was allowed to lie down in the telegraph office, and part of the time he sat about the public room of the station, asleep or apparently asleep. Near the time of the arrival of the evening train going East, the station agent, who was about to go off duty and cross the river to Portsmouth, Ohio, roused him up and endeavored to persuade him to go with him to Portsmouth, where he could be cared for; but the fresh air seemed to revive him, and he refused to go to Portsmouth. He tried to board the rear car of the train, which had just come in. Glockner, the station agent, told the trainman that he had no money, and was not fit to go on the train, and the trainman pushed him off and closed the door. He then went up to the middle of the train, and climbed up the steps of the day coach, between the day coach and the smoker. The conductor then came up, and was told by the witness Charles Molster that the deceased was not fit to travel, and Molster, or some of those standing about, also told the conductor that he had no money; but the deceased produced a bag of silver, and the conductor then said, 'I guess we will have to take him,' and pushed him from the day car into the smoker. The witness Boughner says that, shortly before the train arrived, deceased was walking up and down the platform; that, when roused up by the station agent, he seemed to have his presence of mind, and knew where he was going and what he was doing.

"The witness Howe says: 'He came out and hollowed to him to come and go over the river. He said, "No; I don't want to go over in Kentucky." Finally they got him out, and about the time they got him out the train arrived, and he wanted to get on. Mr. Glockner— I could not say now whether anybody else had hold of him. Anyway, he got away from Mr. Glockner and went to the rear coach. The door was fastened, and he got off and came to the next, and got on, and some one said: "Don't let him on there. He hasn't got any money." And then he went in the coach, and came back out. He said, "I have got money," and pulled out a sack with some money in it.'

"The witness Johnson testified as follows: 'Q. When did you first notice him on the train? A. When the collector told him to get off. Q. Did he get off? A. No, sir. Q. What did he do? A. Well, my recollection is, he asked the collector why he should get off. The collector told him, because he had no money. He says, "You have got no money." Q. Did Korn reply to that? A. He did; put his hand in his pocket and took out a bag, which I supposed contained silver—twenty or twenty-five dollars. I don't know how much, but I know it was silver. I thought that was what it was. He satisfied the collector, at least, he had money. Q. What happened then, if you remember? A. There was nothing else done. The collector and conductor went on about their business until the train stopped. Korn, if he did anything—I don't remember—only walked up and down the aisle. Q. Do you remember whether he sat down in the car? A. I have no recollection of seeing him. I don't think he took a seat. Q. Did he attract your attention after the train started? A. Not until the collector asked for his fare. Q. Then what happened? A. The collector asked him where he was going, and he told him he was going to hell. Q. Go on. A. The collector then insisted on him telling where he was going, and said he must have his fare. I

don't recollect the words he said, but it was a good deal the same line as he answered the first time; and after a few words the conductor pulled the cord, and the train stopped, and the conductor and the collector each took hold of an arm and led him off.'

"The witness Ruane testified: 'Korn came in and leaned his arm up against the seat I was occupying. I had sat down, you know. He leaned his arm up against that seat. Q. Then what happened? A. The conductor told him he couldn't ride on that train. He says, "You cannot ride on this train, for you haven't got no money." Q. Go on. A. He then reached in his pocket—overcoat pocket—and produced a little sack, something like a shot sack, I guess; and he said he had enough money to buy that road. Then they started the train. Q. Then what happened, Mr. Ruane? A. The collector came in from the front of that car—came in and walked back—and he says, "Fare." He didn't answer him then, and he says the second time; he says, "Fare;" and he says to Korn, then, "Where are you going?" and Korn said, says he, "None of your damned business." The conductor stood right behind the collector when he made this remark, so he pulled the bell cord, and they stopped and put him off the train. Q. Was Korn sitting on the arm of your seat during this conversation? A. He was leaning on it; yes, sir; leaning on it.'

"He was put off the train about 7 o'clock in the evening of the 28th of January, 1898, about 300 yards from the station, and within the yard limits of the station in the outskirts of the little village of Springville or South Portsmouth. The weather was near the freezing point, and during the night there was a light snow. In the morning he was found dead within 25 feet of the railroad track, near several houses, two of which were within about 50 feet of the place where the body was found. His hat was folded under his head, and he was lying in a natural position, and his skin was still soft and pliable. There was found on his person, as stated by Dr. Titus, a little of some kind of liquor, and about a dram bottle half full of cocaine hydrochlorate in fine crystals; and, in answer to questions, Dr. Titus testified as follows: 'Q. You spoke of a bottle partly filled with liquor being found. What did you mean by that? A. It was a liquor containing alcohol. Q. About how much had been used from the bottle of cocaine? A. About half. There are sixty grains in a bottle. Q. Do you know what quantity taken internally into the system may result fatally? A. The books give as a fatal dose from half a grain to twenty-two grains.'

"In answer to a question, the witness Ruane testified as follows: 'A. Well, when the conductor spoke to him, and stopped the car and put him off, he says, "I might as well get off here as any place, for I am going to hell anyhow." That was the only words he used.'

"He was well educated, had studied medicine and pharmacy, and had carried on business as a druggist for some time. The witness John J. Korn testified that there was a woman in the case."

This is the substance of the facts as shown by the plaintiff's evidence.

W. Stilwell and Frank S. Monnett, for plaintiff in error.

Henry Bannon and John Galvin, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge, having made the above statement of the case, delivered the opinion of the court.

The right of a conductor of a passenger train to eject one who refuses to pay his fare, or is drunk and disorderly, is unquestioned, but not absolute. It is subject to limitations. In exercising it, due regard must be had to the condition of the person to be ejected, and the situation in which he will be placed when ejected. One helpless from any cause, and incapable of taking care of himself, must not be treated as one in the full possession of his faculties. In every case

care must be taken to expose the person ejected to no unusual or unnecessary hazard. At the same time, the conductor is responsible for his train, and it is not only his right, but may be his duty, to eject a trespasser or a drunken and disorderly passenger. Obviously, in doing this, he must, to a large extent, act upon appearances and in the light of probabilities. All the law requires is that he shall use reasonable care and caution. To the conductor, Korn presented himself as a young man under the influence of liquor, but sensible of his surroundings and capable of controlling his movements. It is true, the conductor was told he was not fit to travel; but this was coupled with the information that he had no money, and the reasonable inference was he was not fit to travel because he had no money. After it was reported that he had money, no other reason being suggested why he was not fit to travel, the conductor naturally said, "I guess we will have to take him," and the train was started. Immediately the episode occurred which resulted in Korn's ejection from the train. Having displayed his money when the train was at the station, he refused, with an oath, to pay his fare, or say where he wanted to go, after the train got under way. So the train was stopped, and he was put off. There was nothing about him at this time to indicate that he was helpless and unfit to take care of himself. He had insisted on getting on the train, and succeeded, despite the plan of the station agent to take him to Portsmouth; he had walked up and down the aisle of the car; he had shown his money, with a boast, when told he had none; and finally, when put off for refusing to pay his fare, he went without resistance, saying, "I might as well get off here as any place, for I am going to hell anyhow." None of these things indicated incapacity of either mind or body, but rather the reverse. He was boastful, rude, and reckless, as drunken men frequently are; but he seemed to know what he was about, and to be able to do what he desired.

It is to be observed, moreover, that the conductor did not have presented to him the case of a passenger bound for a known station. Korn had no destination, and, when the conductor asked him where he was going, replied, "None of your d——d business." Under these circumstances, with the train just started, and the knowledge that there were persons at the station who had tried to keep Korn there, the apparently proper and prudent thing was to stop the train at once and put him off. And this was done. He was put off 300 yards from the station, within its yard limits, in the outskirts of the village of Springville, about 7 o'clock at night, with two lighted houses not 50 feet away, and within easy call. The conductor must have believed, as he stated to a passenger, that he was leaving him "not far from friends." The next morning the young man was found dead not more than 25 feet from the track at the place he was put off the train. He was lying on his back in a natural position, his hat folded under his head. A bottle with a liquor containing alcohol and a drachm bottle half full of cocaine were found upon his person. One physician thought he died from exposure; another, from cocaine poisoning. Whatever the cause of death, it was plain he had invited its coming, and silently awaited its work. There were lighted

houses in sight, but he started for none of them. There were people near, but he called to none of them. When he stepped off the train saying, "I might as well get off here as any place, for I am going to hell anyhow," his last trip here had ended, and he was evidently contemplating a longer journey.

We think the conductor was justified in ejecting Korn, under the circumstances; but, if his act was wrong, we fail to see any connection between it and Korn's death. Korn was not put off in a dangerous place, nor at a dangerous time, nor under dangerous circumstances. His death was not occasioned by any danger which the conductor could have foreseen. The only danger to which the ejection could expose Korn was the danger of being able to do what he desired; and he would have been exposed to this danger if he had been put off at the next station, or if he had never got on the train at all.

But it is insisted that, in point of fact, Korn was helpless through the use of cocaine, and that the station agent was aware of this, and that his knowledge must be imputed to the company, although not communicated to the conductor. It does not appear from the record that the station agent was fully advised as to Korn's condition, and the cause of it. The young man was apparently in a drunken stupor much of the afternoon, but, revived by the fresh air, he threw off the stupor upon the arrival of the train, and resumed control of himself. He refused to return to Portsmouth, and insisted on taking the train. Then the agent dropped the attempt to control him, and returned to Portsmouth. As a matter of humanity, he had done what he thought he could. He was under no obligation to arrest Korn and place him under detention. The circumstances would hardly have justified such action on his part. But if the agent did know Korn's condition, such knowledge cannot be imputed to the company, because it was not his duty either to pass upon Korn's fitness to travel, or to lay before the conductor information on that point. The knowledge of the agent to be imputed to the company must affect some matter lying within the scope of the agent's authority. It must be a part of the agent's duty either to act upon the information himself, or lay it before others for action. Information thus received by the agent is imputed to the company because the company is presumed to be present, acting in the very matter to which the information relates. Mechem on Agency, § 725; Story on Agency, § 140; Waynesville National Bank v. Irons (C. C.) 8 Fed. 1; Congar v. Railway Co., 24 Wis. 157, 1 Am. Rep. 164. Now, it was not the station agent's, but the conductor's, business to decide whether Korn should be permitted to enter the train and remain on it, or should be rejected or subsequently expelled. Moreover, if the station agent had told the conductor all he knew about Korn, the conductor would still, in our opinion, have been justified in receiving him as a passenger, and in subsequently ejecting him upon his refusal to tell where he was going and to pay his fare. The conductor necessarily assumed, when Korn boarded the train and showed his money, that he had a place of destination, and that he would pay his fare. There was nothing in Korn's condition or conduct which would have made

it wrong for the conductor to receive him and carry him as a passenger. That he had no destination and would pay no fare was not known and could not be anticipated by the conductor. The conductor therefore did right in receiving him as a passenger, and, for the reasons we have given above, did not do wrong in ejecting him when he acted as he did.

Agreeing with the trial judge that there was a failure of proof upon essential points, the judgment of the court below is affirmed.

PETTERSON et al. v. BERRY.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1903.)

No. 943.

1. USURY—CONSTRUCTION OF STATUTE—EFFECT OF REPEAL.
   Usury statutes do not affect the obligation of the contract, but pertain to the remedy only, by giving to the debtor the privilege of avoiding his contract when usurious, and their repeal, without a saving clause, takes away such privilege, even as to contracts previously made.
2. SAME—ALASKA STATUTE.
   The Oregon interest statutes, in force in Alaska from 1884 to 1900, limited the rate of interest which might be lawfully contracted for to 10 per cent., and provided that contracts by which a higher rate was reserved should be usurious, and the entire debt should be forfeited. Hill's Ann. Laws Or. 1892, §§ 3587–3590. Act June 6, 1900, c. 786 (31 Stat. 533), adopting a Code for Alaska, §§ 255–259, contains similar provisions, except that the contract rate may be 12 per cent., and the penalty for usury is the forfeiture of the interest only. *Held*, that a mortgage executed in Alaska in 1898, securing notes in which interest at the rate of 12 per cent. was reserved, on which suit was there brought in 1903, was not subject to the defense of usury.
3. SAME—PLEADING.
   The defense of usury cannot be made by demurrer to a bill or complaint to foreclose a mortgage for both principal and interest of the debt, where such defense, under the statute, affects only the interest.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

W. E. Crews and J. H. Cobb (Lorenzo S. B. Sawyer, of counsel), for appellants.

John G. Heid, E. S. Pillsbury, and Pillsbury, Madison & Sutro (Alfred Sutro, of counsel), for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This suit was brought in the District Court of the United States for the district of Alaska, Division No. 1, to recover the amount of a certain promissory note for $3,500, with interest at the rate of 12 per cent. per annum, and for the foreclosure of a mortgage upon certain real property situate in the town of Juneau, Alaska, given to secure the payment of the note. Both note and mortgage were dated September 24, 1898, and were made to one Antonio Visalia, from whom they were purchased by the ap-

pellee on the 8th day of May, 1901, who thereafter, to wit, on March 24, 1903, commenced the present suit. Interest on the note was paid to December 1, 1901.

To the complaint setting out these facts, and asking for the foreclosure of the mortgage, the defendants thereto demurred, upon the ground that the contract sued on was usurious and against public policy, and therefore that no action could be maintained on it. The demurrer was overruled, and, the defendants electing to stand thereon, the court gave judgment for the complainant, and entered the usual decree of foreclosure. The defendants thereupon brought the case here by appeal, and present as the single specification of error relied on that "the court erred in overruling the defendants' demurrer to complainant's complaint, for the reason that it clearly appears on the face of said complaint that the contract declared upon is usurious and against public policy."

At the time of the making of the note and mortgage in question the general laws of the state of Oregon, so far as applicable, governed in Alaska by virtue of the act of Congress entitled "An act providing a civil government for Alaska," approved May 17, 1884 (chapter 52, 23 Stat. 24), the seventh section of which declared "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." 23 Stat. 25. But at the time of the commencement of this suit the act of Congress approved June 6, 1900 (chapter 786, 31 Stat. 321), and entitled "An act making further provision for a civil government for Alaska, and for other purposes," had supplanted the laws of Oregon for that territory, and was in force there.

The laws of Oregon, while in force in Alaska, were, as regards interest, as follows:

"Sec. 3587. The rate of interest in this state shall be eight per centum per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, expressed or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due where there is a contract to pay interest and no rate specified. But on contracts, interest at the rate of ten per centum per annum may be charged by express agreement of the parties, and no more.

"Sec. 3588. No person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan or use of money, or upon contract founded upon any bargain, sale, or loan of wares, merchandise, goods, chattels, lands and tenements, than in this chapter prescribed.

"Sec. 3589. If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money, property, or other valuable thing, or that any gift or donation of money, property, or other valuable thing has been made or promised to be made to a lender or creditor, or to any person for him, directly or indirectly, either by the borrower or debtor, or any person for him, the design of which is to obtain for money so loaned or for debts due or to become due, a rate of interest greater than that specified by the provisions of this chapter, the same shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted to the school fund

of the county where such suit is brought. The court in which such suit is prosecuted shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, against the defendant and in favor of the state of Oregon, for the use of the common-school fund of said county, and against the plaintiff for costs of suit, whether such suit be contested or not.

"Sec. 3590. Nothing in this act shall be construed to prevent the proper bona fide assignee of any usurious contract recovering against his immediate assignor, or the original usurer, the full amount paid by him for such contract, but the same may be recovered by proper action, in any court having competent jurisdiction; provided, that such assignee had no notice of the usury affecting the contract." Hill's Ann. Laws Or. 1892.

The provisions of Act Cong. June 6, 1900, c. 786, 31 Stat. 533, in regard to the same subject, are as follows:

"Sec. 255. Legal Rate of Interest. The rate of interest in the district shall be eight per centum per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, expressed or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due where there is a contract to pay interest and no rate specified. But on contracts, interest at the rate of twelve per centum may be charged by express agreement of the parties, and no more.

"Sec. 256. Illegal Interest not to be Taken. No person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan or use of money, or upon contract founded upon any bargain, sale, or loan of wares, merchandise, goods, chattels, lands, and tenements, than in this chapter prescribed.

"Sec. 257. May Recover Usurious Interest Paid. If usurious interest, as defined by the preceding sections, shall hereafter be received or collected, the person or persons paying the same, or their legal representatives may, by action brought in any court of competent jurisdiction, within two years after such payment, recover from the person, firm, or corporation receiving the same double the amount of the interest so received or collected.

"Sec. 258. Illegal Interest, Contract for. If it shall be ascertained in any action brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money, property, or other valuable thing, or that any gift or donation of money, property, or other valuable thing has been made or promised to be made to a lender or creditor, or to any person for him, directly or indirectly, either by the borrower or debtor, or any person for him, the design of which is to obtain for money so loaned, or for debts due or to become due, a rate of interest greater than that specified by the provisions of this chapter, the same shall be deemed to be usurious, and shall work a forfeiture of the entire interest on the debt. The court before which such action is prosecuted shall render judgment for the amount due, without interest, on the sum loaned or the debt contracted, against the defendant and in favor of the plaintiff, and against the plaintiff for costs of action, whether such action be contested or not.

"Sec. 259. Assignee of Usurious Contract may Recover Amount Paid for Same. Nothing in this Code shall be construed to prevent the proper bona fide assignee of any usurious contract recovering against his immediate assignor, or the original usurer, the full amount paid by him for such contract, but the same may be recovered by proper action in any court having competent jurisdiction: provided, such assignee had no notice of the usury affecting the contract." Carter's Ann. Codes Alaska, pt. 5, c. 27.

Whatever the proper construction of the Oregon law upon the subject may be, it is entirely clear that by the foregoing provisions of the Alaska Code, in force when this suit was brought, the forfeiture declared by reason of a usurious contract for interest applied

only to the interest, and did not in any manner affect the principal debt. Moreover, by section 255 of the act of June 6, 1900, it is declared that "on contracts, interest at the rate of twelve per centum may be charged by express agreement of the parties, and no more."

It is well settled that the defense of usury, either to the principal of a contract debt or to the interest thereon, is in the nature of a penalty or forfeiture, which may be taken away by legislation, both as respects previous as well as subsequent contracts. This is sufficiently shown by the case of Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, but we add other references. Ewell v. Daggs was a suit for the foreclosure of a mortgage given to secure the payment of a note, both of which were executed in the state of Texas, whose statutes at the time provided that a contract of loan at a rate of interest greater than 12 per cent. per annum should be void and of no effect for the whole premium or rate of interest only. At the time of the commencement of the suit, however, a provision of the Constitution of the state of Texas repealing all usury laws had gone into effect, and in answer to the defense of usury which was interposed in the case the Supreme Court said:

"It is claimed by the appellant that, notwithstanding this repeal of the usury laws, the rights of the parties are to be determined according to the law in force at the time the transaction took place; that by the terms of that law the contract between Daggs and James B. Ewell was void as to the entire interest reserved and paid; that no subsequent law could make valid a contract originally void; and that the appellant is not bound by the judgment rendered against James B. Ewell in favor of Daggs, and is entitled in the present suit to make the defense. It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect.' But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of lessee's estate for nonpayment of rent, or breach of other condition, declare that on the happening of the contingency the demise shall thereupon become null and void; meaning that the forfeiture may be enforced by reentry, at the option of the lessor. It is sometimes said that a deed obtained by fraud is void; meaning that the party defrauded may, at his election, treat it as void. All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom's Legal Maxims, 732. And Lord Mansfield, in Holman v. Johnson, Cowp. 341, stated the ground on which, in such cases, courts proceed. He said: 'The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.' And the effect is the same, if the contract is in fact illegal, as made in violation of a statute, whether the statute declares it to be void or not. Bank of United States v. Owens, 2 Pet. 527 [7 L. Ed. 508]. 'There can be no civil right,' said Mr. Justice Johnson in that case, 'when there can be no legal remedy, and there can be no legal remedy for that

which is itself illegal.' A distinction is made between acts which are mala in se, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them, and acts which are mala prohibita, which are void or voidable, according to the nature and effect of the act prohibited. Fletcher v. Stone, 3 Pick. 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration was only voidable, notwithstanding the strong words of the statute. Green v. Kemp, 13 Mass. 515 [7 Am. Dec. 169]. And in such cases the advance of the money, although the contract is illegal for usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed. 'A man by express promise may render himself liable to pay back money which he had received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.' Flight v. Reed, 1 H. & C. 703; 32 Law Jour. Rep. N. S. Ex. 265. The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections, on the ground that they deprived parties of vested rights or impaired the obligation of contracts. The very point was so decided in the following cases: Curtis v. Leavitt, 15 N. Y. 9; Savings Bank v. Allen, 28 Conn. 97; Welch v. Wadsworth, 30 Conn. 149 [79 Am. Dec. 239]; Andrews v. Russell, 7 Blackf. 474; Wood v. Kennedy, 19 Ind. 68; Town of Danville v. Pace, 25 Grat. 1 [18 Am. Rep. 663]; Parmelee v. Lawrence, 48 Ill. 331; Woodruff v. Scruggs, 27 Ark. 26 [11 Am. Rep. 777]. And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of its obligations; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsmouth, 107 U. S. 568 [2 Sup. Ct. 208, 27 L. Ed. 414]; and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, Id. 97; Trustees v. McCaughy, 2 Ohio St. 152; Satterlee v. Matthewson, 16 Serg. & R. 169; Id., in error 2 Pet. 380 [7 L. Ed. 458]; Watson v. Mercer, 8 Pet. 88 [8 L. Ed. 876]. The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract—a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitations, 378, and cases cited. The case of Smith v. Glanton, 39 Tex. 365 [19 Am. Rep. 31] cited and relied on by counsel for the appellant, we cannot accept as a settlement of the law of Texas to the contrary. The opinion does not consider the question, but dismisses it, on the assumption that the fact that the action was brought before the adoption of the Constitution which contained the repeal of the usury laws prevented the application of the rule. It is our opinion, therefore, that the defense of usury cannot avail the appellant by reason of the constitutional repeal of the statute, on the continued existence of which alone his defense rested."

See, also, McBroom v. Scottish Inv. Co., 153 U. S. 318, 14 Sup. Ct. 852, 38 L. Ed. 729; Talbot v. Sioux City Natl. Bank, 185 U. S. 172, 22 Sup. Ct. 612, 46 L. Ed. 857; Bernhisel v. Firman, 22 Wall. 170,

22 L. Ed. 766; Farmers', etc., Natl. Bank v. Dearing, 91 U. S. 35, 23 L. Ed. 196; National Exchange Bank v. Moore, Fed. Cas. No. 10,041.

The rate of interest carried by the note and mortgage in suit does not seem to be obnoxious to the rate allowed by section 255 of the act of Congress of June 6, 1900, supra. But, if so, the demurrer was not the appropriate method of raising the question of usury as to it, since it was directed to the bill as a whole, and the bill was framed for foreclosure as to the principal sum secured by the mortgage as well as the interest. American B. L. & I. Sav. Assn. v. Haley (Ala.) 31 South. 88; Reed v. Moore, 19 Tenn. 80; Reynolds v. Roudabush, 59 Ind. 483; Sujette v. Wilson, 13 Or. 514, 11 Pac. 267; McDaniel v. Pressler, 3 Wash. St. 636, 29 Pac. 209; Nichols v. Stewart, 21 Ill. 106. As a matter of fact, however, the court below only allowed the appellee interest at the rate of 8 per cent. per annum, as is shown by its decree.

As what has been said disposes of the only question raised by the single assignment of error presented on the appeal, it results that the judgment appealed from must be affirmed. Judgment affirmed.

UNITED STATES v. STINSON et al.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 829.

1. UNITED STATES—ACTIONS BY—EQUITABLE ESTOPPEL.

The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals, and when the United States invokes the powers of a court of equity, whose duty it is to protect the rights of others as well, such considerations should be given weight.

2. PUBLIC LANDS—SUIT FOR CANCELLATION OF PATENTS—SUFFICIENCY OF EVIDENCE.

In a suit by the United States to cancel patents to 14 quarter sections of land issued to the same number of pre-emptors, who had made their final proofs 40 years prior to the commencement of the suit, and thereafter conveyed to defendants, the government claimed that the entries were fraudulent, and that the requisite settlement and improvements had not in fact been made. Six or more of the entrymen were dead, and the testimony of only four of those remaining was taken; two being introduced by plaintiff and two by defendant. Such witnesses, as well as defendant, were old, and, for the most part ignorant, men, and their testimony showed that their memories were uncertain and unreliable as to the transactions in question. It further appeared that defendant had continued to hold the land, which had become valuable, had paid a large amount in taxes thereon, and that he had become insolvent with a large indebtedness, his property being in the hands of a receiver. *Held*, that under such circumstances, and especially in view of the length of time since the patents were issued and the death of so many of the patentees, the government was not entitled to ask the cancellation of such patents, except upon clear and full proof of all the facts entering into the pre-emption transactions, and that the evidence adduced was insufficient.

¶ 1. Estoppel against state or United States, see note to State v. Jackson, L. & S. R. Co., 16 C. C. A. 353.

See Estoppel, vol. 19, Cent. Dig. § 152.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The facts are stated in the opinion of the court.

John B. Simmons and M. C. Burch, for the United States.

A. L. Sanborn and Robert Bashford, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The suit in the Circuit Court was to set aside patents upon fourteen quarter sections of land in Douglas County, State of Wisconsin, issued by the United States severally to fourteen grantees, at different times from December 15th, 1855, to March 25th, 1865. The patents were issued in pursuance of preemption by the several patentees, the dates of settlement named in the affidavits running from August 17th, 1854, to June 11th, 1855, and the dates of proving up running from October 24th, 1854, to June 22nd, 1855. Each of the quarter sections, on or about the date when proven up by the preemptor, was conveyed to appellee, James Stinson; who, following such conveyance, entered into possession, and has continued in possession until February 19th, 1900, when receivers were appointed at the instance of his creditors. In the receivership proceedings debts amounting to upwards of five hundred and eighty thousand dollars have been proven against Stinson, about two hundred and fifty thousand dollars of which are the claims of depositors of a bank operated by Stinson. The lands in suit constitute the main part of the assets available for the payment of these debts—debts presumably incurred, to some extent at least, upon the credit that the apparent ownership of these lands gave to Stinson.

The contention of the government is, that the lands were not preempted in accordance either with the letter or spirit of the preemption law; that there was no actual settlement in person by the preemptor; that no dwellings within the meaning of the preemption law were erected; that the pretended preemptions were in substance the carrying out only, of an arrangement with Stinson, whereby Stinson, under the forms of preemption, obtained title to lands that in no other way could have been purchased by him from the government; in short, that the pretended preemptions were in bad faith, intended at the time, not for the settlement and use of the preemptors, but as a part of Stinson's scheme in land speculation.

Testimony was submitted tending to show the truth of these averments. What conclusion would have been reached had this suit been commenced, and the evidence submitted, within such a period after the preemptions as would have enabled the court to have obtained an adequate knowledge of all the facts, it is not necessary, in the view we take of this case, to state.

The suit was not begun until February, 1895, a period of nearly forty years after the preemptors entered the lands and the government issued its patents. Meantime the land—owing to the fact that the City of Superior, within whose corporate limits the lands are located, has grown with unusual rapidity—have sprung into unusual value. Meantime, also, Stinson has paid taxes amounting to more

than seventy-two thousand dollars, and there are now unpaid taxes, presumably colorable liens in favor of the state and its several municipalities, amounting to nearly as much more. Besides, creditors have come into the transaction—creditors whose only knowledge respecting the lands was that Stinson held the title by patent, and had for forty years been in its undisputed possession and enjoyment. These facts alone would make it incumbent upon the government to present a convincing case—a case that left no considerable doubt that a fraud had been practiced as alleged. But other facts are added.

At least six, and perhaps seven, of the original preemptors have died. Of the seven living, the testimony of three, for some reason, has not been taken. Of the four others, two have been examined upon the part of the government, and two upon the part of the defense. Thus, out of fourteen parties, other than Stinson, to the original transaction, only four have been heard.

The testimony reveals that at least three of these four were originally, and are now, ignorant men, unable readily to understand the questions put to them or to convey their own answers. Of these four, one was, when called as a witness, seventy-seven years old, another seventy-four, and another sixty-five. They speak from a memory displaying uncertainty at every point—a memory on which lapse of time, and advanced years, have contributed to lay infirmity. Nor has Stinson himself escaped these consequences. At the age of seventy-seven he is called upon to ransack his memory for events that happened when he was yet young.

At common law there was no bar by limitation, to the bringing of actions. But this, in time, led to such instances of great injustice, where witnesses to the transaction had died, or papers had been mislaid or destroyed, that to prevent them, and render more certain the tenure of property, statutes of limitation were enacted. Though founded on substantial considerations, the effect of such statutes is to fix, more or less arbitrarily, a time beyond which an action shall not be brought. To the extent that the barrier thus set up fails to adjust itself to the equities of each case, the limitations are artificial.

Laches is the name given in courts of equity to such delay as under all the circumstances of a transaction make the claim sued upon a stale one. Though founded partially upon the same considerations that underlie the statutes of limitations, it is, in its practical application, intended as a spur to speedy inquiry. The doctrine of laches is less artificial, in that it adjusts itself more readily to the circumstances of each case. But, in an important sense, it remains artificial; for one of its chief objects—an object not wholly growing out of the effect of the lapse of time upon the availability of evidence—is to bring causes of dispute to an early adjustment, not because of consideration alone of loss of evidence, but because it is to the interest of society and property that known disputes shall be quickly settled.

These barriers, to the extent that they are thus artificial, cannot be set up against the government. It has not hitherto been supposed —at least no legislative action has been taken on such supposition —that government needed the spur intended, as between individuals, to bring controversies to a speedy close; or that government would

press claims that ought not, by the obliteration of adequate sources of evidence through lapse of time, to be pressed. But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. Carr v. United States, 98 U. S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals. Chope v. Detroit Plank Road Company, 37 Mich. 195, 26 Am. Rep. 512; Commonwealth v. Andre, 3 Pick. 224.

A decree such as is invoked in the case under consideration should never be entered unless all the facts entering into the preemption transactions have been gathered with the nicest kind of accuracy. In a case necessarily turning largely upon questions of motive and intention, no data is adequate unless reasonably complete. Courts are disinclined to set aside, upon proof resting wholly in memory, solemn deeds that have not been questioned for such a lapse of years —especially when the parties are dead. Mayor of Hull v. Horner, Cowper Rep. 110; United States v. Flint, 4 Sawy. 58, Fed. Cas. No. 15,121; United States v. Arredondo, 6 Pet. 746, 8 L. Ed. 547; Opinion of Attorney General Black, 9 Op. Atty. Gen. (U. S.) 204.

In the very nature of this case the data brought to our attention is and must remain incomplete. True it is that Stinson is still alive. But the fact of physical death in the cases noted is not a distinction that is controlling. Memory obliterated, or nearly obliterated, is, for the purposes of helpful testimony, as much gone, as the memory of one physically dead. The controlling fact is that the court has no longer a reliable source from which to obtain facts upon which to found a decree. In the very nature of this cause no adequate data can be obtained. Whatever impression the evidence actually submitted may have left, the fact remains—a fact that determines the equities of this suit—that the transactions under review are so remote, and the sources of testimony so depleted by death and time, that there is no longer opportunity to put, with reasonable certainty, one's finger upon the truth. A case thus sapped of any possible satisfactory results from inquiry should not be entertained at all, except for reasons much more cogent than any here disclosed.

The decree of the Circuit Court will be affirmed.

THACKERAY v. SAXLEHNER.*

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

No. 951.

1. TRADE-MARKS—INFRINGEMENT—"HUNYADI" WATERS.

The name "Hunyadi" having been established by complainant as a valid trade-mark for natural bitter waters from Hungary, its use by defendant to designate bitter waters manufactured by him in accordance with a secret formula is an infringement, and complainant is not estopped to maintain a suit for such infringement by the fact that through laches she was so estopped as against certain importers of other Hungarian waters who had used the name for a number of years, where defendant began its use subsequently and after complainant had commenced a vigorous assertion of her rights.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The suit in the Circuit Court was brought by the appellee, widow of Andrew Saxlehner, deceased, and successor to his business, a resident of the city of Budapest, and a subject of the Kingdom of Hungary, against the appellant, a citizen of the state of Illinois, resident of Chicago, to enjoin appellant from using the word "Hunyadi" as a name for waters manufactured and sold by appellant, and from using a style of bottle, capsule, and label similar to that used by appellee for her Hunyadi Janos water. Upon the hearing in the Circuit Court, a decree was entered finding for appellee, and enjoining appellant from using the name "Hunyadi" in connection with his waters, and from selling or offering for sale any such bitter water in bottles, and under labels, in imitation so closely in general appearance of appellee's Hunyadi Janos bottles and labels as to be calculated to deceive the public. From this decree this appeal is prosecuted.

The further facts are stated in the opinion of the Court.

John G. Elliott, for appellant.

Antonio Knauth, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The appellant manufactures in Chicago, according to a recipe not disclosed, the bitter waters to which he attaches the name of Hunyadi Geyza. His business was not in existence prior to the decision of the Supreme Court, in Saxlehner v. Eisner & Mendelson Company, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, nor has he ever been, so far as the record discloses, an importer of natural bitter waters from Hungary. Whether, under these circumstances, appellee is entitled to restrain his use of the word "Hunyadi," is the principal question presented.

It is stipulated that the facts set forth in Saxlehner v. Eisner & Mendelson Company, supra, are to be taken as the facts in the case under consideration. Without transcribing into this opinion the statement at large, it is sufficient to say that in 1862 Andreas Saxlehner, predecessor of appellee, discovered at Budapest, Hungary, a spring named by him "Hunyadi," in honor of a Hungarian hero of

*Rehearing denied November 18, 1903.

¶ 1. Laches as a defense in suit for infringement of trade-mark or trade-name, see notes to Taylor v. Spindle Co., 22 C. C. A. 211; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.

the fifteenth century; that under an order of the municipal council of the place where the wells were located, he subsequently sunk other wells, and began to export the waters to European countries and the United States; that for this purpose he adopted a novel style of bottle of straight shape with short neck, to which was attached a metal capsule bearing the inscription (translated) "Hunyadi Janos bitter water of Buda", as also a peculiar label covering the body of the bottle, divided into three longitudinal panels, the middle one of which bore the supposed portrait of the hero, with the name Hunyadi Janos written in large letters on the top—the color of the middle panel being a reddish brown, and the other panels white; and the water, in this kind of bottles, has found its way to the United States to the extent of about one million bottles a year, and is known at large as Hunyadi water.

In 1872 another water from the same locality was, under an order of the Minister of Agriculture of Hungary, put upon the market under the name of "Hunyadi Matyas", and under that name found its way into the United States. Other waters from the same locality, known as "Hunyadi Arpad", and "Hunyadi Josef" and the like, came under the permission named upon the market, including the market of the United States.

Against some of these importers, suits were brought in 1886 in the Circuit Court of the United States and in the State Courts of New York, by the Apollinaris Company, Limited, of London, the distributing agents of Saxlehner; in some of which suits ex parte injunctions were issued, and in others the suits withdrawn for want of jurisdiction; but in 1888 the pending injunctions were dissolved, and the suits discontinued. In all of these suits the defendants thereto seem to have relied upon the fact, that under the laws of Hungary, as the laws then were, they could rightly use the word "Hunyadi", provided they annexed thereto as a suffix, a word different from "Janos." Subsequently, however, the laws of Hungary were changed, so that in 1895 Saxlehner was enabled to register the name "Hunyadi" as a trade mark, and to procure the cancellation of the other trade marks incorporating that name. Under this changed law of Hungary the case of Saxlehner v. Eisner & Mendelson Company, supra, was brought in 1897.

As we read the decision in that cause, the Supreme Court held, that appellee had a rightful monopoly of the use of the word "Hunyadi", and that there had been no such abandonment as made it a generic term, usable at the pleasure of any one engaging in the sale of bitter waters; but that, owing to laches—her failure to bring suit against certain importers engaged in the importation of natural bitter waters from Hungary—appellee was estopped, as against them, from maintaining her suit. The defeat of appellee, and the success of her opponents, in the case, was grounded, not upon abandonment, but upon estoppel—an estoppel growing out of the fact that the importers defending had been allowed, during the period of appellee's acquiescence, a period of nine years, to build up a business in the importation and sale of natural Hungarian waters in the markets of the United States.

But the estoppel named will not avail the appellant in the case under consideration. He was not engaged in the sale of his waters until after appellee had commenced vigorously to assert her right to the exclusive use of the word "Hunyadi." He entered the market, therefore, with this name upon his manufactured water, not under the implied permission, but against the earnest protest, of the owner of the name. Nor is appellant's case in other essential respects like that of the importers of natural bitter waters from Hungary. Such importers, though giving to the public water other than that from appellee's springs, give genuine native Hungarian water of a character almost identical with that of appellee, and at a price measured by the cost of bringing it from Hungary to the United States. Appellant offers a manufactured water of whose contents the public has no knowledge, and at a cost ruinous to the importation of the genuine water. The Supreme Court never meant, in our judgment, to throw around such a competitor, the protection of the estoppel indicated, or expose the public to a device under which they would drink the waters of Lake Michigan, doctored after appellant's recipe, in the belief that they were drinking the natural waters of Hungary.

It is unnecessary in the view thus taken to go into the case turning upon the similitude of bottles, capsules and labels; for if appellant is enjoined from the use of the word "Hunyadi", the other questions become practically unimportant.

The decree of the Circuit Court is affirmed.

INGRAM v. WILSON.

In re INGRAM.

(Circuit Court of Appeals, Eighth Circuit. November 2, 1903.)

No. 1,882.

No. 34, Original.

1. BANKRUPTCY—ORDERS—MODE OF REVIEW.
An order made by a court of bankruptcy, on petition of a creditor, directing the sale of property which had previously been set apart to the bankrupt as a homestead, is not one from which an appeal is expressly authorized by section 25 of the bankruptcy act, but is one made in the course of a bankruptcy proceeding, and reviewable on petition to revise under section 24.

2. SAME—JURISDICTION OF BANKRUPTCY COURT.
The homestead of a bankrupt, exempt from his general debts under the laws of the state, does not pass to his trustee, and the court of bankruptcy is without power to order its sale because a particular creditor may have the right, under such laws, to subject it to the payment of his debt.

Appeal from the District Court of the United States for the Southern District of Iowa.

On Petition for Review.

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

J. L. Parrish, for appellant.

Howard J. Clark (A. A. McLaughlin, on the brief), for appellee.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. These are bankruptcy cases, one of which comes before us on appeal from an order made by the District Court and the other is an original proceeding which was commenced in this court by a petition for review. Both of these cases involve the same question, the petition for review having been filed because Ingram, the petitioner and appellant, was uncertain whether the order made by the lower court should be brought before this court for review by appeal or by a petition for review.

Adalaska O. Ingram, the appellant and petitioner, was adjudicated a bankrupt on December 27, 1899. After the commencement of bankruptcy proceedings certain real property belonging to the bankrupt, to wit, lots 111, 112, 141, and 142 in the town of Mt. Ayr, in the state of Iowa, were claimed by the bankrupt as a homestead, and as exempt under the laws of the state. On January 30, 1900, this claim was sustained, and the aforesaid property was set aside to the bankrupt as exempt by an order made in the course of the bankruptcy proceedings. At a later date, to wit, on or about September 19, 1902, George W. Wilson, the appellee, presented a petition to the bankrupt court wherein he alleged, in substance, that he was the holder of a note in the sum of $4,000, which was executed by the bankrupt on November 10, 1893, which had been duly proven and allowed as a debt of the bankrupt in the course of the bankruptcy proceedings, on which certain payments had been made before bankruptcy proceedings were inaugurated, and upon which certain dividends had also been paid out of the bankrupt's estate in the course of such proceedings, but that the same had not been fully paid and discharged, and that a balance remained due thereon. Wilson further alleged that Ingram became possessed of the real property aforesaid, which had been set aside to him as exempt, long after the execution and delivery of the last-mentioned note, and that under the laws of the state of Iowa, where said property was located, and where the bankrupt resided, the homestead property of the debtor was liable for the payment of all his debts accrued or existing prior to the acquisition of the property constituting the homestead. He accordingly prayed the bankrupt court to make an order directing the trustee in bankruptcy to take possession of the aforesaid property constituting the homestead, and to sell the same, and apply the proceeds to the extinguishment of the balance due on the aforesaid note in favor of Wilson. Subsequently, on December 18, 1902, the bankrupt court granted the petitioner's prayer by directing the trustee in bankruptcy to proceed to sell at public auction and for cash the real estate constituting the bankrupt's homestead, theretofore set apart to him as exempt, and out of the proceeds of the sale to pay to Wilson, the petitioner, the sum of $2,583.10, being the amount found to be due on the petitioner's note, together with interest thereon at the rate of 8 per cent. per annum from December 12, 1899, and to

pay the balance of the proceeds of the sale of the homestead to the bankrupt. The present appeal, as well as the petition for review, challenge the validity of this order.

Two questions were argued before this court, and have been submitted to us for decision. The first is whether the order below was an order made in the course of bankruptcy proceedings, and reviewable on an original petition for review filed in this court, rather than by an appeal from the order; and the second is whether the bankrupt court had jurisdiction to entertain Wilson's petition for the sale of the homestead, and to make the order to that effect which is now challenged.

The first of these questions is of no great importance now, since the principal question in the case is before us for determination either by virtue of the appeal or the petition for review. We are of opinion, however, that the order in question is an order made in the course of a bankruptcy proceeding, which this court is empowered to revise on a petition for review by virtue of section 24 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]. It is not one of those cases in which an appeal in the ordinary form is expressly authorized by section 25 of the bankrupt act. For that reason we are constrained to hold that it is reviewable by an original petition for review.

Relative to the second question stated above, it is to be observed that since the question was argued in this court it has, in effect, been decided by the Supreme Court in the case of Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. It was there held, in a case which arose in the state of Georgia, that under the bankruptcy act of 1898 the title to property of a bankrupt which is generally exempted by the law of the state in which the bankrupt resides remains in the bankrupt, and does not pass to the trustee; that the bankrupt court has no power to administer such property, even if the bankrupt has, under a law of the state, waived his exemption in favor of certain creditors; and that the fact that the act confers upon the bankruptcy court authority to control exempt property in order to set it aside does not mean that the court can administer and distribute it as an asset of the estate.

In the case in hand, the property which is involved was generally exempt under the laws of the state of Iowa, the same being the bankrupt's homestead. By virtue of those laws (Code Iowa 1897, § 2976) it could only be sold on execution "for debts contracted prior to its acquisition," and even for such debts it could not be sold except "to supply a deficiency remaining after exhausting the other property of the debtor liable to execution." No creditor of the bankrupt other than Wilson had, as it seems, any interest in the homestead, inasmuch as the facts which he alleged as a basis for the order only showed a right personal to himself to have this property subjected to the payment of his claim after all the other property of the bankrupt had been exhausted. This right, existing only in favor of one creditor, did not cause the title of the homestead to vest in the trustee in bankruptcy, nor did it confer any greater authority upon the bankrupt court to administer upon it by ordering its sale

and the distribution of its proceeds than where, as in the case cited, a single creditor had acquired the right to sell exempt property by force of a private contract which had been entered into in accordance with the laws of the state of Georgia. As the title to the property in question was never vested in the trustee and never became subject to administration by the bankrupt court, we are of opinion that that court was without power to order the sale of the homestead, and that its order to that effect was erroneous, if not void. A creditor like Wilson, who has the right, under certain conditions, to subject the homestead to the payment of his debt, must seek such relief as he is entitled to under local laws in the courts of the state; and if a discharge of the bankrupt from all his debts, when granted by the bankrupt court, will stand in the way of his obtaining relief, that court, after administering upon all the assets subject to its control, may withhold the bankrupt's discharge until a reasonable time has elapsed to enable Wilson to assert his rights in the proper forum. The order of date December 18, 1902, directing the sale of the bankrupt's homestead and the application of the proceeds in the manner heretofore stated, is hereby vacated and annulled, and it will be so certified to the bankrupt court.

The appeal in case No. 1,882 will be dismissed, without the allowance of costs to either party in that proceeding.

H. D. WILLIAMS COOPERAGE CO. v. SCOFIELD et al.

(Circuit Court of Appeals, Eighth Circuit. November 2, 1903.)

No. 1,881.

1. APPEAL—REVIEW OF INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.
An exception taken in gross to the refusal of numerous instructions asked will not be noticed on appeal if some of the instructions refused were erroneous or superfluous.

2. SALES—CONSTRUCTION OF CONTRACT.
Defendant contracted to furnish plaintiffs, who were dealers in oil, with their entire requirements for new barrels for a certain year, at specified prices. Plaintiffs were accustomed to purchase barrels from their customers after they were emptied, and use them again. *Held*, that such contract did not require them to purchase secondhand barrels instead of ordering new ones, when they were compelled to pay more than the contract price therefor, but that they were entitled to call on defendant for such number of new barrels as they required in conducting their business in the ordinary and businesslike way.

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

D. W. Robert (E. S. Robert, on the brief), for plaintiff in error.

Richard A. Jones (Nathan Frank and David W. Voyles, on the brief), for defendants in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge. This case was before this court on a former occasion on a writ of error which was sued out by the H. D.

Williams Cooperage Company, the present plaintiff in error. H. D. Williams Cooperage Co. v. Scofield et al., 53 C. C. A. 23, 115 Fed. 119. The former hearing resulted in a judgment of reversal for reasons fully stated in the opinion. The second trial, which was conducted in substantial conformity with the views that were expressed in our previous decision, resulted in a second verdict in favor of Scofield et al., the plaintiffs below, whereupon the H. D. Williams Cooperage Company, the defendant below, sued out another, the present writ of error. The circumstances which gave rise to the controversy are fully stated in our former opinion, to which reference is hereby made, and this fact obviates the necessity of any further statement.

On the present occasion the plaintiff in error complains principally of the refusal of one of four instructions which it requested the trial court to give. An inspection of the record discloses, however, that it did not take an exception on the trial to the refusal of the particular instruction which it now insists should have been given, but that it took an exception in gross to the refusal of the four instructions. This court has held on at least two occasions that an exception taken in gross to the refusal of numerous instructions will not be noticed on appeal if some of the instructions so refused were erroneous or superfluous. The same reasons which have influenced the courts to hold that they will not notice an exception taken in gross to an entire charge or to a long excerpt from a charge embodying several propositions of law, if any of the propositions are sound, applies with equal if not greater force when a long list of instructions enunciating different propositions of law are asked and refused, some of which are unsound or superfluous, and an exception is taken in gross to the refusal of all. Hodge v. Chicago & Alton Railway Company, 121 Fed. 48, 52, 57 C. C. A. 388; Railway Company v. Spencer, 18 C. C. A. 114, 71 Fed. 93; New England Furniture & Carpet Company v. Catholican Company, 24 C. C. A. 595, 79 Fed. 294; Price v. Pankhurst, 3 C. C. A. 551, 53 Fed. 312; Association v. Lyman, 9 C. C. A. 104, 60 Fed. 498. When counsel, on the trial of a case, merely say, as in the present instance, that they except to the court's action in refusing a series of instructions, they assert in substance that all of the instructions were proper and ought to have been given. The only question, therefore, which such an exception fairly presents on appeal is whether such contention, that all of the instructions asked ought to have been given, is well founded. We are of opinion that counsel should challenge the attention of the trial judge to each separate proposition of law which they see fit to submit, when numerous declarations of law are requested, and that they should obtain a distinct ruling on each proposition, as well as the allowance of an exception with respect to such action as may be taken, provided they intend to take advantage of such action on appeal. The practice that is sometimes pursued, of tendering a long list of instructions to a trial judge, and, after they are refused, saying, "we except to the court's action," without pointing out to the trial judge the particular propositions of law that are deemed important, and securing an express ruling thereon, tends to occasion error that might otherwise

be avoided, and ought to be discouraged. Some of the instructions which were refused in the present instance were clearly unnecessary, because the substance thereof was embodied in the general charge. Counsel for the plaintiff in error do not even contend on appeal that all of them ought to have been given, or that a material error was committed in not giving them. They insist, however, that one of the instructions embodied a proposition of law which should have been given. That instruction was as follows:

"The court instructs you that, under the agreement between the plaintiffs and the defendant, the defendant was not obliged to furnish the plaintiffs with all of the barrels which they needed for their business during the year 1899, but only with the new barrels which plaintiffs needed, and that the burden of proving the number of new barrels which the plaintiffs needed is upon them, and, if they have failed to prove the number of new barrels as distinguished from the number of secondhand barrels needed and used by them after the defendant refused to make further deliveries, your verdict must be for defendant."

The contract, for the breach of which this action was brought against the cooperage company, bound it to furnish the plaintiffs below with their "entire requirements * * * for new barrels during the year 1899." It had been the usual practice of the plaintiffs, when they sold barrels containing oil, to repurchase the barrels, when they were emptied, from their customers, although the latter, as it seems, were under no obligation to sell them to the plaintiffs if they saw fit to use them themselves or sell them to other persons. The instruction in question enunciated the proposition that the plaintiffs could not recover if they had failed to prove the number of "new barrels needed and used by them" after the cooperage company had refused to furnish barrels as ordered. Counsel for the cooperage company contend that the plaintiffs had no right, under the contract, to call on it to furnish them with new barrels simply because the price of new barrels, as fixed in the contract, became less than the price demanded by their customers for secondhand barrels. They further urge, in substance, that, to entitle plaintiffs to recover, it was their duty to show how many secondhand barrels they might have obtained by paying the enhanced price, and that they were only entitled to recover damages on account of the new barrels in excess of the number of secondhand barrels that might have been bought, which they "needed or used." We cannot assent to the foregoing proposition. Aside from the fact, heretofore mentioned, that a proper exception was not taken to the refusal of the aforesaid instruction, we think that it was properly refused. In its charge the trial court instructed the jury that, if they found the cooperage company was guilty of a breach of contract as charged in the complaint, they should assess the plaintiffs' damages "at that amount or sum of money that you find they were reasonably and necessarily required to expend, over and above the contract price as fixed in the contract read to you, in order to secure either new barrels, or others of no greater value than the new barrels contracted for, to meet their reasonable business requirements during the term of the contract in question." We are of opinion that this instruction was founded upon a correct view of the contract, and that it prescribed the correct

rule for the assessment of the plaintiffs' damages. By the provisions of the agreement the cooperage company had bound itself, in substance, to supply the plaintiffs with such new barrels as they found it necessary to purchase during the year 1899 to meet the ordinary requirements of their business, and to furnish them at a certain fixed price. It is probably true that the cooperage company did not expect that the plaintiffs would order new barrels from it, provided they could obtain suitable secondhand barrels at a less price, but they did not bind the plaintiffs to buy secondhand barrels in lieu of ordering new barrels when they could be obtained at any price. It is fair to presume that the contract was entered into on the assumption that the plaintiffs would conduct their business in the ordinary way, and that new barrels would be ordered whenever the contract price was less than the market price of old barrels. In that event their business requirements would demand the purchase of new rather than old barrels because they were cheaper. If this was not the view which was entertained when the contract was entered into, the opposite view, that new barrels should not be ordered when secondhand barrels could be obtained at any price, ought to have been clearly expressed. We are of opinion, therefore, that the lower court was right in declaring the measure of damages to be such a sum as was necessarily expended by the plaintiffs in excess of the contract price in securing new barrels, or others of no greater value, that were needed to meet their reasonable business requirements during the year 1899.

We find no occasion to reverse the second judgment in favor of the plaintiffs in this case, and it is accordingly affirmed.

NEWHALL v. McCABE HANGER MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. October 3, 1903.)

No. 144.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
   A preliminary injunction should not be granted in a suit for infringement of a recent patent which has never been adjudicated, where there is no proof of public acquiescence, and on the showing made there appears to be a fair question as to invention, anticipation, construction, or infringement.
2. SAME—THERMAL DOOR-CLOSING APPARATUS.
   An order granting a preliminary injunction against infringement of the Kingsland patents No. 680,415, claims 4 and 5, and No. 680,458, claim 20, each covering a thermal door-closing apparatus, reversed, on the ground that the patents were unadjudicated and under the proofs there was serious doubt of infringement.

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

Appeal from an order of the United States Circuit Court for the Southern District of New York granting an interlocutory injunction in a suit for infringement of complainant's patents Nos. 680,415 and 680,458, granted August 13, 1901, to O. H. Kingsland.

For opinion below see 117 Fed. 621.

Thomas Ewing, Jr., for appellants.
F. S. Duncan, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The patents in suit relate to door-closing apparatus so constructed as to operate automatically in case of fire. They cover generally an ordinary self-closing fire door and thermal fuse, in combination with a sliding catch or bolt so arranged that, while normally holding said door open, the bolt is releasable by heat and permits the door to close by its own weight.

The bill was filed within one year after the issuance of the patents in suit, they have never been litigated, and there is no proof of public acquiescence. Complainant, however, relies upon a decision adverse to the defendant McCabe in interference proceedings between him and the patentee, Kingsland, and on alleged bad faith on the part of said defendant in procuring the patent under which the alleged infringing devices are manufactured, and contends that there is no question either as to the validity of the patents in suit or their infringement. In Reed Manufacturing Company v. Smith & Winchester Company, 107 Fed. 719, 46 C. C. A. 601, a case where a similar claim was made on behalf of a recently issued patent which had not been adjudicated, this court said, concerning the effect of a decision in interference proceedings, as follows:

"The patent is a very recent one, and there is no such proof of long-continued acquiescence by the public as would raise a prima facie case in the patentee's favor. Under such circumstances it is the practice in this circuit to refuse preliminary injunction where there has been no adjudication sustaining the patent, if there appears to be any fair question as to invention, anticipation, construction, or infringement. Dickerson v. De La Vergne Refrigerating Machine Co. (C. C.) 35 Fed. 143."

The allegations in complainant's affidavits relied on to support said charge of bad faith are to the effect that said Kingsland, being an inspector of fire doors and appliances in the employ of the New York Fire Board of Underwriters, having rejected certain fire-door locks made by the defendant company and applied by the contractor to a certain building, told said contractor that he (Kingsland) had devised a new form of lock which obviated the objections to defendant's lock, and explained to said contractor certain features of its construction and operation; and that said contractor thereupon reported said conversation to defendant McCabe, and "stated that said Kingsland was getting up a fire-door lock which did away with the use of a spring, and that it would be necessary for McCabe to supply deponent with a fire-door lock without a spring in order to pass inspection." Said Kingsland alleges that thereafter he again inspected the fire doors in said building, found that they were equipped with locks manufactured by defendant and like those herein claimed to infringe; that he approved the same, and "was given to understand that James T. McCabe was willing to pay him a royalty on each of the locks that might be manufactured by said McCabe and his company of the same construction," but that although he (Kingsland) re-

fused to make any such arrangement he received from the defendant company, on March 9, 1900, a check for $10 for similar locks used on another building which he had inspected, which check he returned. Prior to the sending of said check, complainant and defendants had filed the applications on which the patents here in controversy issued, and after the sending of said check said interference was declared. The defendant McCabe alleges in his affidavit that he received no suggestion from Kingsland or said contractor that Kingsland was getting up any new lock, and makes statements which, if credited, show that said payment was merely made in order to avoid competition with Kingsland, as inspector for the board of underwriters, on such locks as he had to pass upon.

We fail to discover in complainant's affidavits any allegation which shows such conduct on the part of defendant McCabe as should deprive him of the right to defend against this application. It does not appear that said contractor disclosed to defendant the invention of the patent in suit. Defendant's right to devise a new form of lock to obviate Kingsland's objections was not affected by the mere fact that Kingsland was getting up something with the same end in view. And whatever opinion may be entertained as to the attempted payment of $10 to Kingsland as inspector, we do not perceive how such attempt can affect the issues herein, especially as the patents in suit were not granted until nearly a year and a half thereafter.

The question herein, then, is whether the Circuit Court fairly exercised its discretion in granting a preliminary injunction, in view of the rule that such injunction should be refused when there is a fair doubt as to invention, anticipation, construction, or infringement. It would serve no useful purpose to discuss at length the state of the prior art as disclosed in defendant's affidavits. It appears, however, that said Kingsland, in his prior patent, No. 576,733, described and claimed a fire-door apparatus from which, according to Kingsland's affidavit and those of complainant's experts, the patents in suit are chiefly differentiated by the utilization of the pressure of the door to insure the removal of the bolt from the path of the door. It does not appear that the operation of defendant's lock depends upon any such pressure, and the court below refused an injunction on claim 10 of patent No. 680,415, which in terms covers this arrangement. The claims as to which infringement is alleged are as follows:

Patent No. 680,415.

"(4) The combination, with a self-closing door, of a sliding bolt capable of being manually moved in the path in which it slides, and a device comprising a thermal fuse for holding it in that path, releasable by heat for permitting the movement of the bolt out of that path.

"(5) In a thermal door-closing apparatus, a self-closing door, a thermal fuse, a bar extending across the line of travel of the door and capable of being manually withdrawn out of said line of travel, a locking device connected with said thermal fuse for holding the bar in said path when the fuse is intact, and permitting the movement of the bar out of said path when the fuse is broken."

Patent No. 680,458.

"(20) The combination, with a self-closing door, of a sliding bolt capable of being manually moved in the path in which it slides, and a device

for holding it in that path, releasable by heat, for permitting the movement of the bolt out of that path."

Claim 4 of No. 680,415, and claim 20 of No. 680,458, are practically identical, and the specifications and drawings of the two patents seem to relate to the same construction, so far as the issues herein are concerned. It would seem that the only possible novel element covered by these claims is the locking device for holding the sliding bolt in its path. This device is radically different in construction from that used by defendant. The simplicity of defendant's construction, in view of a prior art, of which the court might almost take judicial notice, is at once suggestive of invalidity of the patent under which it is constructed and of noninfringement of any patented construction, especially ones so limited by the prior art and so complicated as those of the patents in suit.

It is unnecessary to discuss the other contentions of defendant. The affidavits and exhibits raise such a serious question as to infringement that, under the rule already stated, we think the application for a preliminary injunction should have been refused.

The order appealed from is reversed, with costs.

NATIONAL PHONOGRAPH CO. v. LAMBERT CO. et al.

LAMBERT CO. et al. v. EDISON PHONOGRAPH CO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1903.)

Nos. 974, 975.

1. PATENTS—INFRINGEMENT—PHONOGRAM BLANKS.

The Edison patents No. 382,418, for a phonogram blank having a tapering bore throughout its length, and No. 414,761, for a similar blank having a ribbed inner surface, both had for their purpose the production of a phonogram blank readily removable from the cylinder, and at the same time having a uniform or practically uniform contact with the cylinder throughout its length, which was an important consideration, since at the time blanks were made of wax or other soft material. Neither of such patents is infringed by phonograms which are reproductions in celluloid, by means of molds, of original records, intended to be fitted on the cylinder of the phonograph of the purchaser, and having a tapering bore, but making contact with such cylinder only at either end by means of concentric ribs. Such duplicate records are a separate commercial product, and also lack the chief feature of the blanks of the patent, which is the practically continuous contact with the cylinder throughout their length.

Appeals from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

R. N. Dyer and Edmond Wetmore, for National Phonograph Co. and Edison Phonograph Co.

Thomas F. Sheridan, for Lambert Co. and another.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The two suits above entitled were separately brought in the Circuit Court, and from the decrees therein entered separate appeals are prosecuted to this court. They are so closely related, however, both in fact, and in the law applicable to the

facts, that they were heard together, and will be disposed of in a single opinion.

The first suit was brought on letters patent No. 414,761, issued November 12, 1889, to Thomas A. Edison for improvement in phonogram blanks; and the second upon letters patent No. 382,418, issued May 8th, 1888, to Thomas A. Edison also for improvement in phonogram blanks; the first resulting in a decree sustaining the validity of the patent, but finding the appellees not guilty of infringement; and the second in a decree sustaining the validity of the patent, and finding the appellants guilty of infringement—the appellees in the first suit being the appellants in the second. To reverse these decrees, the several appeals are prosecuted.

The material part of letters patent No. 382,418 is as follows:

The object I have in view is to produce a cylindrical phonogram blank or phonogram which can be readily placed upon the phonogram-cylinder of a phonograph, and will center itself, and will also be adapted to retain its place upon the phonogram-cylinder by friction alone. This I accomplish by providing the cylindrical phonogram blank or phonogram with a tapering bore adapted to fit over a similarly-tapered phonogram-cylinder. The phonogram-blank or phonogram is provided with a cylindrical recording surface. Blanks or phonograms of the full length of the tapering phonogram-cylinder of the phonograph can be used as well as those of shorter length, the tapering bore centering the blank or phonogram, and adapting it to be pushed onto the phonogram-cylinder until it binds thereon with sufficient friction to hold it in place.

I propose to make these phonogram-blanks the entire length of the phonogram-cylinder, and also to divide such full-length phonogram-blanks into parts, so that sectional phonogram-blanks will be produced, which will be, for illustration, one-fourth, one-half, and three-fourths the length of the full-size phonogram blanks. All of these sectional phonogram blanks, as well as the full-sized phonogram-blank, will have the tapering bore, so that they can be pushed upon the tapering phonogram-cylinder until they bind, and the instrument can then be adjusted to them for recording and reproducing.

I do not claim herein a phonogram-blank having a recording surface of wax, or a wax-like material, nor such a surface mounted upon backing of tougher material, such matters being covered by my application for patent, (Case No. 734, Serial No. 252,964,) filed October 21, 1887.

What I claim is—

1. A phonogram-blank or phonogram having a bore tapered throughout its length, substantially as set forth.

2. A phonogram blank or phonogram having a cylindrical recording-surface and a tapering bore, substantially as set forth.

3. A phonogram-blank or phonogram having a cylindrical recording-surface of wax or wax-like material and provided with a tapering bore, substantially as set forth.

The material part of letters patent No. 414,761 is as follows:

My invention relates to cylindrical blanks for receiving sound-records in the phonograph, made of wax or wax-like or similar materials, and designed to be placed on the cylinder of the phonograph for receiving and reproducing the sound-record. Heretofore these cylinders have been made with a smooth inner surface fitting closely upon the cylinder of the phonograph. I have found that several advantages arise from providing the interior of the cylindrical phonogram-blank with ribs, flanges, or projections, and it is in this that my invention mainly consists. This construction makes it easier to remove the molded blank from the mold in which it is formed, enables the injurious effects of contraction or warping of the cylinder to be readily removed, and prevents any bad effect from the accumulation of dust on the cylinder of the phonograph. I prefer to form a spiral rib on the interior surface of the blank.

I find it easier to remove such a blank from the core than one having a smooth inner surface, since by slightly turning or screwing the same it can be readily withdrawn.

In the process of molding the blank while the material cools it sometimes becomes contracted or warped on its inner surface, so that it does not fit the phonogram-cylinder truly, and in this case it has to be reamed out to remove the irregularities. This has to be allowed for in making the blanks, and when the blank is made with a smooth interior the whole inner surface often has to be cut in order to make it true, and this is a matter of some difficulty and incurs a risk of injury to the blank. Where the blank is formed with an internal rib or ribs and such warping occurs, it is only necessary in order to remove it to cut away the edges of the ribs, and thus a blank having a true inner surface can be formed with less labor and expense and waste of material than where the smooth surface is used. I make the ribs always deep enough to allow for the reaming out of the cylinder. Another advantage is that when the blank is placed on the phonogram-cylinder any particles of dust or other foreign substance which may be on the cylinder enter and remain in the spaces between the ribs, instead of coming between the blank and the cylinder, where they might prevent the blank from assuming a true position and resting evenly thereon.

What I claim is—

1. A tubular phonogram-blank provided with internal ribs or projections, substantially as set forth.

2. A tabular phonogram-blank having an internal spiral rib, substantially as set forth.

The following patents were put into the record, either as anticipations, or other data material to the case:

No. 70,113, Oct. 22, 1867, A. S. Phillips.
No. 170,178, Nov. 23, 1875, L. F. Locke.
No. 200,521, Feb. 19, 1878, T. A. Edison.
No. 277,097, May 8, 1883, J. R. Abbe.
No. 309,288, Dec. 16, 1884, G. Birkmann.
No. 341,214, May 4, 1886, C. A. Bell et al.
No. 341,288, May 4, 1886, S. Tainter.
No. 375,579, Dec. 27, 1887, C. S. Tainter.
No. 380,535, April 3, 1888, C. S. Tainter.
No. 382,419, May 8, 1888, T. A. Edison.
No. 393,463, Nov. 27, 1888, T. A. Edison.
No. 393,967, Dec. 4, 1888, T. A. Edison.
No. 397,856, Feb. 12, 1889, G. H. Herrington.
No. 399,264, Mar. 12, 1889, G. H. Herrington.
No. 399,265, Mar. 12, 1889, G. H. Herrington.
No. 406,571, July 9, 1889, T. A. Edison.
No. 421,450, Feb. 18, 1890, C. S. Tainter.
No. 464,476, Dec. 1, 1891, G. H. Herrington.
No. 488,191, Dec. 20, 1892, T. A. Edison.

We do not feel called upon to pass upon the validity of either of these patents. The phonogram of defendants below, as we construe the patents, infringes the claims of neither of them. A single reference to the state of the art makes this manifest.

At the time Edison took out the first patent named, phonogram blanks were made of wax, or a wax like substance, a material more or less soft and capable of being melted at relatively low temperature. Celluloid records, more or less flexible under pressure, were not then known.

Prior to the Edison patents phonogram blanks were made with a cylindrical bore, adapted to fit over a cylinder that, at the inner end, increased in diameter, so that a push upon the phonogram would cause its inner end to grip the cylinder at some point on its enlarging exterior; and the enlargement being gradual, or in the form of a taper, the cylinder adapted itself to such variable diameters of the phonogram as was brought about by temperature or other causes.

Edison, for reasons perfectly obvious as we see it now, substituted, for this character of a cylinder, a cylinder having a uniform taper throughout, and fitted this with a phonogram having a correspondingly tapering bore. This enabled him to fit the phonogram upon the cylinder so that it gripped or bound, not at one end only, but throughout its length; manifestly with two objects in view—that the soft material out of which the blank was then made should have a securer base; and that with a base secure throughout its length, the blank could be more readily withdrawn from a tapering than from a concentric cylinder. These were the underlying concepts of the first patent.

But phonograms, thus fitting closely upon the corresponding cylinder, were found to have disadvantages; among them the fact that contact of surface throughout their length, made it more difficult to withdraw the blank from the cylinder. Hence in patent No. 414,761, Edison substituted a phonogram blank, the interior of which was provided with ribs, flanges or projections, preferably spiral. This enabled the operator, where warping occurred, to remove it by cutting away the edges of the ribs, leaving a blank having a true inner surface; but retained at the same time the advantage of practical continuous contact throughout the length of the phonogram; for such would be the effect were the ribs spiral, or even concentric at very short intervals. The second patent is an improvement only on the first, and makes no pretense of departing from its underlying purpose, namely, a close contact throughout the length of the joint.

The phonograms of defendants below are not cut upon the cylinder. They are but reproductions in celluloid, by means of molds, of original records. They are a separate commercial product, sold independently of the cylinder, and intended to be fitted on the cylinder of the phonograph owned by the purchaser. To this end—the bore being tapering because the cylinder is tapering—an edged concentric rib is placed at the extreme inner or larger end of the phonogram gripping the inner end of the cylinder; and another edged rib, at the extreme outer or smaller end of the phonogram, causes a close contact to be made between that end of the blank and the outer end of the cylinder. There are no intervening ribs, and, owing to the character of the material used, there is need of none. The use of these two ribs is but the fitting of the blank, in the simplest and most obvious way, to a tapering cylinder.

But the celluloid blank with its end ribs does not depend upon uniform contact throughout the length of the cylinder, or contact at such intervals as to be practically uniform, as its distinctive mechanical basis or concept. Had wax, or a wax like substance, re-

mained the only material out of which phonograms could be made, the form of phonogram of defendants below would have been impracticable. It is in fact practicable, not by adopting the mechanical conception pointed out in the patent, but by introducing a new character of material not before known. It is this discovery of a new material that makes it possible to disregard the previous necessity of close contact, and at the same time enable the blank to be readily taken off, for only the single inner rib grips the cylinder. Thus the real means that brings about successful operation of the phonogram of defendants below is not the adoption of the Edison idea, but the introduction into the art of a new substance. Unless the ribs were employed as indicated, there could be no adaptation of these independently made blanks to the purchasers' phonograph, and this long step in the art—the making of blanks of celluloid, in multiple by means of molds, thus immensely cheapening them—would be almost useless.

The decree of the Circuit Court in case No. 974 will be affirmed, and the decree of the Circuit Court in case No. 975 will be reversed with the direction to dismiss the bill for want of equity

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ELECTRIC SMELTING & ALUMINUM CO. v. PITTSBURG REDUCTION CO.

(Circuit Court of Appeals, Second Circuit. October 20, 1903.)

No. 136.

1. PATENTS—INFRINGEMENT—PROCESS FOR REDUCTION OF ALUMINIUM ORES.
The Bradley patent, No. 468,148, for a process of separating metals from their highly refractory ores, relating especially to aluminium ores, the essential features of which are, first, dispensing with external heat, and, second, the use of the same electric current to produce and maintain fusion and electrolyze the ore, was not anticipated, and its claims are entitled to a liberal construction. The Hall process, covered by patent No. 400,766, in which cryolite is used as a fusing bath for alumina, while an improvement upon, is also an infringement of, the Bradley process, when practiced without the use of external heat for fusing the ore.

2. SAME—ANTICIPATION.
The experiments made by Sir Humphrey Davy in 1807, in which he decomposed small pieces of potash or soda rendered conductive by moisture, by using an electric current to effect both fusion and decomposition, while interesting as experiments, cannot be held an anticipation of the Bradley process for the reduction of aluminium ores, in view of the facts that the materials operated upon were wholly different, and that for 75 years, with such experiments before them, chemists and electricians were unable to make the possibilities suggested thereby practically available for the separation of aluminium from its ores. Moreover, attempts of Davy himself to separate alumina by means similar to those employed with soda and potash were unsuccessful.

3. SAME—PROCESS.
A process is not an anticipation of one subsequently patented, unless, if invented later, it would have been an infringement.

4. SAME—PRIOR PUBLICATION—INDEFINITENESS OF DESCRIPTION.
An article describing in very general terms a process of some unknown inventor for the reduction of aluminium, as explained at a meeting of mining engineers by one who had not seen it practiced, but spoke from

hearsay only, is not such a publication as constitutes an anticipation of a process subsequently invented and patented by another.

5. SAME—EVIDENCE OF INVENTION.
The fact that a large number of processes for the separation of aluminium from its ores were patented, in all of which external heat was used to fuse the ore, and maintain it in a fused state, some of the applications having been made after that of Bradley, on which patent No. 468,148 was issued, for a process, now exclusively used, in which both fusion and electrolysis were produced by the same electric current, is persuasive evidence, not only that the Bradley process was not anticipated, but that it involved invention.

6. SAME—INFRINGEMENT—CONSTRUCTION OF CLAIMS.
The claims of the Bradley patent, No. 468,148, for a process for the reduction of aluminium, in which the same electric current is used to fuse and electrolyze the ore, are not limited to a process in which a current of twice the ordinary strength is used, by the statement in the specification, in describing a particular case illustrating the process, that a current about twice as strong was employed as was used when the fusion was produced by external heat; nor is infringement avoided where the increased effectiveness of the current is obtained by reducing the resistance, instead of increasing the strength of the current.

7. SAME—PROCESS—USE OF DIFFERENT APPARATUS.
A patent process cannot be appropriated because the infringer practices it with new, enlarged, and improved apparatus.

8. SAME—CONSTRUCTION OF CLAIMS.
In the construction of a generic process patent, every phenomenon observed during operation and every minute detail described in illustrating the process in the specification is not to be read into the claims as a limitation, to avoid a charge of infringement.

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

Appeal from a decree dismissing bill filed by the complainant for the infringement of two letters patent granted to C. S. Bradley, the patent in controversy on this appeal being No. 468,148. The opinion of the Circuit Court will be found in 111 Fed. 742.

F. H. Betts and E. N. Dickerson, for appellant.

T. W. Bakewell and Thomas B. Kerr, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The patent in controversy was granted February 2, 1892, to Charles S. Bradley for an improvement in processes for separating, by the electric current, aluminium from its ores or compounds.

The specification states that the difficulty with the process theretofore in vogue was that it was carried on by subjecting the fused ore to the action of the electric current in a crucible placed in a heating-furnace. It is said that by this process the fused ore fluxes with the crucible and the fluorine gas liberated attacks the material of the crucible and destroys it. The main object of the invention is to prevent these disastrous results by dispensing with the external application of heat to the ore, which is accomplished by employing an electric current of greater intensity than is required to produce the electrolytic decomposition alone. In this way the ore is maintained in a state of fusion by the heat developed by the passage of the current through the melted mass. The current performs two distinct functions.

First, it keeps the ore melted by having a portion of its electrical energy converted into heat, and second, it effects the desired electrolytical decomposition, by which means the heat, being produced in the ore itself, is concentrated at exactly the point where it is required to keep the ore in a state of fusion.

Bradley dispenses with the crucible and uses a heap of the ore itself to constitute the vessel in which the reduction takes place, which is not destroyed as was the crucible and admits of the process being continuous, nothing being required but the charging of fresh ore as fast as the reduction goes on either from without or from the sides or walls of the heap itself.

The patent contains six claims, the first three being intended to cover the process as applied to the separation of metals from any highly refractory ores or compounds. Of this group claim one may be taken as an example. It is as follows:

"(1) The process of separating or dissociating metals from their highly refractory ores or compounds, nonconductors in an unfused state, of which the ores and compounds of aluminium are a type, which consists in fusing the refractory ore or compound progressively by a source of heat concentrated directly upon it rather than by an external furnace and as it becomes fused effecting electrolysis by passing an electric current therethrough between terminals which are maintained in circuit with the fused bath, whereby the process is rendered continuous, substantially as set forth."

The last three claims are limited to the application of the process to separating aluminium from its ores or compounds. Of this group claim four may be taken as an example, as follows:

(4) The process of separating or dissociating aluminium from its ores or compounds, consisting in fusing and maintaining the fusion and electrolytically decomposing the ore or compound by the passage of the electric current therethrough, substantially as set forth."

The Circuit Court found that the claims were not infringed and dismissed the bill. The complainant assigns error, contending that the court erred in placing a narrow construction upon the claims, and in holding that the defendant's process did not infringe. The complainant also contends that the court erred in holding that the success of defendant's process was due to the invention of Hall and not to Bradley and insists that the court should not have followed the rulings and decision of the Circuit Court for the Northern District of Ohio in an action pending between the defendant and Cowles Electric Smelting & Aluminum Company, but should have followed the decision of the Circuit Court of Appeals for the Sixth Circuit in the suit of Lowry against the said Cowles Company.

The questions determined in the Ohio case are not involved in the present controversy. Lowry v. Cowles Co. (C. C.) 68 Fed. 354, reversed on appeal 79 Fed. 331, 24 C. C. A. 616. Although both parties quote from these opinions in aid of their present contentions we think it advisable to be guided solely by the facts appearing in the present record. The question actually decided in that case was one of title and though the court made use, tentatively, of expressions which, considered apart from the context, may be regarded as applicable here, yet it is quite obvious that there was no intention to do more than de-

cide the narrow question involved. Indeed, the Circuit Court of Appeals says so explicitly, at page 630, in these words:

"We are not required to pass upon the validity of the patents involved in this suit, or any of them. There is no issue of that kind before us."

These opinions, and others which have been delivered during the protracted litigations over the Bradley and Hall patents, are helpful upon many of the propositions now under discussion, but they cannot be regarded as controlling to such an extent as to justify the court in dispensing with an independent investigation of the issues arising in the present controversy.

The application for the patent in suit was filed February 23, 1883, which may be taken as the date of Bradley's invention. Prior to this date it was known that metals contained in ores which are conductors could be separated therefrom by electricity, but the problem of separating metals from nonconducting ores by this method had not been solved. The compounds of aluminium at ordinary temperature are nonconductors. It had, therefore, been the custom to place these refractory ores in a crucible, apply external heat until the ore was melted and then pass an electric current through the melted mass. In this way a pure product was obtained in small quantities, but as the specification states, the intense heat soon destroyed the crucible and the process could not be worked upon a successful commercial basis. This controversy relates solely to the separation of aluminium from its ores; three of the claims are designed to cover the process when so limited and the remaining claims relate to highly refractory ores of which the compounds of aluminium are a type. The defendant is engaged in producing aluminium. The investigation may, therefore, be confined to this one metal, for if the patent, when so limited, be valid and if the claims cover the defendant's process it matters not what else they cover or fail to cover.

We start, then, with the undisputed fact that prior to Bradley's invention no one had ever succeeded in separating aluminium from its compounds solely by the use of electricity, or, in other words, no one had dispensed with external heat.

The reference principally relied on to anticipate or limit the claims is the description of an experiment made by Sir Humphrey Davy in 1807 and published the following year in "Philosophical Transactions of the Royal Society of London." Davy tried several experiments on the electrization of potash rendered fluid by heat and only attained his object by employing electricity as the common agent for fusion and decomposition. A small piece of potash, which had been exposed for a few seconds to the atmosphere for the purpose of producing moisture, was placed on an insulated disc of platina, connected with the negative side of the battery of the power of 250 of 6 and 4 in a state of intense activity; and a platina wire, communicating with the positive side, was brought in contact with the upper surface of the alkali. The potash soon began to fuse at both its points of electrization. There was a violent effervescence at the upper surface; at the negative surface there was no liberation of elastic fluid; but small globules having a high metallic lustre, like quicksilver,

appeared, some of which burned with explosion and bright flame as soon as they were formed, others remained, were merely tarnished and were finally covered with a white film. Numerous experiments soon showed that these globules of sodium and potassium were the substances of which Davy was in search. Here, then, was an interesting experiment but nothing more. It was not made with the ores of aluminium, but with minute pieces of soda and potash which were rendered conductive by moisture induced by previous exposure to the atmosphere.

In a work on aluminium, published by Tissier in 1858, it is stated that, in 1807, Davy undertook to decompose alumina by the battery, as he had decomposed potash and soda, "but he failed completely." In fact, Davy himself admits that his experiments in this regard were without substantial results. His method was incapable of producing results upon a commercial scale. He had no conception of progressive feeding or of a fused bath, or regulating the strength of the electric current. The experiment was undoubtedly a brilliant one, but it can no more be regarded as an anticipation of the Bradley process than it could be regarded as an infringement if made to-day for the first time. That such a claim of infringement might be asserted is, perhaps, conceivable, but that it could be sustained is an unthinkable proposition.

Davy suggested the possibility of producing metal from certain ores conductive in a fused state, and this hint, for it was hardly more, undoubtedly set the chemists and electricians thinking, just as the discovery of Franklin put the idea of the telegraph into the brain of Morse and as the discovery of Watt made possible the inventions of Stephenson and Fulton. Judged by its practical results, the contribution of Davy was not as valuable as it now appears when read in the light of subsequent achievement. For three-quarters of a century chemists and electricians all over the world, with Davy's work before them, were endeavoring to find a method of producing aluminium commercially, and they all failed. After Davy's experiment no further effort of the inventive faculties was required, says the defendant. All that a manufacturer needed to do was to operate the Davy process on a large scale. To do this no expert knowledge was required. And yet manufacturers not only, but the most learned specialists of the age, permitted this treasure of inestimable value to remain in plain view before them and would not even stoop to pick it up. The fact that Davy's experiment was permitted to lie dormant during 76 years of intense activity in chemistry, electricity and metallurgy is almost conclusive evidence that the defendant has greatly overestimated its importance.

Duvivier's experiment of 1854 has even less bearing upon the present controversy. A small piece of disthene was exposed to the electric flame, undoubtedly an electric arc, disengaged from a carbon point about as large as a drawing pencil. It was melted at the end of three or four minutes and the aluminium, freed from its oxygen, showed itself at the surface of the molten material. A small globule set on the outer edge flattened out as it cooled and, when scratched with the point of a knife, it showed silver white and in hardness it re-

sembled pure silver. That this was aluminium is not shown and cannot be shown, as the only test to which it was subjected was the one above stated. The entire description is meager and uncertain and by no means as definite and satisfactory as the prior experiment of Davy.

The Siemens British patent of 1879 also describes the use of an electric arc for the fusion of metals, but electrolysis cannot be so accomplished.

The United States patent to Ball and Guest, of January, 1881, is for an improvement in "electrical carbonizing apparatus." It does not relate to the separation of aluminium, or any other metal, from its ores by electricity.

Faure's French patent, of 1880, describes an invention the object of which is "the manufacture of metallic sodium, of the cyanides, by fixing atmospheric nitrogen, and in general the treatment, at high temperature, of alkaline salts or metals." He employs electric arcs and external heat to produce high temperatures, and secures the sodium by chemical reaction.

The British patent to Lane Fox, of 1878, is for "improvements in the application of electricity to lighting and heating purposes," and discloses nothing more than the Ball and Guest patent, supra. It has no application to electrolyzing refractory ores.

The article printed in the "Transactions of the American Institute of Mining Engineers," in May, 1882, describes the process of some unknown inventor as it was explained to the Institute by Prof. Howe. Assuming this to be a "publication" within the meaning of the law it is too indeterminate to be of value as an anticipation. Prof. Howe did not pretend to have any personal knowledge of the facts and merely gave a brief statement of what had been told him. That he had reference to an arc process is evident from the following language: "A voltaic arc is then thrown across from another electrode against the carbon crucible," which is described as the cathode. It seems to be conceded on all hands that the use of an arc constitutes "a radical and fatal departure" from the process involved in this controversy. The person who actually practiced the method of producing aluminium described by Prof. Howe may have accomplished something of practical value and he may not. No one knows. Had he done so it is, perhaps, fairly inferable that something more would have been heard of it in the art of electrolysis. The name, at least, of so eminent an inventor would not have been permitted to remain long in obscurity. It might have taken time and persuasion but, eventually, his reluctance to being enrolled among the immortals would have been overcome.

The court understands that the foregoing are all the references relied on by the defendant to anticipate the Bradley claims. This supposition may be inaccurate because, in the multitude of exhibits and maze of contradictions with which this ponderous record abounds, perfect accuracy is well-nigh impossible. It is thought that they describe the only instances where, in the prior art, there was an attempt to dispense with external heating and to utilize the electric current for the double purpose of fusion and electrolysis. That they do not anticipate, or materially restrict, the Bradley patent seems self-evident.

Extended discussion on this point is rendered unnecessary for the reason that failure to prove anticipation is found by the Circuit Court and is hardly disputed by the defendant.

The principal expert for the defendant, Dr. Chandler, whose reputation for learning and ability is well known to the courts, although of the opinion that slight modifications of the previous methods would produce the Bradley process, nevertheless admits frankly:

"I do not recall any one process which, when applied to the ore of aluminium, would without any modification whatever have produced aluminium, in which process both the fusion and the electrolysis would have been accomplished by the electric current."

Not only did the electricians of the earlier art fail to produce aluminium by electricity alone, but the wrecks which strew the pathway, which Davy pointed out nearly a century ago, offer mute but impressive proof of the genius of the man who first surmounted its many obstacles and reached the destination in safety. Indeed, after numerous abortive attempts and repeated failures the electrical world seemed to have settled down into the belief that aluminium could not be produced by the sole agency of electricity. Accordingly the effort of inventors was directed to the perfection of processes in which external heat was employed to melt the ore and keep it in a fused state. The record abounds in such instances. Patent after patent is introduced claiming new methods of separating aluminium from its ores, but in every instance external fire is used to fuse the bath and maintain it in a fused condition. Many of these inventions were long after the introduction of dynamos and they continued to be made and practiced for several years after the Bradley invention. Indeed, so strongly was the inventive trend towards the employment of external heat that even the defendant's inventor, Hall, could not be induced to dispense with its use until 1889. When the defendant's works were started at Pittsburgh, in December, 1888, the pots were built to be externally heated and they were so heated for some time thereafter. The Hall patent of April 2, 1889, which was applied for July 9, 1886, three years after the Bradley application, was for improvements in the "process of reducing aluminium by electrolysis." In this patent externally heated crucibles are shown in the drawing and described in the specification.

Since the Bradley invention aluminium, which formerly was regarded as one of the precious metals, has become as common as copper and brass and its price has been reduced from $15 per pound to 25 cents per pound. We do not intend to intimate that this marvelous change was due solely to Bradley's invention, but simply, at this time, to emphasize the fact that it took place after Bradley's invention. If he has done nothing to produce this result he is, of course, entitled to no consideration whatever, but if he has contributed something he is entitled to protection to the extent of that contribution, be it much or little.

We have proceeded thus far to the conclusion that we are dealing with a patent which discloses a meritorious process for producing aluminium in large quantities, the essential features of which are, first

dispensing with external heat, and, second, the use of the same electric current to produce and maintain fusion and electrolyze the ores of aluminium. We are unable to discover anything in the prior art describing this process or anything closely approximating thereto. The patent is, therefore, not anticipated and its claims are entitled to a liberal construction.

The judge of the Circuit Court, after careful and painstaking research, reached the conclusion that Bradley had made a valuable invention, but he failed to grant relief to the complainant upon the theory that the process which the defendant uses was an entirely separate invention, neither dependent upon nor subsidiary to the invention of Bradley. In this we think there was error. Hall's achievement should be considered in the light of an improvement upon Bradley's fundamental discovery. There can be little doubt that the defendant's process is a valuable one and that to it is largely due the cheap aluminium of the present day. There is not the least disposition to detract from the merits of Hall or minimize his contribution to the art. Indeed, it may be conceded that, if the novel features so introduced be secured by a valid patent, he can hold the monopoly against all, Bradley included. This concession does not permit him, however, to appropriate the broad invention. He does not acquire the right to use the Bradley process simply because he has improved that process. He is entitled to enjoy what is his, but in so doing he cannot appropriate the property of another. The record discloses nothing unusual in this regard. It is rarely that an invention develops ultimate perfection in the hands of the inventor. The test of actual use discovers defects to be remedied and suggests improvements to be made. If the inventor produces a new and useful result he does not lose his reward because he, or some one else, subsequently renders it more useful. This proposition may be made plain by an analogy taken from a kindred art. It is not perfect; no analogy is, but it will serve as an illustration. Charles F. Brush was the de jure inventor in the United States of a secondary battery having its electrodes mechanically coated with active material, as distinguished from the electrode coated by the slow and expensive process of electrical disintegration discovered by Gaston Planté. The electrodes first used by Brush were crude and incapable of commercial work. The lead powder was held in place by blotting paper tied by a string, and the battery succeeded, after charging, in developing a current of only sufficient strength to ring a call bell, but the principle was thus established which has since been utilized to propel heavy vans and railway carriages. Although Brush had made the broad invention Faure made the important discovery that the active material could be placed on the supports in the form of a paste, paint or cement and to this improvement the commercial efficacy of the invention was due. Although the Brush patents were subjected to fierce attack during their entire existence it was never thought that they could be invalidated or ignored because Faure had discovered a method of carrying out the invention which was far superior to anything discovered by Brush. No one could use Faure's improvement without infringing the broad patent of Brush and no one could use the improvement without in-

fringing the patent of Faure. When worked together success was assured.

We have, then, a valid patent with claims which, on their face, clearly cover the infringing process and yet the principal defense is noninfringement; the contention being that when these claims are construed in the light of the description and the prior art there is no infringement.

Considerable time has been devoted, in the court below and in the briefs, to a consideration of the patent to Hall, under which the defendant is said to operate. It is thought this discussion is irrelevant, for the reason that the patent was not granted until 1889 and does not disclose the process which the defendant uses and of which the complainant complains. The process patented to Hall adopts external heat to produce fusion, the specification showing and describing an iron or steel carbon-lined crucible which is "placed in a suitable furnace, B, and subjected to a sufficient heat to fuse the materials placed therein." It was only when the defendant abandoned the "furnace, B," and adopted the Bradley method of fusing by means of the electric current that the charge of infringement was made. It seems evident that the defendant may practice the invention of the Hall patent with perfect impunity so far as the Bradley patent is concerned. Neither is it important to determine whether Hall knew of Bradley's invention when he made the discovery which induced him to dispense with his melting pots. It is enough that it was at least three years after Bradley's invention. Whether Hall was an independent inventor or appropriated Bradley's idea, is utterly immaterial.

What the defendant does is this: It uses a series of metal pots, the sides and bottom of each being lined with carbon, connected in series with a direct current generator, each pot holding about 450 pounds of molten bath material. The bottom carbon lining is the cathode and a group of carbon cylinders, three inches in diameter, suitably suspended on copper stems and connected with the positive pole of the dynamo is the anode. Suitable conductors also extend from the metal shell of the pot to the negative pole of the dynamo. The bath material consists of a compound of fluoride of aluminium, fluoride of sodium and some fluoride of calcium. Alumina is added when the bath is in a molten condition and it is asserted that it dissolves freely upon being stirred in the bath. The electric current is sent through the solution by raising slightly the carbon rods and the alumina is decomposed, the metal going to the negative electrode at the bottom of the pot. The oxygen goes to the anode and escapes in the form of carbonic oxide gas. As the alumina is decomposed the bath is charged with fresh quantities, thus making the process continuous. No external fire is used. When a new pot is started the method usually adopted is to ladle into it the liquid material from an old pot, but sometimes a new pot is started from cold materials in which case the anodes are short-circuited for several hours and the current brings their ends and the adjacent parts of the lining to a red heat, the double fluoride is piled around the anodes and left for several hours until the compound is melted by the heat conducted from the lining. The alumina is then added and the process goes on as before.

To a layman this seems impressively similar to the description in the Bradley patent, but it is not surprising that skilled scientists, familiar with every detail of the art, have been able to point out discrepancies. That differences exist cannot be denied; that they are material is strenuously denied. To use an expression more familiar to lawyers than to electricians, the complainant contends that there has been a failure to "distinguish on principle" the defendant's process from the process of the patent. Speaking generally, it is thought that most of the points at variance relied on can be traced directly to the improvement introduced by Hall, namely, the use of cryolite as a solvent for alumina. Were it not for this change it is hardly probable that infringement would be denied. But the change of materials does not create a new process but a new way of working the old process. The complainant's position regarding the Hall process, as used by the defendant, is sententiously stated in one of the briefs as follows:

"We contend that the process actually practiced by defendants is that of Hall minus the impracticable external heating feature shown by Hall, and plus the desirable and eminently successful internal heating feature of Bradley."

Hall starts by fusing cryolite and maintaining fusion by means of the electric current; so does Bradley; at least in the example given in the patent cryolite is the ore mentioned. If no other ore were added by Hall the processes up to this point would be identical. But Hall found that alumina, which is just as much an ore of aluminium as is cryolite, dissolves readily with cryolite as a solvent or flux, and he was thus enabled to produce a more efficient and cheaper electrolyte. The Bradley process is not confined to cryolite or alumina; it relates to all ores or compounds of aluminium and all other refractory ores of a like type. Cryolite is mentioned as an illustration in the specification, but it might as well have mentioned alumina or any other similar ore. That there is nothing in the patent, or out of the patent, requiring the limitation of the claims to cryolite seems too plain for debate. The process may be used with cryolite alone or alumina alone or with both together, whether applied synchronically or successively. In either case the essential features of the process are appropriated.

Again, it is argued that the claims are limited to an electric current twice as strong as that formerly employed when external heat was used and that defendant does not use such a current, and therefore, does not infringe. We are not satisfied that this proposition has been established. The patentee says:

"In order to accomplish this object, I employ an electric current of greater strength or intensity than what would be required to produce the electrolytic decomposition alone."

And, again:

"I employ, as I have already stated, an electric current sufficiently powerful not only to affect the electrolytic decomposition of the ore treated, but also to develop by its passage the heat required to keep the ore fused."

The meaning of this is obvious. A current must be employed sufficiently powerful to do the work in hand and, as more work is required,

the current must be of greater strength than that used when electrolysis alone was required of it. No amount of scientific theory can overthrow the plain fact that when additional work is required additional power must be provided. If one horse is to carry the load of two he must be stronger than either of those whose place he takes. He need not necessarily be "twice as strong," although such a standard of comparison would be a wise one to follow. After a few trials his owner will know what changes to make in harness and load in order to economize "horse power." So a current which is to fuse, maintain fusion and electrolyze must be of greater power than one whose sole vocation is to electrolyze. It has two additional burdens laid upon it which require expenditure of energy, relieved of these there is more strength for electrolysis.

The patentee says further:

"I have found that by using an electric current about twice as strong as would be employed to perform a given amount of electrolytic work in the ordinary way in externally heated crucibles, I am enabled to keep the ore fused according to my invention without the application of any external heat whatever."

It must be remembered that he is here illustrating his invention "as applied in one particular case to the extraction of aluminium from its ore cryolite," by the simple and embryonic apparatus shown in the drawings. There is no attempt to state a hard and fast rule applicable to all cases alike without reference to the size of the containing vessel, the quantity and character of the ore, and the amount of loss produced by conduction and radiation. The patentee, as required to do by statute, is simply giving those familiar with the art the information, which he has found to be of value, that, in the circumstances stated by him, the current should be not twice as strong, but "about" twice as strong as in the old method. He is not attempting to inform the skilled electrician what current will be required if some other ore, or combination of ores, be used or if the process be employed with pots of much larger capacity, upon an immense scale and under different conditions. There is not a word in the claims limiting them to a current double the old capacity, and we are unable to perceive any reason why the claims should be eviscerated by importing into them the statements of a formula intended only as an illustration. The patentee undoubtedly does say that, as compared with the old method, a more powerful current is employed, but he does not say that this result can only be produced by increasing the voltage. It may be accomplished by decreasing the resistance of the bath, and this is apparently what the defendant has done. The general manager of the defendant says:

"We have never made at any one time a radical change in voltage. We have, however, as we improved our practice, slowly lowered the resistance, enabling us to get the required current density with less voltage."

Even if it be admitted that defendant has not raised the voltage, infringement cannot be avoided for the reason that the same result has been reached by increasing the size of the bath and of the electrodes and in this way decreasing the resistance. In one case the

voltage is increased and in the other the resistance is decreased, both embody the essence of the invention.

Again, it is said that the patent provides that the heat must be generated in the fused ore itself and that the claims can be evaded by any one possessing sufficient intelligence to generate a portion of the heat elsewhere. It is admitted that in the defendant's process some heat is generated in the fused ore and that in the Bradley process some heat is generated by the resistance of the electrodes. The fact that the defendant has made mechanical changes in the containing vessels and thus gets a greater proportion of heat from the electrodes than from the fused ore is a mere incident of the new construction and immaterial upon the question of infringement. A patented process cannot be appropriated because the infringer practices it with new, enlarged and improved apparatus.

The suggestion that the defendant does not use the Bradley process because it does not regulate the strength of the current by raising and lowering the e. m. f. of the generator, as provided in the specification, applies only to the sixth claim where the regulation of the current is made an element. The proposition is, however, untenable from any point of view, for the reason that defendant does regulate its current, not, it is true, in the precise manner described in the patent, but in a manner clearly its equivalent.

The argument based upon the alleged distinction between "fusion" and "solution" is supported by considerations too technical and refined for practical adoption. The proof leaves no doubt as to what the defendant actually does and it seems to us a matter of no moment whether the reduction of the alumina to a fluid state is described as "fusion," "solution" or "fluxing." If the defendant had added fresh quantities of cryolite to the bath it would have followed the exact formula of the patent and the liquefaction would have been properly denominated as "fusion" or "solution." The fact that the "fresh material," or "fresh quantities of the ore or compound," happened to be alumina instead of cryolite does not, in the eye of the patent law, change the nature of the process, even though one may be "fused" and the other "dissolved."

Various other limitations upon the claims are urged by which the defendant seeks to avoid infringement. They are of the same general nature and proceed upon the same initial fallacy, namely, that in a generic process patent every phenomenon observed during operation and every minute detail described must be read into the claims and that the least departure from the claims as so construed avoids infringement. Neither position is tenable. In a patent like Bradley's the claims should be as broad as the invention and, even if unnecessary and unreasonable limitations are incorporated in the claims, the court should interpret them liberally and not permit a defendant to escape who reaches the same result by analogous means, though he may employ additional elements and improve mechanical appliances.

In Ventilating Co. v. Fuller & Warren Co., 57 Fed. 626, 6 C. C. A. 481, the court says:

"The actual invention, if in conformity with the language of the claims, should control in the construction of patents. A strict construction should

not be resorted to if it becomes a limitation upon the actual invention, unless such construction is required by the claim, it being understood that the construction should not go beyond and enlarge the limitations of the claim."

In Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279, the court says, at page 733, 102 U. S., 26 L. Ed. 279:

"It is probably true, as contended for by defendants, that by the use of a small portion of lime, the process can be performed with less heat than if none is used. It may be an improvement to use the lime for that purpose; but the process remains substantially the same. The patent cannot be evaded in that way."

It is asserted that the Bradley process is not operative. Having found that the defendant is using the process and it appearing that the annual output of its works is now over seven million pounds, it seems unnecessary to enter upon an extended discussion of this proposition. There is, however, ample proof that the patented process when practiced experimentally produced aluminium and there is also proof that practically the same process was commercially operated for short periods both in this country and in Europe. The owners of the patent have not attempted to operate under it of late years, but the reasons are obvious. Some of the more important of these reasons are as follows: The protracted litigation over the title, the suit based upon the Hall patent, the present suit and the impossibility of commercial competition with the defendant without using the so-called Hall improvement or some other improvement equally cheap and effective. The cryolite alumina electrolyte cannot be used so long as the decision sustaining the validity of the Hall patent remains undisturbed.

To attempt a discussion of all the questions mooted in the briefs would extend this decision beyond all reasonable length and would serve no beneficial purpose. Even were it possible to do so it is surely unnecessary to follow all of the excursions of the experts into the occult realms of electro-chemical science. Some of these trails seem to vanish into thin air, others are lost in a desert of technicalities and of others still it is true that he who attempts to travel them is quite likely to find himself wandering aimlessly "through caverns measureless to man."

Although the appeal included both patents the argument has been confined wholly to No. 468,148.

It follows that the decree, in so far as it relates to letters patent No. 464,933, must be affirmed with the costs of this appeal, and in so far as it relates to No. 468,148 the decree is reversed with the costs of this appeal and the cause is remanded to the Circuit Court with instructions to enter a decree in favor of the complainant for an injunction and an accounting, with costs.

ARMAT MOVING PICTURE CO. v. EDISON MFG. CO.

(Circuit Court of Appeals, Second Circuit. July 24, 1903.)

No. 184.

1. APPEAL—APPEALABLE ORDERS—CONTINUANCE OF INTERLOCUTORY INJUNCTION.
Under section 7 of the act creating the Circuit Courts of Appeals, as amended by Act June 6, 1900 (chapter 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550]), which provides for an appeal from any interlocutory order or decree granting "or continuing" an injunction, an order made on an application for reargument of a motion for an injunction and a motion to vacate, overruling both said motions and continuing the injunction previously granted, is appealable, although the original injunction was not formally vacated, but merely suspended pending the disposition of such motions.

2. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
Where the defense of license is set up in a suit for infringement of a patent, and the evidence offered on the hearing of a motion for a preliminary injunction is of such contradictory character that the validity of such license cannot be determined therefrom, an injunction should not be granted until final hearing.

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

See 121 Fed. 559.

Edmund Wetmore and Richard N. Dyer, for appellant.

Melville Church, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The appeal herein is taken from an order continuing a preliminary injunction previously granted to restrain defendant from infringing complainant's patent, No. 586,953, issued July 20, 1897, to Jenkins and Armat, for improvements in phantoscopes.

Complainant contends that the order is not appealable, because the court continued the original injunction instead of first formally vacating and then continuing it. Section 7 of the Evarts act, as amended by the act of June 6, 1900 (chapter 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550]), provides for an appeal from "any interlocutory order or decree granting or continuing" an injunction. In the case at bar the original injunction was suspended pending a hearing on a motion to show cause why the same should not be vacated, and thereafter the court, in its disposition of said motion, entered the following order:

"Ordered, that the motion for rehearing or reargument of the motion for preliminary injunction and the motion to vacate the order for preliminary injunction are denied, and that the preliminary injunction heretofore granted is continued."

¶ 1. Review of interlocutory decree granting or continuing injunction in Circuit Court of Appeals in patent cases, see notes to Fisher v. Browne, 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; New York, N. H. & H. R. Co. v. Sayles, 32 C. C. A. 484.

¶ 2. See Patents, vol. 38, Cent. Dig. § 489.

The objection is technical and formal, and, in view of the language of the act, and of the fact that the action of the court was in accordance with the settled practice in this circuit, should not be sustained.

It is contended that an order continuing an injunction, in order to be appealable, must have some additional effect upon the rights of the parties. Even if this be so (a question which we do not decide), we think the order herein satisfies the statute as thus construed. The original injunction, absolute in terms, was only granted until the further order of the court. Thereafter, a motion for rehearing having been filed, the court suspended the injunction. The motion for rehearing having been argued upon new proofs, and having been denied, two new orders were entered, the one continuing the injunction, the other suspending its operation pending the appeal from the order of continuance. In these circumstances, a new state of facts having been presented and the rights of the parties having been determined anew thereunder, the practical effect was the same as though the court had originally vacated the order instead of suspending it.

The appeal raises the single question of the validity of a license to defendant. It appears from the affidavits and exhibits that on March 25, 1895, Jenkins, one of the patentees of the patent in suit, having filed certain applications for patents for a phantoscope and some new methods of photography, assigned to Armat, the other patentee of the patent in suit, a "one-half interest in the stereopticon or projecting phantoscope, as distinguished from the cabinet form of the instrument," and in any improvements to or patents therein. The assignment further provided for the "promotion" of said invention by Armat, "said promotion to consist in personal efforts on the part of the party of the second part to dispose of said invention to the best possible advantage." On August 28, 1895, Jenkins and Armat filed their joint application for the patent in suit. On May 14, 1896, Jenkins executed an agreement to the American Graphophone Company purporting to grant to it "the exclusive right to make, sell, use and operate the inventions of the party of the first part relating to a process and application known as 'Phantoscope,' including in said term any and all processes, apparatus, devices or appliances for, or in any manner relating to, the exhibition of photographic representations of moving or other objects, such exclusive license to extend to all inventions of the above character in which the said party of the first part now has, or may hereafter have or acquire, any right or interest." On December 24, 1902, said grantee licensed the defendant to use the inventions embraced in said grant from Jenkins, specifically including therein a license under the patent in suit. But on May 15, 1896, Armat, claiming to act under the authority of said contract of March 25, 1895, executed an assignment of the entire right of Jenkins and Armat in the inventions relating to the phantoscope, including the application for the patent in suit, to parties through whom the complainant claims title. Upon these and other facts the complainant contended that, as Jenkins had no legal title to the joint invention when he executed said license, the patent therefor not having then issued, and no title to the patent after issue, by

reason of said Armat assignment of May 15, 1896, prior to the issuance of said patent, the attempted license by Jenkins to the graphophone company was void. The court, in disposing of the question, held as follows:

"The defense of license from some one who, it is claimed, has some interest in a patent sued upon, is one to be made out by defendant by a fair preponderance of proof. In this case there seems not to be sufficient identification of the invention of the patent in suit to Armat and Jenkins with the invention of Jenkins himself, which was the subject of his contract with the graphophone company. It is thought, therefore, that the moving papers do not present sufficient reasons for modifying the injunction already granted, and the motion for rehearing is denied.

"The order of denial should itself contain a clause continuing the injunction, so that, if defendant decides to appeal, all the papers used on original hearing and on application for rehearing may be brought before the appellate court."

It would serve no useful purpose to discuss the further statements in the affidavits herein, from which it appears, inter alia, that Jenkins, while in the employ of the graphophone company, attempted to ratify the Armat assignment, so as to destroy the effect of the prior license to it, and that the Supreme Court of the District of Columbia has held that the attempted assignment of Jenkins' interest by Armat was void. It is not clear, and cannot be satisfactorily determined upon the conflicting affidavits, that Jenkins, by his contract with Armat of March 25, 1895, empowered Armat to divest him (Jenkins) of his interest in the invention in suit. It does not appear what the distinction is between the "projecting phantoscope" as distinguished from the cabinet form. And it is impossible to determine whether the assignment from Jenkins to the graphophone company "of all inventions of the above character in which the said party of the first part now has, or may hereafter have or acquire, any right or interest," did or did not include the interest of Jenkins under the joint application, without the testimony of witnesses as to the relations and situation of the parties and their understanding of the scope of said assignment. It is sufficient to say, therefore, without passing on any of these questions, that the uncertainty as to said agreements, and the contradictory character of the affidavits, leave the question of license in such serious doubt that we think no injunction should issue except after an opportunity has been given to resolve said doubt upon final hearing.

The order is reversed, with costs.

GEORGE FROST CO. et al. v. CRANDALL WEDGE CO. et al.

(Circuit Court of Appeals, Second Circuit. October 21, 1903.)

No. 195.

1. PATENTS—VALIDITY AND INFRINGEMENT—HOSE SUPPORTERS.
The Gorton patent, No. 552,470, for a hose supporter, *held* not anticipated, entitled to a broad construction, and infringed, on review of an order granting a preliminary injunction, and on a consideration of certain alleged anticipatory patents not before the court in prior suits.

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

Appeal from an order of the United States Circuit Court for the Southern District of New York granting an interlocutory injunction in a suit for infringement of complainant's patent, No. 552,470, granted to Robert Gorton, December 31, 1895.

For opinion below, see 123 Fed. 104.

W. P. Preble, Jr., for appellants.

A. D. Salinger, for appellees.

Before TOWNSEND and COXE, Circuit Judges, and THOMAS, District Judge.

TOWNSEND, Circuit Judge. The first claim of the patent, the one involved herein, is as follows:

"(1) In a hose supporter, the combination of the webbing, the loop having an opening large at one end and narrower at the other, the button supporting plate, and the button composed of the central support and the surrounding rubber portion, substantially as set forth."

The history of the art to which the patent relates, the scope of the invention, and the status of the patent in view of prior constructions, have been fully discussed in the opinions at circuit and on appeal sustaining the validity of said claim. George Frost Co. v. Cohn (C. C.) 112 Fed. 1009; Id., 119 Fed. 505, 56 C. C. A. 185. The Circuit Court of Appeals in its opinion held, inter alia, as follows:

"It seems obvious that the claim in controversy is not to be limited to a hose supporter the button shank of which is made of rubber or surrounded with a rubber surface, and that it includes one in which the shank is made of or surrounded with any fibrous or yielding material; and that a button made of or covered with felt, fiber, cloth, or leather would, when combined with the other parts, infringe the claim."

In the Cohn Case the shank of the infringing button was surrounded by rubber. In the case at bar the shank and head of defendants' button is surrounded by cotton webbing.

Counsel for defendants herein have introduced 29 United States patents and 2 British patents, all prior to the patent in suit, which were not before the court in the Cohn Case, and contends that the conclusion of the court, quoted above, as to the scope of the patent, was not necessary to the decision in the Cohn Case, and that the character of the new evidence is such that, if it had been presented on the former trial, the court must have reached a different conclusion. The new evidence does not affect the conclusion of the court

in the Cohn Case that the claim in suit covers a button surrounded with fibrous material other than rubber. Of the 31 new patents, four, namely, those to Gifford, Yarrington, Cushing, and Knight, illustrate a jaw type of clasp, substantially similar types of which were before the court in the Cohn Case. As to this class of devices the Court of Appeals held as follows:

"We have not overlooked the prior patents, showing a device having a pair of jaws faced with springy or elastic material, which are pressed against the intervening fabric to hold it between them. * * * These patents are of insignificant value as anticipatory references, or as suggesting the adaptability of the material for the new occasion of its use."

The patents cited above confirm this view. Thus, Yarrington, of which defendants' counsel says, "on this patent alone the Gorton patent should be held invalid," shows "two spring pressed clamping arms, each being provided with a block of rubber," which are normally pressed together by said spring so as to bear against the article to be supported. The two devices are totally dissimilar in object, construction, function, and result. In Yarrington the amount of tension necessary to prevent the fabric from slipping is determined by the resiliency of the lateral spring pressure against the soft rubber pads. In Gorton there is no such tension to prevent slipping, but the fabric is locked between the firm shank and its loop. The stated object of the rubber pads in Yarrington is to obviate the liability of "spring pressed clamping arms, the same being provided with teeth or serrated edges," to puncture or tear the fabric. Gorton's object in using rubber was to perfect his lock by providing a yielding surface to which the garment would cling. In Yarrington the rubber permits the garment to slip; in Gorton the rubber absolutely prevents the locked garment from slipping between the lock of rigid button and loop. The remaining patents above cited and the Williams supporter, also of this class, are open to the objections stated, and need not be discussed.

Of the remaining patents introduced by defendants, those to Gengembre, Ferris, Crandall, and Parry were chiefly pressed on the argument. Defendants' counsel says as follows: "The Gorton button (so called) was invented and patented by Gengembre in 1864." Gengembre shows a button adapted to revolve in order "to prevent it from becoming irregularly worn during the process of passing it into and out of a buttonhole," provided with a shank encompassed with rubber "to protect the buttonholes of the cloth from contact with the shank," etc. There is no suggestion of the inventive conception of Gorton—the adaptability of rubber to grip or clamp a fabric when exposed to strain.

The Circuit Court of Appeals in the Cohn Case, discussing the prior uses of rubber, said, concerning the Allen patent of 1883, identical with Gengembre so far as concerns the issues herein, as follows:

"It has also been used for buttons in order that its elasticity would permit the button to yield easily to sudden pressure and yet not abrade the fabric of the buttonhole, as in the instance of the collar stud of the Allen patent. But in none of its prior uses had it been employed as the member of a device between which and another member a portion of the fabric was to be

clamped. The instances of the prior use of such a material do not necessarily suggest its adaptability to do the work required of a button in a hose or garment supporter more efficiently than one of metal."

We think it unnecessary to add anything to the foregoing statement of the well-settled law applicable to constructions thus widely differing in the result sought to be accomplished. The Ferris patent, introduced by defendants' expert without discussion, seems to cover a device like that of the Walker patent considered in the Cohn Case. In the Crandall patent for a fabric holder there is no statement of the material of which the holding spool is made, and it is not attached to a base plate, as in Gorton. The Parry patent shows a small rubber ball without any shank and a soft leather tab. The Court of Appeals in the Cohn suit construed the claim in suit as covering a clasp consisting of a button with a firm shank made of or so surrounded by any yielding material that in connection with its proportioned rigid loop it would hold the fabric firmly without slipping or abrasion under strain, and would be adapted for fabrics of different thicknesses.

Upon this review of the order of the court below it is unnecessary to finally pass upon the relevancy of the four patents last cited to the patent in suit. Taken together, they may remotely suggest the grip or lock characteristic of the patented device, but they fail to show or suggest the firm shank or rigid loop which are essential in the patented construction. We concur in the conclusion of the court below that a comparison of the prior patents introduced herein with those considered in the Cohn suit does not justify the assumption that their presence therein would have induced a different construction of the patent in suit.

The order is affirmed, with costs.

HENRY HUBER CO. v. J. L. MOTT IRONWORKS.

(Circuit Court of Appeals, Second Circuit. September 14, 1903.)

No. 81.

1. PATENTS—INFRINGEMENT—BATH-WATER HEATERS.
The Beaumont patent, No. 555,033, for a hot-water bath fixture, in view of the prior art and the doubtful utility of the structure, is entitled only to a narrow construction of its claims, covering only the details of construction, chief of which are the independently controlled steam valve, and a pair of valves, one for the water and the other for the steam pipe, connected for simultaneous operation. Claims 1, 2, and 6 construed, and *held* not infringed.

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

For opinion below see 113 Fed. 599.

This cause comes before this court upon appeal from a decree of the United States Circuit Court for the Southern District of New York dismissing bill for infringement of patent No. 555,033, granted

February 18, 1896, to complainant, as assignee of Thomas C. Beaumont, for a hot water bath fixture.

Walter S. Logan, for appellant.

W. P. Preble, Jr., for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The patent in suit relates, so far as this appeal is concerned, to the class of water-heating devices wherein the water is heated by steam in pipes so arranged that the steam does not mingle with the water. The stated object of the alleged invention is to avoid all danger of scalding by providing means for controlling admission of water and steam so "that the steam cannot be turned on without also turning on water, while the flow of steam may be regulated, independently of the flow of water to a greater or less extent." The means employed to accomplish this result are described generally as follows:

"The improved apparatus has a compound valve for controlling the admission of water or steam to the water-heating and steam passages, consisting of a shell having steam and water passages through it, a pair of valves connected together, and adapted to close the steam and water passages, respectively, and an independent valve adapted to close the steam passages only, so that steam can flow only when both valves are open, and cannot be turned on without thereby opening the water valve."

The only claims involved in this appeal are the first, second, and sixth, which are as follows:

"(1) The combination with a water-outlet passage of a compound valve for controlling the admission of water and steam thereto, consisting of a shell having two distinct inlet-passages for water and steam, a pair of valves connected for simultaneous operation, and adapted to close, respectively, the steam and water passages, and an independent valve adapted to close the steam passage, whereby steam can flow only when both valves are open, and cannot be turned on without also turning on a stream of water to be heated.

"(2) The combination with a water-outlet passage of a compound valve for controlling the admission of water and steam, consisting of a shell having two distinct steam and water inlet-chambers and outlet-seats therefrom, a valve-stem and two valves carried thereby, the one closing the steam-outlet seat, and the other the water-outlet seat, and an independent stem carrying a valve closing the steam-outlet seat, whereby the former stem controls the flow of water, and both control the flow of steam, so that the steam cannot be turned on without also turning on a stream of water to be heated."

"(6) The combination of a valve-shell, B, formed with steam and water inlet chambers, c and d, and outlet-seats, h and o, therefrom, valves, i and p, closing against said seats, respectively, a valve-stem, J, carrying both said valves, and formed in two sections screwed together, with a valve, p, between them, and a valve, i, swiveled on the section, q', by means of a coupling nut, T', engaging the head, t, of this stem-section."

The first two claims cover generally, and the sixth specifically, a construction comprising a hollow shell divided into two chambers, one of which is connected with a steam, the other with a water, supply. These connections are controlled by a compound valve, consisting of a pair of valves on one stem operated simultaneously by the handle of one screw, and an independent valve on a separate

stem controlling the supply of steam, and operated by another and independent handle and screw. When the stem carrying the two valves is screwed out, it opens the valve connecting with the cold-water passage, and permits cold water to flow out through the faucet. By the same operation the other valve connecting with the steam chamber is unseated, but steam cannot enter the chamber until the other independent valve controlling the steam supply is opened. All the valves are normally closed. By means of this arrangement the danger of scalding in opening them under ordinary conditions is reduced to a minimum, provided the valve joints are tight.

There have been three distinct stages in the progress of the art of water heating. In the first devices, cold water was heated by mixing it with hot water; later devices mixed it with steam; and the still later class of devices, to which the patent in suit belongs, accomplished the result by the external application of heat. The construction and arrangement of the earliest devices shows that their inventors had the same object in view as that of the patent in suit. Thus Baldwin, in his patent of 1854, showed a three-way cock so connected with the cold and warm water pipes of a shower bath as to admit cold and warm water mixed, or cold and warm water separately, and the drawings and normal position of the valve handle indicate an arrangement in which no warm water could flow until after the cold water had been fully turned on. Mattson, in his patent of 1864, provided for such mixing of water, and its delivery by a pump at any temperature desired; such temperature being regulated by a lever, and indicated by a scale. And Blessing, in 1879, showed how by first elevating a valve stem cold water alone could be obtained, and how a further elevation produced a mixture of cold and hot water at any desired temperature. The patent provided for a further elevation when hot water only was desired, but this was merely an additional possible advantage in the use of said apparatus. The foregoing patents illustrate the means used in the devices of the first or water-mixing stage of the art for protection against scalding. Burnett, in 1881, applied to the art in its second stage—that of injecting the steam into cold water—an apparatus confessedly similar, except in mechanical details, to that of the patent in suit, and thereby confessedly accomplished in this class of devices the stated object of said patent. That this is so appears from an inspection of the patent, and from the declarations of Beaumont in the Patent Office when the original claims of the patent in suit were rejected on reference to the Burnett patent. In these circumstances, it becomes unnecessary to consider the later Tobey and Schaffstadt patents, which are relevant merely as illustrating the development of the third stage of the prior art, where water is heated by steam without mixing with it. They show that this idea was not new with Beaumont. Burnett shows that a device wherein you cannot turn on steam without having the cold water come at the same time was old. The still earlier art shows practicable devices to prevent scalding.

In view of these circumstances, and of the fact that the apparatus of the patent in suit is of doubtful utility, and does not appear ever to

have been put on the market, the claims can only be so interpreted as to cover details of construction. Chief among these is "the steam valve, J, for independently controlling the admission of steam," and "a pair of valves connected for simultaneous operation." Defendant's device is operated by a single handle only, on a stem carrying a single valve connecting with the water supply. Another valve, on a separate stem, connects with the steam supply, and is normally closed by a spring. Its operation depends entirely upon the operation of the water valve, but between the two there is "play enough to allow valves to open and close at different times." When the handle is turned, it lifts the first valve from its seat, and opens the cold-water passage. If the handle be further turned until its stem presses against the dependent stem of the steam valve, it will open the steam passage. Therefore defendant's device lacks the "pair of valves connected for simultaneous operation," and the "independent valve adapted to close the steam passage," of the first claim. For the same reasons, the second claim is not infringed. The sixth claim, which is confined by its letters to a specific construction of valve stem, is not infringed by the radically different construction adopted by defendant.

The decree is affirmed, with costs.

STANLEY RULE & LEVEL CO. v. OHIO TOOL CO.

(Circuit Court of Appeals, Second Circuit. October 3, 1903.)

No. 125.

1. PATENTS—INFRINGEMENT—PLANE IRONS.
The Schade patent, No. 473,087, for a plane iron, construed, and *held* not infringed.

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

This cause is brought here by appeal from a decree of the United States Circuit Court for the Northern District of New York dismissing bill for infringement of complainant's patent No. 473,087, granted to Edmund Schade April 19, 1892, for a plane iron.

For opinion below see 115 Fed. 813.

Chas. P. Mitchell and J. P. Bartlett, for appellant.

Chas H. Duell and W. A. Megrath, for appellee.

Before LACOMBE and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The only contribution to the prior art furnished by the patentee was the idea of placing in an ordinary plane iron a circular enlargement of the slot near its lower instead of its upper end. It would seem that this mere transposition involved only the exercise of ordinary mechanical skill, as found by the court below, especially as the prior art showed such circular slots and suggested such transposition. Thus, the Smith patent of 1878, for plane

irons, stated as follows: "A circular enlargement of the slot B near one or the other end; but this is not claimed here as original." But it is shown in support of the contention of invention that such transposition involved advantages in the use, and prolongation of the life, of the plane iron, and that the patented plane is of great utility and has been commercially successful.

We do not deem it necessary to discuss or determine the question of patentable novelty. If it be assumed that the patent is valid, the issue of infringement herein is disposed of by the limitations introduced into the single claim, which is as follows:

"In a plane, the combination of a plane iron having a longitudinal slot, 4, with the circular enlargement at its lower end, said slot extending up near to the upper end of the bit without any enlargement at said upper end, and a laterally adjusting lever having a projecting part fitted to work in the upper end of said slot, substantially as described, and for the purpose specified."

In the specifications and drawings the patentee describes and shows a circular slot, and emphasizes the importance of circular shape, as follows:

"By making the circular enlargement at the end of the slot, which is nearest the cutting edge, I am enabled to make the plane irons by pressing them out from sheet steel, and to harden and temper them to a point up to or beyond the lower edge of this circular enlargement with less liability of cracking the plane irons at this point, so that fewer irons are lost in hardening and tempering, and they are less liable to become cracked or broken at said point after they are put into use. This is because there are no angular notches at the lower end of the slot from which a crack will start."

It thus appears that the patentee contemplated the use of his circular slot enlargement on the lower end of sheet-steel plane irons, designed to be hardened and tempered after said slot had been punched, and that by his circular construction he proposed to obviate the objections attendant upon the use of angular notches. The plane irons manufactured by defendant belong to an entirely different class. They consist of wrought-iron bodies provided with thin strips or facings of steel welded to said bodies and serving to form the cutting edge of the plane iron. The slot enlargements are hexagonal in shape, and are punched in said wrought-iron bodies. The plane iron requires no tempering after said slot has been punched, and there is therefore no attendant difficulty by reason of cracking at the angular notches, such as was found in the class of irons described in the patent in suit. In these circumstances, it would be clearly outside the scope of the alleged invention to broaden said claim so as to exclude the word "circular" therefrom, and to include a distinctly different class of devices, which successfully employ the angular notches, with the use of which the patentee sought to dispense.

The decree is affirmed, with costs.

UNITED STATES v. SEVERINO.

(Circuit Court, S. D. New York. November 3, 1903.)

1. NATURALIZATION—PERJURY IN STATE COURT—JURISDICTION OF FEDERAL COURT—STATUS OF STATE TRIBUNAL.
Under Const. art. 3, § 1, providing that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may ordain and establish, and that the judges shall hold office during good behavior, and shall receive a compensation which shall not be diminished during their continuance in office, state courts acting in the naturalization of aliens pursuant to the authority given by Congress remain state tribunals, and do not become in any degree courts of the United States; and hence a perjury committed in such proceedings is an offense against the state, and not the federal sovereignty, and, in the absence of statute conferring jurisdiction on the federal courts, is exclusively a matter of state cognizance.

2. SAME—STATUTE GIVING FEDERAL COURTS JURISDICTION.
Act July 14, 1870, c. 254, 16 Stat. 254 [U. S. Comp. St. 1901, p. 3654], entitled "An act to amend the naturalization laws and to punish crimes against the same," etc., provides (section 1) that "in all cases where any oath or affidavit is made or taken under or by virtue of the law relating to the naturalization of aliens or in any proceedings under such laws" any person who knowingly swears falsely shall be punished, etc. Section 4 made the provisions of the act applicable to all naturalization proceedings before any court, and provided that "the courts of the United States shall have jurisdiction of all offenses under the provisions of this act in or before whatsoever court or tribunal the same shall have been committed." When incorporated into the Revised Statutes of 1875, section 1 of this act became section 5395 [U. S. Comp. St. 1901, p. 3654], being placed in the chapter entitled "Crimes against Justice," while the other sections were distributed elsewhere. Section 4 became section 5429 [U. S. Comp. St. 1901, p. 3670], and, with the portion of this section above quoted omitted, was made applicable only to sections immediately preceding, thus excluding section 5395. *Held* that, notwithstanding the changes on revision, section 5395 still conferred on the federal courts jurisdiction of a perjury committed in naturalization proceedings in a state court, in the procedure prescribed by Congress.

3. SAME—REQUIREMENT OF STATE STATUTE.
Laws N. Y. 1895, c. 927, p. 742, provides, in addition to the procedure prescribed by Congress in the naturalization of aliens, that an application in the form of a petition, accompanied by an affidavit of some citizen who may or may not afterwards be a witness, shall be filed 14 days before final action, etc. *Held*, that perjury in the making of this affidavit was not punishable in the federal courts under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], punishing perjuries occurring in naturalization proceedings; section 711, cl. 1 [U. S. Comp. St. 1901, p. 577] giving United States Circuit and District Courts jurisdiction of all crimes and offenses cognizable under the authority of the United States.

Henry L. Burnett, U. S. Atty., and Clarence S. Houghton and William S. Ball, Asst. U. S. Attys.

Ullo & Ruebsamen (Lorenzo Ullo, of counsel), for defendant.

THOMAS, District Judge. By chapter 927, p. 742, of the Laws of 1895, the state of New York enacted laws for the naturalization of aliens in the courts of that state in conformity to the rule of naturalization established by Congress, and also added provisions to those contained in the Revised Statutes of the United States, tit. 30 [U. S. Comp. St. 1901, p. 1329], and, among other things, that there should

be filed with the court, at least 14 days prior to the hearing for naturalization, an application that "shall be in the form of a petition, subscribed and verified by the oath of the applicant, and shall be filed in the court to which it is presented at least fourteen days before final action thereon shall be had"; and that "simultaneously with the presentation and filing of the petition herein prescribed and provided for, there shall also be filed an affidavit of a person, who must be a citizen of the United States, and who may or may not be a person whom the petitioner intends to summon as a witness at the final hearing upon his application to be admitted to become a citizen of the United States, which said affidavit shall set forth the full name, residence and occupation of the affiant, and that the affiant is a citizen of the United States and is personally well acquainted with the petitioner, and that the said petitioner will have resided for five years within the United States, and one year within the state of New York, immediately preceding the return day of the petition." The proceeding in the court is initiated by filing this petition, and upon it all subsequent proceedings are based.

In the present action the defendant was indicted for committing perjury in the affidavit accompanying such petition, wherein, as charged, he knowingly and falsely swore that he was personally well acquainted with the petitioner, and that "the said petitioner will have resided for five years within the United States, and one year within the state of New York, immediately preceding the return day of the petition." The proceeding was in the County Court of the county of Dutchess, in the state of New York. Upon the trial the defendant was found guilty, and now moves for a new trial.

There are two questions involved:

First. Whether a defendant, by committing any perjury in a naturalization proceeding in the court of a state, offends the statute of the United States, to wit:

"Sec. 5395 [page 3654, U. S. Comp. St. 1901]. In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who knowingly swears falsely, shall be punished by imprisonment not more than five years, nor less than one year, and by a fine of not more than one thousand dollars."

Second. Even if section 5395 includes false oaths in a naturalization proceeding in a court of the state of New York, does it relate to the preliminary oath of a witness to the petition, which is demanded only by the State Statute?

Title 30, Rev. St. [page 1329, U. S. Comp. St. 1901], among other things provides:

"Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner and not otherwise: First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states, having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States," etc.

From the federal statutes relating to naturalization two inferences have been drawn: First. That the state courts, while engaged in naturalization proceedings, become federal courts, or federal agents, and

that perjury committed therein is a crime against justice in a federal court, and is punishable only in such court. This view is illustrated in People v. Sweetman, 3 Parker, Cr. R. 358 (1857), where the General Term of the state of New York held that a witness who had committed perjury in a naturalization proceeding could be punished only in a federal court, under the federal statute denouncing perjuries. The opinion denominates the state court an agent of Congress for the purpose of naturalization.

In the Matter of Ramsden, 13 How. Prac. 429 (1857), Mr. Justice Hoffman discussed the relation of the state courts to the subject, and summarized his view as follows:

"The power of legislation upon this subject existed in the states prior to the Constitution. The legislation would have been executed in the ordinary tribunals of justice. The power has been superseded by an act of Congress passed under the Constitution. Congress adopt the state tribunals as the agents to exercise the power, as they would have performed it before. The concurrence of the state Legislatures, expressed or fairly implied, adds the sanction of the state to this delegation of power. Whether such tribunals are bound to act may admit of controversy. That their acts are lawful if they do so, seems undeniable."

The word "agents," as used in the Sweetman and Ramsden Cases, cannot mean that the state courts become other or less than courts, inasmuch as a proceeding in naturalization is recognized as a judicial proceeding in a court. Spratt v. Spratt, 4 Pet. 406, 7 L. Ed. 897; Ex parte Frank Knowles, 5 Cal. 300. If the doctrine of the Sweetman Case be adopted and applied to the action at bar, the county court, upon the filing of the application, became, as to the proceeding initiated by it, a court of the United States. The perjury, when committed, offended a court of the United States, and an indictment could be found in the proper federal court, but not in a state court.

There is another view, to the effect that courts entertaining naturalization proceedings remain courts of the state, so that persons committing perjury in such proceedings may be punished under the laws of the state, although it is neither denied nor affirmed that such persons could be punished also under the laws of the United States. This view is illustrated by the decisions in Rump v. Commonwealth, 30 Pa. 475 (1858); State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196 (1870); and these decisions are expressly approved in the opinion in In re Loney, 134 U. S. 372, 376, 10 Sup. Ct. 584, 586, 33 L. Ed. 949, where it is said:

"The decisions in the Supreme Court of Pennsylvania and of New Hampshire, cited for the appellant, holding that the judiciary of a state has jurisdiction of perjury committed in a proceeding for naturalization before a court of the state, under authority of Congress, tend rather to support than to oppose our conclusion; for they were put upon the ground that the proceeding for naturalization was a judicial proceeding in a court of the state, as it doubtless was. Rump v. Commonwealth, 30 Pa. 475; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Spratt v. Spratt, 4 Pet. 393, 408, 7 L. Ed. 897."

According to this view, the state court, while entertaining such proceedings, remains a part of the sovereignty which created it, and does not become a federal court. The federal courts in instances have entertained actions to punish witnesses charged with perjury in nat-

uralization proceedings in state courts. In United States v. Lehman (D. C.) 39 Fed. 49 (1889), it was held that a person acting as a witness as to the residence of the applicant, pursuant to Rev. St. § 2167 [U. S. Comp. St. 1901, p. 1332], and swearing falsely in regard thereto, was liable to the penalty prescribed in section 5424 [U. S. Comp. St. 1901, p. 3668], which relates, among other things, to "falsely making, forging, or counterfeiting * * * any oath, * * * or other instrument, * * * required or authorized by any law relating to or provided for the naturalization of aliens." The question now under discussion was not raised, but it will be seen later that section 5429 [U. S. Comp. St. 1901, p. 3670] gives the federal court such jurisdiction over offenses included in section 5424. The decision was on demurrer to the indictment. Later (United States v. Lehman [D. C.] 39 Fed. 768) it was concluded that the offense of perjury is punishable not by section 5424, but by the above-quoted section 5395 of the Revised Statutes [U. S. Comp. St. 1901, p. 3654], which, as will appear, section 5429 does not include.

In United States v. Power, 14 Blatchf. 223, Fed. Cas. No. 16,080 (1877), Judge Benedict decided that the city court of Yonkers, N. Y., had jurisdiction of naturalization proceedings. The question arose upon an indictment found in the Circuit Court of the United States for perjury alleged to have been committed by the defendant in the city court. The jurisdiction of the Circuit Court was not questioned.

Thus far it appears that the General Term of the Supreme Court of the state of New York held that federal courts had exclusive jurisdiction of perjuries committed in state courts in naturalization cases, because they become federal courts or agents of Congress; that Mr. Justice Hoffman, of the Superior Court of New York, also regarded state courts as agents adopted by Congress; that the courts of two states have held, with the approval expressed in In re Loney, supra, that the state courts had jurisdiction, as the proceeding was in a court of the state; and in the cases of Lehman and Power an unchallenged jurisdiction was exercised. In Re Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949 (s. c. [C. C.] 38 Fed. 101), Loney was arrested for trial before a state tribunal on a charge of perjury, alleged to have been committed in testifying as a witness in a contest for a seat in the House of Representatives of the United States. The contention in behalf of the state jurisdiction was that, as the oath was taken before a notary public, a state officer, the state court had jurisdiction. But it was held by the federal courts that, although he was a state officer, he had no jurisdiction to administer an oath in the matter before him, except pursuant to the law of the United States, and therefore that he was a person competent to take an oath, and authorized so to do by the law of the United States. Hence the case was within the general section 5392, Rev. St. [page 3653, U. S. Comp. St. 1901], relating to perjuries. In the opinion Mr. Justice Gray says:

"But the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administra-

tion of justice in the tribunals of the nation that witnesses should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. * * * A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal or before any magistrate or officer (either of the nation or of the state) designated by act of Congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public justice of the United States, and within the exclusive jurisdiction of the courts of the United States, and cannot, therefore, be punished in the courts of Virginia under the general provision of her statutes."

In this very opinion is found the statement, earlier quoted, that a naturalization proceeding severally in the courts of Pennsylvania and New Hampshire "was a judicial proceeding in a court of the state." It will be observed that in the Loney Case the proceeding and purpose and subject-matter thereof were entirely federal, and that a person belonging to a designated class of Union officials in the state was adopted and empowered by Congress to take evidence to be returned to the House of Representatives of the United States. In the action at bar the case is different. No department of the national government was related to the record or proceedings that were taken in the county court. The proceeding began and ended in that court. In the Loney Case the person taking the evidence to report became a federal officer. But the state court cannot become a federal court for the purpose of naturalization.

Section 8, art. 1, Const. U. S., empowers Congress to "establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." This means that Congress should make uniform rules whereby aliens may become citizens of the United States and of the state where they reside. Amendment 14, Const.; Gassies v. Ballou, 6 Pet. 761, 8 L. Ed. 573; Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Boyd v. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103. Article 3, § 1, of the Constitution, provides:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The present inquiry is not whether Congress could confer jurisdiction in naturalization proceedings upon the state courts; but whether in so doing it vested judicial power in an authorized federal court. The Constitution vests the judicial power of the United States in the Supreme Court and inferior courts such as Congress may "ordain and establish." Congress did not "ordain and establish" the County Court of the county of Dutchess. Const. art. 3, § 1, plainly refers to an inferior court that owes its life to an act of congress. But look farther at this section. It provides that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which

shall not be diminished during their continuance in office." This means that the federal power shall appoint the judges (article 2, § 2), supervise their behavior, and remove them for bad behavior; and that it shall make compensation for their services, and shall not diminish the same during their continuance in office. The section does not mean that Congress can convert into a federal court a state court, ordained and established by a state, which can act on the subject delegated only by sufferance of the state, and whose judges are paid and removable by the state alone. To assert that the County Court of the county of Dutchess was a federal court is to offend article 3, § 1, of the Constitution of the United States, in every sentence and phrase thereof. In State v. Whittemore, supra, it is said:

"In the present case the oath was taken to be used in a proceeding in a state court, whose officers were appointed solely by state authority. The proceeding was, in one sense, under the laws of the United States; but it was carried on in the state court only by the sufferance of the state. The state is under no obligation to furnish tribunals to aid in the administration of the naturalization laws of Congress, and may prohibit its courts from entertaining jurisdiction of applications for naturalization. Stephen's Petition, 4 Gray, 559; Beavin's Petition, 33 N. H. 89."

This opinion further quite properly calls attention to the spectacle of a court of the state dependent upon the officer of another jurisdiction for prosecuting perjuries committed in its court. In Rump v. Commonwealth, supra, the learned judge said:

"Although such cases arise under the Constitution and laws of the United States, yet, because these are part of the law of the land, and merely give the rule for the exercise of our admitted state functions, our state courts may entertain this jurisdiction."

It is concluded that state courts, while entertaining jurisdiction in naturalization proceedings, remain state courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends (that is, the state court); and that the federal court cannot entertain jurisdiction in the absence of a federal statute conferring it.

An attempt will not be made at this time to discover a maintainable theory whereby Congress was enabled to permit the state courts to share with the federal courts jurisdiction in matters of naturalization. That it had such ability has been doubted rarely. Indeed, the Supreme Court of California considered that the exclusive jurisdiction must be vested in the state courts. Ex parte Frank Knowles, 5 Cal. 305. While the legislative authority is vested exclusively in Congress (Kent's Commentaries, vol. 1, 396, 400; Chirac v. Chirac, 2 Wheat. 259, 4 L. Ed. 234; Houston v. Moore, 5 Wheat. 49, 5 L. Ed. 19; U. S. v. Villato, 2 Dall. 370, Fed. Cas. No. 16,622, 1 L. Ed. 419; Boyd v. Thayer, 143 U. S. 160, 12 Sup. Ct. 375, 36 L. Ed. 103), the state courts could be permitted to share jurisdiction for the admission of citizens to the political bodies of the United States and of the state of residence, unless it should be concluded that it was a judicial power exclusively vested in the courts of the United States. It has been decided that the judicial power is of such a nature that it may be committed to the state courts. In the Matter of Ramsden, 13

How. Prac. 429 (1857); Ex parte Frank Knowles, 5 Cal. 305. This phase of the subject may be left at this point for a discussion of the question whether Congress did provide a statute for the punishment in the federal courts of perjuries committed in courts of a state in naturalization proceedings.

Therefore the next inquiry is whether section 5395 is applicable to perjuries in state courts. This leads to the discussion of a question made the more obscure by the manner in which the federal statutes have been enacted, revised, and repealed. At the first view there would be hesitation in concluding that Congress intended to punish perjuries in naturalization proceedings, committed in a court foreign to its governmental jurisdiction, against another and independent sovereignty, thereby making its penal statutes applicable to offenses committed against the justice of a separate state. But it is precisely what at a time, and for a time at least, it did do in plainest terms by Act July 14, 1870, c. 254, 16 Stat. 254 [U. S. Comp. St. 1901, p. 3654]. The first four sections relate specifically to naturalization. In 1875 they were embodied in the Revised Statutes, as follows:

Act of 1870.	Revised Statutes.
Section 1	Section 5395
" 2	" 5424
	" 5425
	" 5426
	" 5427
" 3	" 5428
" 4	" 5429

See Rev. St. (Ed. 1878) Reference Index, p. 1149 [U. S. Comp. St. 1901, p. 3831].

The language and provisions of the sections of the act of 1870, as carried into the Revised Statutes [U. S. Comp. St. 1901, pp. 3654, 3668–3670], are practically the same, with the exception of section 4, which, in the act of 1870, was made applicable to the three sections which preceded it, while, after being carried in part, but shorn of certain definite language, into the Revised Statutes, it was made applicable only to sections 5424–5428, inclusive, formerly sections 2 and 3 of the act of 1870. This excluded section 5395, formerly section 1 of the act of 1870, from its provisions. The doubt occasioned by this change will appear from the language of section 4 and the use made of it in the Revised Statutes. Section 4 reads:

"Sec. 4. And be it further enacted, that the provisions of this act shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the courts of the United States shall have jurisdiction of all offences under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed."

In the Revised Statutes, section 5429 [U. S. Comp. St. 1901, p. 3670], as substituted for section 4 of Act July 14, 1870, 16 Stat. 255, c. 254 [U. S. Comp. St. 1901, p. 3670], reads as follows:

"Sec. 5429. The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any

court in which any proceeding for naturalization may be commenced or attempted to be commenced."

The history is this: Until 1870 Congress had enacted no special statute relating to perjuries in naturalization proceedings. In that year it did enact section 1 of the act of July 14, 1870 (16 Stat. 254, c. 254 [U. S. Comp. St. 1901, p. 3654]), covering the subject of perjuries in such proceedings, and two other penal sections, relating in other respects to naturalization. Section 4 was sufficiently broad to give the federal courts jurisdiction of offenses denounced by such sections, whether arising in a state or federal court. In 1875 Congress enacted penal sections 5395, 5424, 5425, 5426, 5427, 5428, 5429 in place of sections 1 to 4 of the act of 1870. By section 5429 it made sections 5424–5428 applicable to "all proceedings had or taken or attempted * * * before any court in which any proceeding for naturalization may be commenced or attempted to be commenced." This excludes section 5395. Is this clear evidence that Congress did not intend that section 5395 should longer apply to perjuries in courts other than federal?

Section 1 of the act of 1870 in language and substance is substantially embodied in section 5395; but to section 1 as it existed section 4 was added. That section is in part re-enacted so as to exclude section 5395. Hence, in terms, section 5395 stands as section 1 in the act of 1870 would have stood without the help of section 4. But the act of July 14, 1870 (chapter 254) was "An act to amend the naturalization laws, and to punish crimes against the same, and for other purposes." The naturalization laws (title 30), thus amended, related to proceedings before state courts as well as federal courts. Hence section 1 should be construed as amendatory of title 30, and applicable to state courts mentioned therein, irrespective of section 4, which is technically surplusage, but practically a useful aid to interpretation. This conclusion is helped by the language of section 5395, which provides:

"In all cases where any oath or affidavit is made or taken, under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person * * * who knowingly swears falsely * * * shall be punished," etc.

An oath required by title 30, Rev. St. [page 1329, U. S. Comp. St. 1901], is taken in "any (a) proceeding under such laws." Except for such laws it could not be taken, nor, if falsely and knowingly taken, could it be the basis of a charge of perjury. Considering this language that the act of 1870 is by the terms of its title amendatory of the naturalization laws, that the offense of perjury in naturalization proceedings in any court was made cognizable by the federal courts by the act on which the revision is based, it is concluded that section 5395 is applicable to perjuries committed in naturalization proceedings in the state courts, when the oath is required by the federal statute. This conclusion is reached notwithstanding the fact that section 4 of the act of 1870 was only in part carried into the Revised Statutes, and such part made applicable to all the new sections except section 5395. This probably arose from the fact that it would not broaden, although it would make more

definite, the terms of section 5395, and from the further fact that section 5395 was placed under the chapter relating to "Crimes against Justice," while the other sections were distributed to the chapter relating to forgeries, frauds, etc., thereby separating sections that had theretofore fallen under a common title.

Whatever view may be taken of the foregoing discussion, the false oath taken in the case at bar was not one authorized or demanded by the federal statute. It was an oath added by the state law as a condition precedent to the exercise of the jurisdiction tendered by the federal statute to the state tribunal. It is true that in the Southern and Eastern Districts of New York a petition verified by an applicant must be presented as the initiatory step in naturalization proceedings, but such federal courts are permitted to establish each its own rules of practice, not inconsistent with certain other rules and statutes, and such rules have the full force of law. Section 916, Rev. St. [page 684, U. S. Comp. St. 1901]. The state law requires a similar application, but demands that it be accompanied by the affidavit of a person who can and shall testify to such residence of the applicant as must be proven on the return day to entitle him to naturalization pursuant to the federal statute. There is nothing in the federal statutes that requires the preliminary oath that was violated, and, tested thereby, it is extrajudicial and immaterial. The witness whose affidavit accompanies such petition may or may not be the witness who shall be present in court, nor was the defendant at the time of making or filing such oath doing an act stated or contemplated by the federal statutes.

The question now is whether section 5395, Rev. St. [page 3654, U. S. Comp. St. 1901], contemplates an oath or affidavit which is commanded by a state statute and is not demanded by the United States Statutes; that is, does the United States undertake to punish a breach of its own law and also any breach of the law of the state? Does the state law become also a federal law because it pertains to a court that is enabled to enforce some other cognate federal law? Had the defendant done the precise thing for which he has been convicted previous to the passage of the state act, he would have done an act required by no statute, federal or state, and could not be punished. The state statute has since placed upon him the necessity, and to that statute, and to the government creating it, he alone owes duty in taking the steps commanded by that statute. United States v. Grottkau (D. C.) 30 Fed. 672, decided that the Revised Statutes of the United States (section 5395), which provide for punishment by fine and imprisonment where any person knowingly swears falsely in an oath or affidavit made or taken under any law relating to the naturalization of aliens, are to be construed to refer to oaths which the naturalization law requires or authorizes a party to take; and that where the oath is extrajudicial, and not required or authorized by law, perjury cannot be assigned. Whatever disagreement there may be with the conclusion that the oath in that case was extrajudicial, and related to immaterial matter, although it accords with the decision in In re ———, 7 Hill, 137, 139, there can be no doubt that, if it was extrajudicial, no action for perjury could be based upon it.

The contention of the government is that section 5395, Rev. St. [page 3654, U. S. Comp. St. 1901], means that a person shall be guilty of perjury who violates any law of the United States or any law of a state by swearing falsely respecting any matter required by either of such laws. By the statutes of the United States the Circuit and District Courts have jurisdiction, exclusive of the courts of the several states, "of all crimes and offences cognizable under the authority of the United States." Rev. St. § 711, cl. 1 [U. S. Comp. St. 1901, p. 577]. The laws of the United States do not make it an offense to testify as the defendant did in the present instance, nor did the statute intend to command that it would punish any person who committed perjury in a state court in reference to any matter that the Legislature of that state had required to be proven or should in the future require to be proven in naturalization proceedings. It was a matter that related entirely to the practice of the court, and was not substantively connected with any duty which the federal statutes imposed upon the state court or witnesses in that court. This suggested incorporation of the state law into the federal law, both as to past and future, for the purpose of making infraction thereof punishable by the United States, is not approved.

The exclusive power of Congress to establish a uniform rule of naturalization has not been considered in the present connection. But, if it be claimed that the requirement of the state statute was an addition to the existing law relating to naturalization, it would be a sufficient answer that the state has no power to enact it, as it was deprived of such power by the federal Constitution, as the cases already cited illustrate. But it is not necessary to hold that a state, as a condition of allowing its courts to entertain naturalization proceedings, may not regulate its practice and punish suitors who knowingly violate by false oaths the requirements of its statutes relating thereto, provided the "rule of naturalization" enacted by Congress is not varied. It is enough that the new requirement does not become a part of the federal law, and that any disobedience thereto must be punished by the sovereignty offended. What the defendant did he did in a court ordained and established by the state of New York and its Constitution, respecting a matter prescribed by such state, and unprovided for in the federal law, before a judge neither appointed nor compensated by the United States, but by the state, and holding his office for a term of years, and not during good behavior, and in no wise accountable or owing official duty to the United States.

It follows from the foregoing views that a new trial must be granted.

BRYCE v. SOUTHERN RY. CO. et al.

(Circuit Court, D. South Carolina. November 27, 1903.)

1. CARRIERS—INJURY TO PASSENGER—PARTIES—SERVANTS—JOINDER—PLEADING.
Where an engineer and conductor of a railroad train were joined with the railroad company as defendants in an action for injuries to a passenger from the derailment of the train, the averment of the accident and injuries resulting therefrom to the plaintiff, though sufficient to con-

stitute a cause of action against the railroad company, was insufficient as against the engineer and conductor.

2. SAME—LIABILITY OF SERVANTS.

Servants of a railroad company in charge of a train on which a passenger was injured are not personally liable to such passenger for the injuries sustained unless the injury resulted from the misfeasance and positive wrongs of such servants.

On Rehearing.

For former opinion, see 122 Fed. 709.

SIMONTON, Circuit Judge. This case now comes up on a motion for rehearing the order refusing to remand the cause. The importance of the question involved, and the weight of the arguments of counsel upon the motion, demand and have received most careful consideration. The whole question has been studiously reviewed.

The cause of action is injury to a passenger upon the Southern Railway arising from the derailment of one of its trains. The defendants to the action are the corporation itself and the conductor and engineer of the train. The complaint prays judgment against all the defendants. It charges that the accident occurred from the negligence of the defendant company, and further charges that at the time and place when and where the plaintiff was injured as aforesaid the defendants Edward Bird was the engineer and James Harling was the conductor, servants of the said Southern Railway Company, in charge and control of said train respectively as engineer and conductor of said train, and that the negligence of the said Southern Railway Company defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the said defendants.

It is clear that, so far as the Southern Railway Company is concerned, the allegations of the complaint are sufficient to hold it responsible for the accident if they be established. This railway company is a common carrier of passengers. It is bound by contract with the plaintiff, a passenger, to carry him safely. He was not carried safely, and the policy of the law throws upon the carrier the burden of proving that the failure of its contract did not arise from negligence of any agents of the corporation. The Supreme Court of South Carolina, in Steele v. Railway, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756, states the rule and its reason very clearly:

"The reasons for the rule are: First. The contractual relation between the carrier and passenger, by which it is incumbent on the carrier to transport with safety; hence the burden of explaining failure of performance should be on the carrier. Second. The cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain." (Evidently the court proceeds upon this idea. The knowledge of every agent of the carrier, not only as to the conductor of the train as the agent in control of the train, but as to the condition of the roadbed by the other agents whose duty it is to keep up the roadbed, is in law the knowledge of the carrier.) "Third. Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care, hence the fact of injury affords a presumption that such care is wanting."

This rule, as has been said, is one created and established by the policy of the law. Carriers are clothed with important privileges. They serve the public. In the exercise of these privileges and this service they are held to a responsibility much more strict than that imposed upon individuals. If an injury occur to one of the public, who has entered into contract with the carrier, the law demands from the carrier an explanation and excuse for it. The bare fact of the breach of the contract puts the carrier on the defensive. The assertion in the complaint that the injury arose from negligence of the carrier is enough to require an explanation and defense at its hands.

But this complaint goes farther. It seeks damages not only from the Southern Railway, but also from two individuals, its servants, and bases its demand upon the allegation of negligence on the part of these servants with other of the servants of the railway company then and there in its employment, which negligence was the joint negligence of all the said defendants. The facts constituting such negligence upon the part of these two individuals and other of the servants of the railway company then and there in its employment are not set forth. There was here no contractual relation between the plaintiff and these two men; no presumption of law arising from the policy of the law against them. They are called upon to defend themselves, and can be called upon to defend themselves only in the same way as if the carrier was not a party in the suit with them. The rule in the suits against individuals for injury is stated in Shearman & Redfield on Negligence (2d Ed.) § 5. The mere fact of an injury having been suffered is not enough to establish a charge of negligence against the person causing the injury. No one is responsible for an injury caused purely by inevitable accident while he is engaged in a lawful business, even though the injury was the direct consequence of his own act, and the injured party was at the time lawfully employed, and in all respects free from fault. "Still less can a charge of negligence be sustained by the bare fact of the injury, when at the same time it is said that the negligence was also the negligence of other servants beside themselves." The same author, at section 12, says:

"The burden of proof in an action upon negligence rests upon the party charging it. * * * It is not enough for him to prove that he has suffered loss from some event which happened upon the defendant's premises, or even by the act or omission of the defendant. He must also prove that the defendant by such act or omission violated a duty resting upon him. [And if he must prove, he must first allege.] There is a class of cases which constitute an apparent exception to the rule; such as actions against a carrier, etc. But these cases are not real exceptions. The defendant in such cases is under a positive obligation to deliver safely the thing committed to him, except under peculiar circumstances beyond his control. His failure to deliver safely puts him prima facie in the wrong, and it is for him to prove the exceptional circumstances which excuse him. But, when no special relation exists, the presumption is that the defendant has complied with all the obligations which rest equally upon every man, and if he has not the plaintiff must prove it. He must, for this purpose, prove facts from which it can be ascertained with reasonable certainty what particular precaution the defendant ought to have taken, but did not take. And he must

also prove facts from which it can fairly be inferred that the defendant's negligence caused the injury complained of."

And, as has been said, if he must prove these facts he must first allege them.

It must be observed that a personal liability is sought to be thrown on these two defendants simply from the fact that an injury was occasioned to the plaintiff by reason of the joint negligence of the carrier, of these two defendants, its servants, and others, the servants of the carrier, then and there in its employment. The facts upon which this conclusion is based are not stated. How can these two men prepare their defense until they are informed where they were negligent? Was the train running at an inordinate speed? Was the engine taken on the run in a defective condition, which should have been known to the engineer, the defendant? Was the roadbed, track, or were the rails, defective from any negligence of others the servants of the carrier? For such charges they could prepare themselves, and could seek an escape from present liability. And to a knowledge of such facts they were entitled. It is true that in Danner v. Railroad, 4 Rich. Law, 336, 55 Am. Dec. 678, the judge delivering the opinion says that the mere proof of the injury in a suit against the engineer would be prima facie evidence that the act was done willfully. That was a case against a railroad company. It held as a matter of evidence that the burden was on the company to prove that there was no negligence on its part or that of its agents. And that, too, is a rule based on public policy. And even then the rule is of limited application. See Wilson v. The R. Rd., 10 Rich. Law, 53; Richardson v. R. Rd., 55 S. C. 334, 33 S. E. 466. This expression of the judge is clearly obiter dictum. So also in Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115. The court says that there was a presumption of negligence against the driver of a stage coach when the coach was upset. But that was a suit against a carrier, and, the accident having happened, the policy of the law presumed negligence in the carrier whether the act was his or his agent's. And then, too, the fact on which the negligence was based was stated—the unskillful driver. The case also turns upon the contract of carriage, a warranty that, so far as human foresight or skill can go, the passenger would be carried safely. That warranty was broken, and the burden was on the carrier.

There is another point of view in considering this question: Should the facts constituting the negligence be alleged when it is sought to make these two agents, the conductor and the engineer, personally liable jointly with their principal? An agent or servant is not always personally liable to third persons for negligence. When he is charged with negligence the facts must be stated wherein the negligence consisted—whether in the omission of an act he should have done, or in the commission of an act he should not have done. Judge Story, in his work on Agency (9th Ed.) §§ 308, 309, states the law on this subject, which comes with all the authority of his name:

"We come, in the next place, to the consideration of the liability of agents to third persons in regard to torts or wrongs done by them in the course

of their agency. * * * And here the distinction ordinarily is taken between acts of misfeasance, or positive wrongs, and nonfeasance, or mere omissions of duty, by private agents. * * * The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servants in all cases within the scope of his employment. So a principal is also liable to third persons for like misfeasances, negligences, or omissions of duty of his agent; leaving him to his remedy over against the agent in all cases when the tort is of such a nature as that he is entitled to compensation. * * * The agent is also liable to third persons for his own misfeasances and positive wrongs. But he is not liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal. * * * Hence the general maxim is to all such negligences and omissions of duty in the case of private agency, respondeat superior. * * * The distinction thus propounded between misfeasance and nonfeasance between acts of direct positive wrongs and mere neglects of agents as to their personal liability therefor may seem nice and artificial, and partakes not a little, perhaps, of the subtleties and overrefinement of the old doctrines of the common law. It seems, however, to be founded on this ground: No authority whatever from a superior to an inferior can furnish the latter a just defense for his own positive wrongs or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasances, or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct."

It would seem, therefore, that the conclusion heretofore reached in this case that, in order to require the two defendants, Edward Bird, the engineer, and James Harling, the conductor, to answer personally in this case, something more than the charge of negligence or joint negligence with the railway company must be made. The facts upon which this charge is made must be stated.

The motion to remand after rehearing is refused.

WILSON v. FREEDLEY.

(Circuit Court, D. Vermont. November 17, 1903.)

1. CONTRACTS—BREACH—ELEMENTS OF DAMAGE—VERDICT—FORM.
   Where, in an action for breach of contract, plaintiff's damages were alleged under four heads—for defendant's failure to supply water, for defendant's failure to provide a derrick, for failure to transport coal, and for denying an option to do certain additional work—a verdict finding in favor of plaintiff, and finding a specific sum of damages separately under each of such heads, was not erroneous.

2. SAME—EVIDENCE.
   In an action for breach of a quarry contract, evidence *held* insufficient to support a verdict in favor of plaintiff for not furnishing water and a 16-ton derrick, as provided by the contract.

3. SAME—WORK AND LABOR—QUASI CONTRACT.
   Where a contract for the quarrying of marble required plaintiff to uncover and quarry not less than 50,000 cubic feet during the year 1901, and that, if he uncovered more than such amount, he should have an option of quarrying it on the same terms, and, by reason of his failure to quarry the amount required, he forfeited his right to the option, but he did certain additional uncovering which was beneficial to defendant, the owner of the quarry, plaintiff was entitled to recover for the benefit so conferred.

Motion to Set Aside Verdict.

Orion M. Barber and James L. Martin, for plaintiff.
Fred M. Butler and James K. Batchelder, for defendant.

WHEELER, District Judge. The defendant owns a marble quarry on the side of a mountain, which was supplied with water from a Harwood spring higher up, through a three-quarter inch pipe about two-thirds of the way, and a half-inch pipe the rest of the way, and a derrick at the head of a gravity railroad, by which quarried blocks of marble are taken to his mill at the foot of the mountain below. He contracted in writing with plaintiff for uncovering good marble in a part of the quarry in 1901, and quarrying and delivering on cars not less than 50,000 cubic feet of marble (2,000 cubic feet in April, and 6,000 in each month after), in blocks of "random sizes," at 45 cents a foot, monthly, with a deduction of 10 cents a foot for any deficiency in any month; and he agreed to furnish a derrick for the use of the plaintiff at the head of the railroad, "sufficient to handle blocks of 16 tons weight"; to furnish a supply of running water at the quarry, equal to two-thirds the amount that could be obtained by a three-fourth inch pipe all the way from the Harwood spring, and to transport promptly by the gravity road supplies required by the plaintiff; and that, "if the plaintiff uncovered more good marble than the 50,000 feet required, he should have an option of quarrying it upon the same terms." The plaintiff uncovered in the spring what was estimated to be necessary for quarrying the 50,000 feet required, and quarried and delivered up to December 31, 43,707 feet, from the price of which there was deducted, without objection, 10 cents a foot on 31,231 feet for monthly deficiencies. The defendant required the plaintiff to quit December 31st, and denied his right to quarry further under the option. This suit is brought for damages for not supplying water, for not furnishing a 16-ton derrick, for not transporting supplies promptly, and for not allowing the option.

As to not furnishing water, the plaintiff testified:

"Q. Did that cause you any delay? A. Yes, sir. Q. How—to what extent? A. In the month of March we were shut down eight days, in May we were shut down four days, and in the balance of the season we were shut down a day at a time for not less than 10 days all told—the balance. Q. Making, in all, how many days' loss? A. Making, in all, 22 days. We quarried an average of about 200 feet a day on the average, and it would have made a difference in our output through the year of about 4,400 feet. Q. You say you could have gotten out that amount more if he had complied with the contract in this respect? A. Yes, sir; very easily gotten it out. Q. And the amount of loss to you in that failure to quarry that amount is how much? A. I lost a profit on 4,400 feet at 15 cents a foot, which would be $660. I paid damages 10 cents a foot, which would have been $440; and the repairs that I was compelled to make on the boiler, in the shape of flues, and labor in putting them in, amounted to $225 more. I put in 100 new flues, and 50 flues that had been taken out, and a new piece welded onto the end. The new flues cost $1.25, which would be $125, and the old flues cost 50 cents apiece to have a new piece welded on. Q. Making a total of how much? A. The work of putting them in cost about $75, making a total of $225 on the flues. Q. And how much on the other? A. Making, all total, $1,325."

As to the derrick, the plaintiff testified:

"Derrick not capable of hoisting 16 tons. Small—only 6 guys. Mast not sound. Changed the power. We were compelled to get out blocks much smaller. Could not measure to the limit. We quarried 619 blocks in the year of this contract, and the average 619 blocks was 70 cubic feet to the block. If we had been able to break our blocks, with the idea of being able to handle 16 tons at the wheelhouse, I don't think—in fact, I know—there would have been no trouble in making our average 100 feet to the block, and, instead of having 619 blocks, we should have had about 182 less. Q. Now, on that 182 less, what would have been the gain, or what was the loss per block? A. 437 blocks at 100 feet would have made the same amount which we quarried with 619. * * * 1,092 feet which we lost at 45 cents per cubic foot, $491. On this 1,092 feet, we were obliged to pay damages of 10 cents a cubic foot under the contract for the deficiency, which, at 10 cents a foot would have been $109.20. Then the extra expense of quarrying and handling 182 blocks, which would not have been necessary if we had had sufficient power, I placed at $1 a block, $182. The total foots up $782.20. Q. That includes that 10 cents a foot? A. Yes, sir. Q. That includes the $109.20 of the forfeiture that you had to pay? A. Yes, sir. * * * Q. Were any of those smaller-sized blocks that were referred to quarried that way for convenience to you? A. No, sir; it was an inconvenience to us—the extra trouble of splitting, drilling, and handling these blocks. It was a great inconvenience and great loss. Q. In splitting some of those large blocks so you could handle them, did you occasionally get trouble from not splitting straight? A. Oh, yes. Q. And in that way made smaller-sized blocks? A. Yes, sir; that was my loss."

As to failure to transport supplies, the plaintiff testified:

"We had coal at the mill in December that was not delivered. By reason of our being short of coal, we had to leave off all of our overtime, and were troubled a great many days; obliged to shut off our steam; didn't have coal to furnish steam to do our work. By reason of this shortage, there was 1,000 feet left in there the 1st day of January, which we did not take out, and which, if we had had coal as we should have, would have been a very easy matter to take out. Surface of block was 694 square feet when it was stripped. Q. You say when you got through there at the end of the year there was 1,000 feet left in that block? A. 1,000 cubic feet; yes, sir. Coal was taken up the last two or three days of the year. Q. You say you lost the quarrying of that 1,000 feet. How much damage was that to you, or any way that you may state it, if you have a way of your own of stating the damage, by his failure to comply with this clause? A. Leave out the damage at 10 cents a foot. Q. State that with the other, but state it so we can see just what there is of it? A. The stripping costs 15 cents a cubic foot in that tunnel, and the quarrying costs about the same—about 15 cents a foot. Of course, I didn't have to quarry it. I have charged up the stripping at 15 cents on a thousand feet, would be $150 I paid for the stripping. The profit I would have made if I had quarried it would have been 15 cents more, which would be another $150, and I was charged damages on that 1,000 feet at 10 cents a foot, made another $100, and also the drawing of the coal away cost $7, making $407."

As to denial of the option, the plaintiff testified, calling uncovering "stripping," and uncovered good marble, not quarried, a "block":

"In order to get pay for stripping, I was obliged to quarry out the blocks. Q. Now, what did it cost to strip that block? A. I have figured that the cost of stripping stone in these tunnels is 15 cents a cubic foot, and the size of this tunnel was 1,332. In comparison with the other tunnels which we have driven there, it would have given us 26,640 feet. That is, if this tunnel turned out the same proportion. Q. I was getting at the stripping first. A. The stripping on this amount of stone at 15 cents a foot would be $3,996. Q. You never had any opportunity, or did you have any opportunity— What was said about your quarrying out that block of marble that you stripped

which cost $3,996? A. He refused to allow me to take it out—to continue there. Q. Did you have your machinery there all ready to do it? A. Yes, sir; had a derrick there, hoisting power, railroad graded in. The rails were not laid. Except to transfer them from the other part of the quarry, everything was all ready to put the machines in there and go to quarrying. Q. Now, Mr. Wilson, if you had been permitted to quarry out that block that you stripped as you describe here, how many feet, as near as you can estimate, is there of it, and what would have been the profit? A. The number of feet I estimate at 26,640. I get this from the rate that the stone in other parts of the quarry turned out from the same amount of stripping. The profits on it would have been— I had already put in 15 cents a foot for stripping, but outside of that I would have had 15 cents a foot profit. Q. When you say 'profit,' just what do you mean by that? A. I mean that, after paying the expense of the stripping and quarrying this out, I would have had 15 cents a cubic foot left, after paying all the expenses of the quarrying. Q. The net profit, you say, would have been 15 cents a foot? A. Yes, sir."

And as to the shortages the plaintiff's foreman testified:

"Q. You say you were the foreman there, and had charge of that when Wilson wasn't there. Now, let me ask you, supposing you had had plenty of good water from the Harwood spring, and no trouble about the fuel, and the hoisting power at the derrick had been sufficient, how many more feet of marble, if any, do you think you could have quarried out there before the last of December than you did quarry? A. 10,000 feet."

A quarryman of long experience in that vicinity testified that it is cheaper to get out blocks of large sizes, and, on cross-examination, that those of 8, 10, and 12 tons are of usual sizes. The largest block quarried by the plaintiff was 13 tons. There is no other evidence making the plaintiff's claims any more definite as to right of action or damages.

The defendant claims that the option ended with the year 1901, and that the plaintiff lost all right to it by not quarrying the 50,000 feet within that year according to the contract, and by not quarrying within the year what would be left uncovered after quarrying the 50,000 feet. The court held that, as the plaintiff had not fulfilled his part of the contract by quarrying the full 50,000 feet within the year, he would not be entitled to the option to be exercised at the end of the quarrying the 50,000 feet within the year unless the plaintiff's failure to fulfill was caused by the defendant, in not fulfilling his part of the contract, by not supplying water, not providing a 16-ton derrick, and not taking up coal, and submitted the question whether he was so in fault, and whether that caused the plaintiff's failure to fulfill, to the jury, with instructions, if it was, to find for the plaintiff as to the option, with damages for the consequences. The jury returned a verdict for the plaintiff in the usual form in actions on contract, but finding damages separately, under the direction of the court, for failure to supply water, $885; for failure to provide derrick, $600; for failure to transport coal, $307; for denying option, $8,351.66.

The defendant has moved to set aside the verdict because of its form, as against the evidence, and for excessive damages. The verdict covers all the issues in the case, it differs from a general verdict only in distinguishing the damages, and it conforms to frequent practice. Its special features are of advantage in tracing the findings, and neither injure any one, nor furnish any grounds for setting it aside.

The rulings and instructions seem now to be correct, but an important question arises on the face of the verdict—whether there was any sufficient evidence that the deficiency of 6,293 feet out of the 50,000 was due to the failure of the defendant to perform his parts of the contract. The figures show that the jury followed the plaintiff's statements and estimates as to the extent and consequences of the deprivation of water, which would account for 4,400 feet of the deficiency. But the greatest deficiency occurred in March, while the plaintiff had all the water that came to the quarry from the Harwood spring, instead of two-thirds, and while he was uncovering and not quarrying. If that loss of time, then, was due to the deficiency of water, the statement that the loss of time then in uncovering delayed the whole work for the same length of time during the season, without fault of the plaintiff intervening, is wholly conjectural. Loss of time in uncovering is not shown to have been of the same detriment as in quarrying, and in either case the deficiency caused would be left to be made up at the same profit by an adequate increase of force, and the true damages for the interruption would be what such increase of force would properly cost, of which no evidence is given. The statements of delay and loss in consequence of the deficiency of the derrick are still more conjectural. The derrick furnished was sufficient for what appear to be ordinary random sizes. The handling of greater blocks is shown to be more than proportionally difficult and expensive. The practicability of increasing the average from 70 cubic feet to 100 is a conjecture, and that it would be a gain in either time or profit is a further conjecture founded upon the first. The statements as to delay and loss from failure to transport coal are, in view of the near end of the time in which the plaintiff could do anything more, and of the situation of the 1,000 feet of marble all ready to be quarried, more definite and better founded; but, if adequate and well founded, they would not be sufficient for placing the deficiency of 6,293 feet in the plaintiff's performance to the fault of the defendant. The finding of the jury placing the fault upon the defendant, based, as it is, upon incompetent evidence as to the other 5,293 feet, cannot be sustained. The fault must be substantially that of the defendant, and not materially that of the plaintiff, to entitle the plaintiff to the option without fulfilling on his part. These considerations show that the damages found for not furnishing water and for not providing a 16-ton derrick are too large, and also that there is no place in these findings below which these damages can be said, upon the evidence, to be well founded. The jury apparently went to the full extent of the plaintiff's statements of his claims in these respects, because there was no place to stop at. These damages, therefore, appear to be excessive, and to be without competent evidence to show that they are to any extent well founded. Upon these views, the verdict must be set aside, unless it is corrected by remission down to what is well founded. The uncovering was done with the concurrence of the defendant, and, as it is necessary to the beneficial use of the quarry by the defendant in taking out the good marble, and the plaintiff cannot get any benefit from it otherwise, he seems to be entitled to

recover what he has in that way benefited the plaintiff by increasing the value of the quarry. This, without question, upon the evidence, is about one-half of the damages found for denying the option. The other one-half and the damages for not transporting coal, seem well enough founded to stand. If the plaintiff remits the rest, the motion should accordingly be overruled; if not, the verdict should be set aside.

If plaintiff remits within 20 days the $885 damages for not supplying water, the $600 damages for not providing derrick, and $4,175.83 of the damages for denying the option, the motion to set aside the verdict is to be denied; if not, the motion is to be granted.

Ex parte O'NEAL.

(Circuit Court, N. D. Florida. November 10, 1903.)

1. HABEAS CORPUS—RECORD—SUPPLEMENTAL FACTS.
   In a habeas corpus proceeding to obtain relief from imprisonment for contempt, the petitioner is entitled to supplement the record by alleging such additional facts as tend to show that his misbehavior was not a contempt. As to how far, see Ex parte Cuddy, 9 Sup. Ct. 703, 131 U. S. 280, 33 L. Ed. 154.
2. CONTEMPT—FEDERAL COURT—OFFICERS—RESISTANCE.
   Where relator was charged with contempt in resisting an officer of a federal District Court in the execution of orders of such court, it was immaterial whether at the time of the resistance the court was actually in session, with the judge then present, or whether the place of resistance was some distance from the actual place where court was usually held, so long as it was not in the actual presence of the court, or so near thereto as to embarrass the administration of justice.
3. SAME—TRUSTEE IN BANKRUPTCY—ASSAULT—CONTEMPT—DISTRICT COURT—JURISDICTION.
   Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], providing that the District Courts of the United States sitting in bankruptcy are continuously open, and section 63 (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), declaring that a trustee in bankruptcy is an officer of the court, such court has jurisdiction to summarily try and determine the merits of a proceeding to punish relator for an assault on a trustee in bankruptcy in the performance of his duties as such, as a contempt of such court.
4. SAME—HABEAS CORPUS—CIRCUIT COURT—REVIEW.
   Where a federal District Court had jurisdiction to punish relator for an assault on a trustee in bankruptcy as for a contempt, alleged errors and irregularities in such proceeding could not be reviewed by the Circuit Court on a writ of habeas corpus.

Habeas Corpus.

W. A. Blount and C. H. Laney, for relator.
E. A. Angier, U. S. Atty.

PARDEE, Circuit Judge. The petitioner, W. C. O'Neal, was convicted in the District Court for the Northern District of Florida on a charge of contempt of court, in committing an assault upon an officer of said court, and thereupon was sentenced to imprisonment in the county jail at Pensacola, Fla., for the term of 60 days. This conviction was immediately followed by a writ of error to the Su-

preme Court of the United States, based on a certified question as to jurisdiction. In dismissing the writ of error, the Supreme Court said:

"Jurisdiction over the person and jurisdiction over the subject-matter of contempts were not challenged. The charge was the commission of an assault on an officer of the court for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out. In other words, the contention was addressed to the merits of the case, and not to the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided. Louisville Trust Company v. Comingor, 184 U. S. 18, 26 [22 Sup. Ct. 293, 46 L. Ed. 416]; Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 814. And while proceedings in contempt may be said to be sui generis, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. Section 5, Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], as amended by the act of January 20, 1897, c. 68, 29 Stat. 492; Chetwood's Case, 165 U. S. 443, 462 [17 Sup. Ct. 385, 41 L. Ed. 782]; Tinsley v. Anderson, 171 U. S. 101, 105 [18 Sup. Ct. 805, 43 L. Ed. 91]; Cary Manufacturing Company v. Acme Flexible Clasp Company, 187 U. S. 427, 428 [23 Sup. Ct. 211, 47 L. Ed. 244]." 190 U. S. 37, 38, 23 Sup. Ct. 776, 777, 47 L. Ed. 945.

The case is here presented upon the record proper as submitted to the Supreme Court, and upon a further showing of alleged facts which petitioner claims do not contradict the record, to wit:

"That the place at which took place on the morning of October 20, 1902, the affray between A. Greenhut and petitioner, in which is alleged to have occurred the assault by petitioner upon the said A. Greenhut, for which the said District Court has sentenced petitioner as for a contempt, was the office in the store of the said Greenhut, and was a part of the building occupied by him as a wholesale grocery store, and that his office was used by him for the purpose of conducting the said grocery business, and was used in connection with his position as trustee only because it was his place of business, and therefore more convenient for him. That the said building was at said time, and is now, No. 104 East Government street, in the city of Pensacola, and distant from the United States courtroom, and the building in which it was and is held, not less than four hundred feet, and separated therefrom by an intervening street and an intervening alley, and by more than a block of brick business houses, and was not in any way connected with, or used in connection with, the said court or courthouse, or any of the functions or duties of the said court, or of the judge thereof. That the said District Court was not in session in the city of Pensacola on the said 20th day of October, nor had been for months before the said date, and that no session thereof occurred thereafter until November 7, 1902, and that the judge of said court was not on the said date in said state, nor had he been therein for months prior thereto, nor did he come therein until the 6th day of November, A. D. 1902."

As to claimed authority to supplement record as to facts, see Ex parte Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154.

In my opinion, the additional facts offered to supplement the record do not materially change the status of the case, nor do they in any wise extend the jurisdiction of this court upon this writ. The charge of contempt against the relator is based upon the fact that he unlawfuly assaulted and resisted an officer of the District Court in the execution of orders of the court, and in the performance of the duties of his office under such orders; and in that respect it would seem to be immaterial whether at the time of the resistance the court was actually in session, with a judge present in the district, or wheth-

er the place of resistance was 40 or 400 feet from the actual place where the court was usually held, so long as it was not in the actual presence of the court, nor so near thereto as to embarrass the administration of justice.

Under the bankruptcy act of July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], the District Courts of the United States, sitting in bankruptcy, are continuously open; and, under section 63 (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), and others of the same act, a trustee in bankruptcy is an officer of the court. The questions before the District Court in the contempt proceeding were whether or not an assault upon an officer of the court, to wit, a trustee in bankruptcy, for and on account of, and in resistance of, the performance of the duties of such trustee, had been committed by the relator; and, if so, was it, under the facts proven, a contempt of the court whose officer the trustee was? Unquestionably, the District Court had jurisdiction summarily to try and determine these questions, and, having such jurisdiction, said court was fully authorized to hear and decide and adjudge upon the merits. Ex parte Savin, 131 U. S. 267, 276, 277, 9 Sup. Ct. 699, 33 L. Ed. 150.

This brings us squarely to the question whether, upon this writ of habeas corpus, the inquiry can be extended by this court so as to review, as upon writ of error, any irregularities of the District Court in the proceedings, or to determine, as upon appeal, the real merits of the case. I have examined with care the decisions of the Supreme Court of the United States in Ex parte Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154, Ex parte Mayfield, 141 U. S. 116, 11 Sup. Ct. 939, 35 L. Ed. 635, and in In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct 718, 47 L. Ed. 933, and in many other cases, and do not find that either or any of them control or determine the question in favor of such claimed jurisdiction. Whatever an appellate court may have power to do in regard to supplementing the record, as held in In re Cuddy and in Ex parte Mayfield, or upon certiorari and habeas corpus to examine the merits of the case, as in In re Watts & Sachs, I am forced to follow, as I did in Ex parte Davis (C. C.) 112 Fed. 139, the Supreme Court in United States v. Pridgeon, 153 U. S. 48, 62, 14 Sup. Ct. 746, 751, 38 L. Ed. 631, wherein it is declared:

"Under a writ of habeas corpus, the inquiry is addressed, not to errors, but to the question whether the proceedings and the judgment rendered therein are for any reason nullities; and, unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge."

This court has no appellate jurisdiction over the District Court for this district, and if it should attempt to go beyond the rule declared in United States v. Pridgeon, and assume authority to look into the merits wherein judgments have been rendered in the District Court in contempt cases, it would be, from my standpoint, an unwarranted assumption of jurisdiction, decidedly tending to scandal in judicial proceedings.

In dealing with the proceedings against petitioner in the District Court, the Supreme Court said that an erroneous conclusion in re-

gard to the merits can only be reviewed on appeal or error, or in such appropriate way as may be provided. As shown above, the writ of habeas corpus is not an appropriate way provided. The Supreme Court further said that the judgment in this present case is in effect a judgment in a criminal case, over which that court had no jurisdiction on error. The court did not say that no other appellate court had jurisdiction on error. In In re Paquet, 114 Fed. 437, 52 C. C. A. 239, the Circuit Court of Appeals in this circuit held that that court had no jurisdiction to issue a writ of prohibition in a certain contempt case then pending in the Circuit Court of the Northern District of Florida, but intimated that possibly a writ of error might lie in such cases where final judgment of conviction had been rendered; but whether the petitioner here has or had a remedy by writ of error from, or by appeal to, any appellate court, is immaterial on this inquiry, and I am satisfied that this court has no jurisdiction to review the petitioner's case by any remedy provided by law.

The writ of habeas corpus is discharged.

Circuit Judges McCORMICK and SHELBY sat with me and heard argument in this case, and they concur in this opinion.

HYDE v. VICTORIA LAND CO. et al.

(Circuit Court, E. D. Wisconsin. November 16, 1903.)

1. FEDERAL COURTS—JURISDICTION—STATUTES.
Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], declaring the jurisdiction of federal circuit courts, limits the jurisdiction as to actions removed from state courts, as well as to actions originally begun in the circuit court.

2. REMOVAL OF CAUSES—DISTRICT TO WHICH CAUSE MAY BE REMOVED.
Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], providing that a cause removed from a state court shall be transferred to the circuit court to be held in the district where such suit is pending, should be construed to mean the district within the territorial limits of which the suit is pending in the state court.

3. SAME—ESTABLISHMENT OF DISTRICTS—STATE LEGISLATION—EFFECT.
Where the boundaries of a federal judicial district were established by act of Congress, such districts could not be affected by subsequent state legislation organizing new counties, and changing county lines so as to change the district to which suits brought in the state courts of such counties might be removed.

4. SAME.
Where, by reason of the subsequent organization of new counties after the establishment of federal judicial districts in the state, one of the counties was in two federal districts, a suit originating in the state courts of such county, and removable to the federal courts, could be removed to either federal district, without regard to the district in which the county seat of the county was located.

5. SAME—PARTIES—CITIZENSHIP—FORMAL DEFENDANT.
Where a suit was brought to set aside certain land contracts against a nonresident defendant, and the register of deeds of the county in which the suit was brought was joined for the mere purpose of restraining him from recording such contracts pending the litigation, such officer was

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¶ 1. See Removal of Causes, vol. 42, Cent. Dig. § 31.

a mere formal party, and the fact that his citizenship was the same as that of plaintiff did not prevent the noncitizen defendant from removing the cause to the federal court.

6. SAME—AMOUNT IN CONTROVERSY.
Where, on motion to remand a cause removed to the federal court, the removal petition stated that the amount in controversy exceeded $2,000, and it was alleged in the complaint that land contracts sought to be set aside were of greater value than $2,000, a contention that the matter in dispute did not exceed $2,000 in value was without merit.

In Equity. On motion to remand the cause, which was removed from the circuit court of Oneida county on application of Victoria Land Company, as a nonresident of the state

John Barnes, for plaintiff.
Wilson & Mercer, for defendants.

SEAMAN, District Judge. The motion to remand is urged upon three contentions: (1) That the cause, if removable under the acts of Congress, cannot be removed to the Eastern District of Wisconsin; (2) that the defendant Mr. McLaughlin is a citizen of Wisconsin, and is not a mere nominal party, but an indispensable party for relief under the complaint; (3) that the amount involved in the controversy is not within federal jurisdiction. If either of these propositions is supported by the record, it is obvious that this court cannot entertain the suit. But I am of opinion that neither is tenable, and that the several objections must be overruled upon the following grounds, respectively:

1. The first objection rests on these facts: The suit was pending in the circuit court for Oneida county, and involves alleged interests in numerous tracts of land situated in Oneida, Forest, and Vilas counties. In 1870 (Rev. St. § 550 [U. S. Comp. St. 1901, p. 443]) the District of Wisconsin was divided into the Eastern and Western Districts, and the act of Congress named the counties as then organized, which were set apart to the Western District, and declared the Eastern District to "include the residue of said state." Neither of the above-mentioned counties was then organized, but they were subsequently formed out of several existing counties by state legislation at various sessions, with various changes of boundary from time to time. As now organized, the territory of Oneida county extends into both Western and Eastern Districts; the eastern tier of five townships, in range 11, being in this district, while the larger portion, including the county seat, is in the Western District. The whole of Forest county is in the Eastern District, and all of Vilas county is in the Western District. Under this anomalous territorial condition, counsel for the plaintiff contends that the location of the county seat, where the state court is required by statute to hold its sessions and keep its records, is controlling over all other circumstances to ascertain the federal district which may take jurisdiction on the removal from the circuit court for Oneida county. The ground urged for the

¶ 6. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

removal to this district, instead of the Western District, is this: The lands in controversy are mainly, though not wholly, within the territorial limits of the Eastern District, and the plaintiff resides at Appleton, in such district, so that a suit between the parties, founded on diverse citizenship, must be brought in that district (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), as instanced in the cross-bill filed by the defendant for affirmative relief. No authority is cited which upholds either of these tests under the removal acts (Rev. St. § 629 [1 U. S. Comp. St. 1901, pp. 508–510]), and I have found none wherein this or any analogous question appears to have arisen. Jurisdiction of the cause on removal depends alone on the provisions of the acts of Congress referred to. The primary test is whether it is within the original jurisdiction of the court, as defined in the first section [1 U. S. Comp. St. 1901, p. 508], which is a limitation as well on actions removed. Mexican National R. R. v. Davidson, 157 U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672. If the record shows the requisite diversity of citizenship, and that the matter in dispute exceeds the value of $2,000, the subject-matter of the present suit is plainly within the cognizance of this court. In such event the cause is removable, within the act of Congress, and the filing of due application for removal terminates the jurisdiction of the state court, with or without an order therein removing the case; and federal jurisdiction does not depend upon the existence or regularity of any order of removal (1 Desty, Fed. Prac. [9th Ed.] § 110, p. 547; Kanouse v. Martin, 15 How. 198, 14 L. Ed. 660, and 5 Rose, Notes U. S. Rep. 316), so that I deem it questionable, to say the least, whether the cause can be remanded to the state court upon the sole ground that it was not sent to the proper federal district. Laying aside that question, however, I am satisfied that the case is within the jurisdiction of this court, if the right of removal from the state court is established. The only designation of the court to take jurisdiction on removal appears in section 3 of the act as amended (Act Aug. 13, 1888, c. 866, 25 Stat. 435 [1 U. S. Comp. St. 1901, p. 510]), namely, "the circuit court to be held in the district where such suit is pending." This means that the proper district "is the district within the territorial limits of which the suit is pending in the state court." Knowlton v. Congress & Empire Spring Co., 13 Blatchf. 170, Fed. Cas. No. 7,902. The territorial limits of the Eastern and Western Districts of Wisconsin are fixed by the act of Congress referred to (Rev. St. § 550 [U. S. Comp. St. 1901, p. 443]), and are, of course, unaffected by the subsequent state legislation organizing new counties and changing county lines. The county of Oneida was thus organized with one portion of its territory in the Eastern District, and the other portion in the Western District; and the suit brought in the circuit court for Oneida county was pending in that county as a territorial whole, not alone on the county seat or any separate portion, so that it was thus pending within the territorial limits of both federal districts. As that is the only jurisdictional requirement under the act of Congress, no other test can be imposed, and the two districts so embracing the county have con-

current jurisdiction of a suit removable therefrom, in so far as the subject-matter is within the original cognizance of both. The circumstances which are referred to as influencing the order of removal to this district furnish proper grounds for such order, though not controlling for jurisdictional purposes. Jurisdiction thereupon rests alone upon the rightfulness of removal from the state court as disclosed by the record.

2. The second contention is that the defendant McLaughlin is a necessary party and a citizen of Wisconsin, and removal on behalf of the noncitizen defendants is thereby barred. The suit is brought for relief against certain contracts held by the Victoria Land Company, and tendered for record, under which the noncitizen defendants assert an interest in the lands described in the complaint, and an injunction is sought to prevent recording such contracts as clouds upon the title. McLaughlin is register of deeds, with no interest in the controversy, but made a defendant for the sole purpose of restraining him, as such officer, from recording the contracts. It may be assumed that he is a proper party to that end, and that circumstances are stated which indicate that recording cannot be prevented without his presence as a party; but the register is nevertheless a mere formal party, in no sense interested in the sole matter of the controversy, which is the validity or effect of the contracts in suit. So joined to restrain his mere ministerial act of recording the instruments, if they are held to be inoperative as contracts between the parties thereto, the presence of this resident officer will not defeat the right of the real parties in interest to remove the cause. Walden v. Skinner, 101 U. S. 577, 589, 25 L. Ed. 963; Barney v. Latham, 103 U. S. 205, 216, 26 L. Ed. 514, and 10 Rose, Notes U. S. Rep. 39; Geer v. Mathieson Alkali Works, 190 U. S. 428, 435, 23 Sup. Ct. 807, 47 L. Ed. 1122; Lake St. El. R. Co. v. Ziegler, 99 Fed. 114, 39 C. C. A. 431. The only issue tendered by the complaint is whether the contracts relating to sale of the lands described are enforceable, and a decree thereupon would settle all rights between the contracting parties. Recording cannot affect those rights, and, if material in any view pending the suits, the temporary restraining order granted by the state court preserves the statu quo, while the issue upon the contracts remains to be determined between the parties in interest, unaffected either by the fact of recording or withholding from record.

3. The remaining contention, that the matter in dispute does not appear to exceed "the sum or value of two thousand dollars," is without merit. The alleged value of the contracts is the amount involved, and the petition expressly states that it exceeds $2,000, which is sufficient for the present inquiry, under all the authorities. Moreover, the allegations of the complaint in respect of the contracts, and of the amounts paid and involved therein, are corroborative of value in excess of the jurisdictional amount, if the contracts are treated as enforceable. That being the matter in dispute, the amount involved is sufficient to confer jurisdiction.

The motion to remand is overruled.

ANNISTON IRON & SUPPLY CO. et al. v. ANNISTON ROLLING MILL CO.

(District Court, N. D. Alabama, E. D. November 28, 1903.)

No. 11.

1. ACT OF BANKRUPTCY—PREFERENCE—SUBSTITUTION OF SECURITIES.
Where a manufacturing corporation pledges materials under agreement that it may sell or use the same as it may need, and that in case of such sale or use it will pay cash, or transfer its equivalent in good accounts, and the company then disposes of the material, and within four months of its bankruptcy transfers accounts to the pledgee, a large amount of which was not realized from the disposition of the material, it constitutes a voidable preference, and an act of bankruptcy; the transaction not amounting to a mere substitution of securities.

2. SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS.
A direct transfer to creditors, without the intervention of a trustee, is not an assignment for the benefit of creditors, constituting an act of bankruptcy.

Involuntary Bankruptcy.

Lapsley, Arnoled & Martin and Blackwell & Agee, for petitioners.
Knox, Aker & Blackmon, for defendant.

TOULMIN, District Judge. The specific act of bankruptcy alleged in the petition to have been committed by the defendant, the Anniston Rolling Mill Company, by which it is claimed it gave a preference to the Alabama National Bank of Birmingham, Ala., over its other creditors, is that the said defendant did, within four months next preceding the filing of the petition, transfer and assign to said bank a large amount of accounts due to it by a number of its debtors. A further act of bankruptcy alleged is that within said four months the defendant made a general assignment for the benefit of its creditors.

It appeared from the evidence in the case that on the 6th day of December, 1902, the Alabama National Bank of Birmingham, Ala., loaned to the defendant $8,000, for which the latter executed and delivered to the former its promissory note, payable on demand, and at the same time, as security for the payment of said note, executed and delivered to said bank a pledge of a large quantity of material, consisting of wrought, cast, and steel scrap pig iron, iron ore, etc., being all of the material then on hand at defendant's mill; that prior to this transaction, to wit, on November 6, 1902, the defendant made a lease to said bank of a certain part of the land on which defendant's mill plant was located, for the deposit of any material the defendant might from time to time pledge to said bank, and that the material covered by the aforesaid pledge was so deposited; that, at or about the time of the execution of said note and pledge, it was understood and agreed between the defendant and said Alabama National Bank, by their respective presidents, that the defendant should have the privilege to sell or use any or all of said material, as might be needed by it in the operation of its mill, and

that, in case of such sale or use by the defendant, it would pay the cash in settlement of its debt to the bank, or transfer and deliver to the bank its equivalent in good accounts. It further appeared from the evidence that the defendant did, from time to time, use or otherwise dispose of said material; that it did not pay any cash therefor, or on account of said note, but that on February 28, 1903, it transferred to the bank a large amount of open accounts against debtors of the defendant. Each account was transferred in writing on the account, as it appeared on the defendant's books, substantially in these words: "1903, Feb. 28th, transferred to Ala. Nat'l Bank to take place of material previously pledged to the bank." Of the accounts so transferred, a large amount of them accrued prior to December 6, 1902, the date of the loan and pledge referred to. The evidence tended to show that some of the accounts transferred were for some part of the product or finished work of said material; but which particular accounts were for such product or finished work, or to what extent such product or finished work entered into said accounts, or what amount of said accounts represented said product, the evidence did not show. The evidence showed that on the 28th day of February, 1903, the defendant was indebted to a large amount, other than that to the Alabama National Bank, and that among its other creditors were its operatives or employés, to whom it was then indebted in the sum of about $1,500, in the payment of which it had but recently defaulted.

The first question presented is whether the transfer of the accounts by defendant to the Alabama National Bank on the 28th day of February, 1903, was a preference given to said bank over the other creditors of the defendant, within the purview of the bankrupt act, although said transfers were made in compliance with the agreement to that effect theretofore made between the parties.

The said material was used and sold with the consent of the bank, but there was no agreement that it was to be used or sold for the benefit of the bank, and there was no covenant to account to the bank for the proceeds thereof. If there had been, there is no identifying the specific accounts representing such proceeds, and no such description of them that they can be identified. The accounts were not substituted or exchanged for the material, as security for the debt to the bank, contemporaneously with the use and sale of the material. They were never actually pledged to the bank until the transfer on the 28th day of February, 1903. Before that time there was a mere agreement to pledge. The accounts were never delivered to the bank, or set apart and treated as its property, until that day. The pledge was not completed until the date of the transfer. Besides, under the agreement, the defendant had the option to pay to the bank the cash, or to transfer and deliver to it the equivalent in good accounts. The defendant did not exercise this option until the 28th day of February, 1903. Until the transfer of the accounts on that day, they were the property of the defendant.

The contention of the defendant is that, by the transfer of the accounts, they took the place of the material, as an exchange of securi-

ties, and that therefore such transfer was not a preference, within the purview of the bankrupt act. An exchange of securities in four months of the proceedings in bankruptcy is not a preference, within the meaning of the bankrupt law, if the security given up is a valid one when the exchange is made, and if it be of equal value with the security substituted for it, or of not greater value. Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235. But, in my opinion, the facts in this case wholly fail to show an exchange of securities. At the time it was sought by the transfer of the accounts to substitute them for the material pledged as security for the debt, there was no material to be substituted—no security for which said accounts could be exchanged. The effect of the agreement permitting the defendant to use or sell the pledged material was to withdraw the material so used or sold from the operation of the pledge, and, so far as that material was concerned, to merely obligate the defendant to pay its debt to the bank with cash, or to transfer and deliver to it the equivalent in good accounts, which obligation was not performed until within four months prior to the petition in bankruptcy. In re Sheridan, 3 Am. Bankr. R. 554, 98 Fed. 406; In re Ball, 10 Am. Bankr. R. 564, 123 Fed. 164. I find that the transfer of said accounts was not an exchange of one species of property for another as a payment of, or as security for the payment of, the debt due by the defendant to the Alabama National Bank; that at the time of said transfer the defendant was insolvent; that said transfer was made within four months preceding the bankruptcy proceedings herein; that it gave a preference to said bank over other creditors of the defendant; and that it was designed and calculated to have such effect. Johnson v. Wald et al., 2 Am. Bankr. R. 84, and authorities cited in note pages 84 and 85.

My opinion is that the general assignment for the benefit of creditors alleged in the petition as an act of bankruptcy has not been maintained. A direct transfer to creditors, without the intervention of a trustee duly appointed, is not an assignment for the benefit of creditors. May v. Tenney, 148 U. S. 66, 13 Sup. Ct. 491, 37 L. Ed. 368; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289. An assignment directly to creditors, and not upon trust, is not a voluntary assignment for the benefit of creditors. Burrill on Assignments, § 122.

A decree declaring and adjudging the defendant a bankrupt is herewith made and filed.

BLOOM & HAMLIN v. NIXON et al.

(Circuit Court, E. D. Pennsylvania. November 23, 1903.)

No. 18.

1. MUSICAL COMPOSITIONS—COPYRIGHT—PRODUCTION—IMITATION.
Plaintiffs were the owners and producers of a copyrighted song, which was rendered during the performance of an extravaganza by an actress who was required during the action to step to one of the boxes, single out a particular person, and sing the song to him alone, accompanied by certain gestures, postures, and other artistical effects; she being assisted in the chorus by a number of other actresses. *Held*, that an imitation of the actress while singing such song by another actress, in which she, in good faith, attempted to mimic the postures and gestures of the original actress, etc., and used the chorus of the song only as a vehicle for the imitation, was not prohibited by Rev. St. § 4966, as amended in 1897 [3 U. S. Comp. St. 1901, p. 3415], prohibiting any person from publicly performing or representing any dramatic or musical composition for which a copyright had been obtained, without the consent of the proprietor.

Thomas W. Barlow, Nathan Burkan, and Henry P. Brown, for complainants.

William Klein and George S. Graham, for defendants.

J. B. McPHERSON, District Judge. The complainant Bloom owns the copyright of a song entitled "Sammy," and the complainant Hamlin is the manager and owner of a musical extravaganza entitled "The Wizard of Oz," and avers that he has an exclusive license to perform and represent the song in public. The song was not composed as part of the extravaganza, but was a later production, by other hands, introduced because it was believed to be likely to attract. The stage business to be used by the actress who was to sing the song was prepared by Hamlin's stage director, and requires the actress to step to one of the proscenium boxes, single out a particular person in the box, and sing to him alone. A number of girls are also brought upon the stage to sing the chorus, and there are the usual gestures, postures, and other resources of the actor's and of the manager's art. The song, aided by these accompaniments—especially, as it seems, by the rather striking impertinence of making one of the audience uncomfortable—obtained some popular favor; and Lotta Faust, who is the most recent singer of the song, was regarded in the theatrical profession as having "made a hit." The defendants are owners and managers of a musical comedy entitled "The Runaways," and among the company is an actress named Fay Templeton, who is said to possess unusual powers of mimicry. In The Runaways she imitates the peculiarities and characteristics of five actresses—among them, Lotta Faust singing the chorus of "Sammy." Her performance is preceded by an announcement that it is an imitation of Lotta Faust singing her song "Sammy" in The Wizard of Oz, and that only the chorus will be sung. Miss Templeton is alone upon the stage, no chorus of girls being present. It is this mimicry that the court is asked to enjoin, and the question for decision is whether such a performance is forbidden by section

4966 of the Revised Statutes as amended in 1897 [3 U. S. Comp. St. 1901, p. 3415], which imposes a liability in damages upon any person "publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition," and authorizes such performance to be stopped by injunction. The first verse and chorus of the song will exhibit its quality:

"Did you ever meet the fellow fine and dandy,
Who can readily dispel your ills and woes?
Did you ever meet the boy who's all the candy
Where'er he goes?
That's the very sort of fellow I'm in love with,
He is all the daffodils of early spring,
And to me the finest bliss is
Just to revel in his kisses
When to him I sing:"

(Chorus)

"'Sammy, oh, oh, oh, Sammy,
For you I'm pining when we're apart;
Sammy, when you come wooing
There's something doing around my heart.
Sammy, oh, oh, oh, Sammy,
Can't live without you, my dream of joy;
Tell me, oh, oh, oh, tell me,
You're only mine, my Sammy boy.'"

As will, no doubt, be observed, this sounds the note of personal emotion that is the characteristic of the lyric; and I think counsel are agreed that there is nothing dramatic about either the words or the music. Assuming, for present purposes, that a lyric is capable of being "performed or represented" in the sense that should be given to those words as they are used by the statute, the question remains, is the song in fact being performed or represented? In my opinion, the question should be answered in the negative. What is being represented are the peculiar actions, gestures, and tones of Miss Faust; and these were not copyrighted by the complainant Bloom, and could not be, since they were the subsequent device of other minds. It is the personality imitated that is the subject of Miss Templeton's act, modified, of course, by her own individuality, and it seems to me that the chorus of the song is a mere vehicle for carrying the imitation along. Surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced. No doubt, the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly. But where, as here, it is clearly established that the imitation is in good faith, and that the repetition of the chorus is an incident that is due solely to the fact that the stage business and the characteristics imitated are inseparably connected with the particular words and music, I do not believe that the performance is forbidden either by the letter or the spirit of the act of 1897. The owner of the copyright is entitled (upon the assumption heretofore stated) to be protected from unauthorized public

performance or representation of the song, in order that whoever might desire to hear "Sammy" sung in public would be obliged to attend a performance of The Wizard of Oz; and, as it seems to me, he still has that protection. The song is only sung publicly in that extravaganza. Fay Templeton does not sing it, she merely imitates the singer; and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation. This is a distinct and different variety of the histrionic art from the singing of songs, dramatic or otherwise, and I do not think that the example now before the court has in any way interfered with the legal rights of the complainants.

For the present, of course, I am guided by the ex parte affidavits. When the evidence comes to be put in, a different case may be presented.

A preliminary injunction is refused.

OREGON R. & NAV. CO. v. SHELL et al.

(Circuit Court, D. Washington, S. D. December 3, 1903.)

No. 211.

1. UNITED STATES CIRCUIT COURT—JURISDICTION—PECUNIARY LIMIT—RAILROAD RIGHT OF WAY—SUIT TO ENJOIN TRESPASS AND CORRECT DEED.

The circuit court has no jurisdiction of a suit to correct an ambiguity in the deed of a railroad right of way, and to restrain the removal of gates at a crossing in the inclosure thereof, where the value of the realty and the damage accruing to adjacent property from the road's construction are not shown to exceed $2,000; and the fact that animals may stray on the track through the threatened openings in the inclosure, and cause wrecks occasioning great damage, does not help the case, since, when jurisdiction depends on a particular sum, suits where the right involved cannot be calculated in money are not within it.

The complainant, a railroad corporation, claiming to own a right of way 100 feet wide for each of two parallel lines of railroad crossing land owned by the defendants, under a deed describing the right of way granted by the words: "A strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the main track of the Oregon Railway & Navigation Company's railroads as the same are staked out and located over and across the lands of," etc.—commenced this suit to correct a supposed ambiguity in said deed, so as to make the same more clearly describe a right of way 100 feet wide for each of its two lines, and for an injunction to restrain the defendants from removing gates of the right of way fences opposite a crossing, the right of way having been inclosed and the owners of the land having a private way across the tracks. The bill of complaint contains an averment that the complainant's right to maintain said gates, which is disputed by

¶ 1. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

the defendants, is necessary for safety in operation of its railroads, and that the value thereof exceeds $2,000, and said averment is denied by the defendants' answer. On final hearing. Findings and decree that the value of the matter in controversy is not sufficient, and that the case be dismissed for want of jurisdiction.

Cotton, Teal & Minor and L. S. Wilson, for complainant.
T. P. Gose and C. C. Gose, for defendants.

HANFORD, District Judge (after stating the facts as above). The jurisdiction of the court over this case is disputed on the ground that the controversy does not involve anything exceeding $2,000 in value. The complainant contends that the subject of the controversy is its right to inclose the right of way; that an open way across its tracks by which animals may come upon the roadbed is a menace to the safety of all trains; that accidents which may happen by reason of collisions with animals which the utmost vigilance may not prevent may cause personal injuries to and death of many of its passengers and employés, and destruction of property of immense value; that the difference in value to it of an inclosed right of way compared with an uninclosed right of way is very great; and that the exact or proximate value cannot be calculated. This contention is strongly supported by uncontradicted evidence as to all the facts involved. On the other hand, the defendants contend that the question of jurisdiction is to be determined by the application of the rule that for the appropriation of the land required for its right of way with full title and absolute dominion over it, including the right to inclose it, the complainant will only be obligated to pay the reasonable value of the land actually appropriated and the amount of damages which the owners of the land may be entitled to claim by reason of the construction and operation of the railroad; that if the complainant prevails in this lawsuit the defendants will only lose the amount of such value and damages, the aggregate amount of which constitutes the pecuniary value of the subject of controversy; and that the evidence does not prove said amount to be more than $2,000.

It is my opinion that in the mere statement of the two opposing propositions the superior strength of the defendants' position, in reason, is obvious; for if the court should grant a decree in favor of the complainant for all the relief demanded it will gain and the defendants will lose only the pecuniary advantage of having possession and complete control of the right of way, and the value thereof cannot be greater than the amount which the complainant would be obliged to pay to the defendants in order to acquire possession and complete control, if it did not claim to be already entitled thereto. The authorities also sustain the defendants' theory of the law. 18 Encyc. Pl. & Pr. 270, n. 2; Security Company v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Clay Center v. Farmers' Loan & Trust Co., 145 U. S. 224, 12 Sup. Ct. 817, 36 L. Ed. 685; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; United States v. Wanamaker, 147 U. S. 149, 13 Sup. Ct. 279, 37 L. Ed. 118.

The pleadings make an issue, and the burden of proof is upon the complainant, and, as the case was tried only upon the complainant's theory, no evidence was offered with respect to the value of the right of way nor of the amount of damages caused by the railroad, and the court is unable to make the findings necessary to sustain its jurisdiction. Therefore the case must be dismissed.

Were the complainant's theory accepted the result would be the same, for there is no certainty that trains will be wrecked in consequence of the opening of the right of way fence at the particular place in controversy, and it is not possible to even conjecture the amount of the damages if one or more such accidents should occur, nor will closed gates afford absolute protection against accidents of the kind apprehended. Hence the value of the right to maintain closed gates cannot be calculated, and the case falls within the rule that, where jurisdiction depends upon a specified amount, jurisdiction does not attach to any case in which the right involved cannot be calculated in money. 1 Encyc. Pl. & Pr. 719; Kurtz v. Moffitt, 115 U. S. 498, 6 Sup. Ct. 148, 29 L. Ed. 458.

A decree will be entered dismissing the case, with costs.

HARTFORD & N. Y. TRANSP. CO. v. HUGHES et al.

(District Court, S. D. New York. November 12, 1903.)

1. WHARVES—LIABILITY OF OWNERS FOR INJURY OF VESSEL—OBSTRUCTIONS IN BOTTOM.

   It is the duty of a wharfinger to ascertain the condition of the bottom of the waters adjacent to his wharf which the public is invited to use, and if there are any dangerous obstructions to remove the same, or, if that cannot be done, to notify vessels using the wharf of their existence and position; and a general notice by the owners of a bulkhead to the master of a vessel of the depth of water, and that he must be responsible for any injury to his vessel while lying at the bulkhead, will not relieve such owners from liability for an injury caused by a rock projecting three feet from the bottom, of the existence of which the master was not notified.

In Admiralty. Action to recover for injury of vessel at respondents' bulkhead.

James J. Macklin, for libellant.
Alexander & Ash, for respondents.

ADAMS, District Judge. This action was brought by the libellant to recover the damages caused its barge, the H. & N. Y. T. Co. No. 3, and the cargo of stone on board, of which it was bailee, by sinking while lying at the respondents' bulkhead in the East river, at Ravenswood, Long Island, on or about the 1st day of July, 1895.

The barge was 123 feet long and about 28 feet wide, and drew, when loaded as she was this day, 7 feet 4 inches forward and 8 feet 6 inches aft. The bulkhead had been constructed for two or three months before the accident. It was 75 feet long and had a depth of water of about 6 feet, a short distance off the face, increasing towards the river.

The barge was made fast at about the height of the tide at 6 o'clock in the morning and lay there, apparently without injury, through one tide but at the next tide, she was injured by having a hole knocked in her bottom by a sharp rock, which by a subsequent examination of the bottom was found to be projecting about 3 feet above the bed of the river.

Shortly after her arrival, the respondents, who were the consignees of the cargo, asked the captain to discharge it, as they were in immediate need of it, and they provided men for that purpose. Having ascertained, from the master, the draft of the barge, they also notified him that there were only about 6 feet of water in the berth and if she were injured there at low tide he would have to be responsible. They did not at the time know of the existence of the rock but supposed the bottom to be of hard sand. The master said he could not discharge at that time but would have to await the arrival of the superintendent of his company. When the superintendent came subsequently, and while the barge was on the bottom, during the first low tide, he had no men and did not attempt to get any, as he had been accustomed to have the barge lie aground without injury, but he directed the master to slacken up his lines, so that the barge would go further into the stream. This the master did and at the next tide, the barge went off from the face of the bulkhead so that she was lying at her stern 10 or 12 feet off and at her bow 2 or 3 feet off.

The examination of the bottom after the accident showed that the rock which did the injury, was about 18 feet from the bulkhead, with about 12 feet of water on it at high tide. The fall of the tide was 5 or 6 feet, depending somewhat upon local conditions, and it seems clear that the change of position did not affect the situation, because if the barge had remained in the first position, she would still have been subjected to the danger, which she afterwards encountered and caused her bottom to be punctured. How the barge happened to go through the first tide without apparent injury is not adequately explained.

The question to be determined is, whether the notice given by the respondents to the master, was sufficient to relieve them of the liability, which ordinarily attends the failure of wharfingers to be familiar with the nature of the bottom of waters adjacent to the wharves which they hold out to the public for use.

The law is well settled and is stated by the Supreme Court, in the following language:

"Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the conditions of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care and cannot carelessly run into danger. Philadelphia, Wilmington, etc., Railroad v. Philadelphia, etc., Steam Towboat Co., 23 How. 209 [16 L. Ed. 433]; Sawyer v. Oakman, 7 Blatchf. 290 [Fed. Cas. No. 12,402]; Thompson v. N. E. R. R. Company, 2 B. & S. 106, s. c. Exch. (1860) 119; Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93; Carleton v. Franconia Iron and Steel Company, 99 Mass. 216; Nickerson v. Tirrell, 127 Mass. 236; Barber v. Abendroth,

102 N. Y. 406 [7 N. E. 417, 55 Am. Rep. 821]". Smith v. Burnett, 173 U. S. 430, 433, 19 Sup. Ct. 442, 43 L. Ed. 756.

In this case the court further said (page 435, 173 U. S., page 444, 19 Sup. Ct., 43 L. Ed. 756):

"In The Moorcock, 13 P. D. 157, defendants, who were wharfingers, agreed with plaintiff for a consideration to allow him to discharge his vessel at their jetty which extended into the river Thames, where the vessel would necessarily ground at the ebb of the tide. The vessel sustained injury from the uneven condition of the bed of the river adjoining the jetty. Defendants had no control over the bed, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. It was held that, though there was no warranty, and no express representation, there was an implied undertaking by defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to a vessel, and that they were liable. The judgment was sustained in the Court of Appeal, 14 P. D. 64, and was approved by the House of Lords in The Calliope (1891) App. Cas. 11."

It was further said (pages 435, 436, 173 U. S., page 444, 19 Sup. Ct., 43 L. Ed. 756):

"The Lord Chancellor remarked: 'In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have invited the vessel or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided.' Lord Watson: 'I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or if that cannot be done, they must give due notice of it to ships coming there to use their quay.' And Lord Herschell: 'I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned judges in the cases which have been cited to us, with the condition of the bed of the river in itself dangerous—that is to say, which is such as necessarily to involve danger to a vessel coming to use a wharf in the ordinary way; and we are not dealing with a case of what I may call an abnormal obstruction in the river—the existence of some foreign substance or some condition not arising from the ordinary course of navigation.' "

The respondents were maintaining a bulkhead wharf for public use which they could easily have ascertained (as they did shortly after the accident not only with respect to the rock in question but others which were there) was in a dangerous condition for the use of vessels drawing over 6 feet, and they took no sufficient steps to become familiar with its conditions for such use, although they invited the vessels there. If they had fulfilled their primary duty of ascertaining the condition and had notified the master of the boat of the existence of the rocks, and he had remained there with his boat and suffered the damage, the owner could probably not recover but, in view of the circumstances, I do not consider that the respondents can avoid the consequences of their neglect to ascer-

tain the condition of the bottom by endeavoring to throw the responsibility of remaining at the bulkhead upon the libellant, when nothing but a general warning was given the master to the effect that if anything happened he, not they, would be responsible.

There should be a decree for the libellant, with an order of reference, but, in view of the long delay in bringing the case to trial, without interest beyond the period of one year.

In re KANE.

(District Court, M. D. Pennsylvania. September 15, 1903.)

1 BANKRUPT—FAILURE TO TURN OVER ASSETS TO TRUSTEE—CONTEMPT—VOIDABLE PRIORITY.

A bankrupt cannot be adjudged in contempt for failure to turn over to his trustee, pursuant to order of the referee, money which, before the proceedings were begun, had been paid out by him to creditors.

2. SAME.

The sole purpose of a contempt proceeding against a bankrupt for failure to turn over assets to his trustee is to reach and compel the surrender of all property in his actual control or possession, and not to punish him for concealing assets from his trustee.

3 SAME—SUFFICIENCY OF EVIDENCE.

In proceedings against a bankrupt for contempt for failure to turn over to his trustee, on order of the referee, money traced into his hands, it is not a sufficient accounting by him for such money to say that he gave it to his wife, who has spent it for the benefit of himself and family.

On Exceptions to Report of Referee.

H. F. Maynard and C. C. Yocum, for bankrupt.

E. G. Herendeen and Joseph W. Beaman, for defendant.

ARCHBALD, District Judge. The referee found that the bankrupt had in his hands $1,340, and ordered him to turn it over to his trustee; and, for the failure to do so, he has reported him in contempt. Whether he is, or not, depends on the correctness of this finding. The checks which the bankrupt received from Farley upon the sale of his merchandise and accounts, amounting to $2,538.58, he turned over to his attorney, Yocum, who had them cashed at once at the Sayre National Bank, and paid out of the proceeds two overdue notes, of $1,160, which were lying there. We are not concerned at this time with the validity of the sale, nor the circumstances attending it, nor whether the payment to the bank was a voidable preference. The bankrupt certainly has not got the $1,160 so turned over to it, and he cannot, therefore, be charged therewith. The only question is as to the remainder. This was left with the bank, but was not put to the credit of the bankrupt, probably to escape checks which were outstanding. This occurrence was on May 19, 1902, and on May 23d a petition in involuntary bankruptcy was filed against Kane, on which an adjudication was had July 24th following. It would have been obtained earlier, except that the bankrupt had withdrawn from the district, and his whereabouts were not known. Somewhere about June 19th Yocum drew from the bank the money which had been left

there, and took it to Milville, N. J., where Kane, as it seems, had been staying with his wife's relatives, and gave it into Kane's hands. Out of what was so received, Kane paid Yocum a bill for services of $50, and gave him $750 additional with which to settle a claim which his brother Patrick J. Kane had against him. This was a debt incurred a year or two previous, when Michael bought out his brother Patrick's half interest in the business which they had been carrying on together. Yocum succeeded in securing a settlement for $600, and turned over the $150 which he saved to the bankrupt's wife. It is contended that the money so turned over to Patrick was to be held by him for the benefit of the bankrupt, but there is not a shadow of anything to sustain such an idea. It is true that Patrick says the money was paid to him the evening of the sale, and that he spent it all soon afterwards on a wedding trip; also that he gave a receipt for it the same day; and the receipt which is produced bears date of May 19th, in apparent accordance. But his story is very unsatisfactory in many ways, which I will not stop to discuss; and, contradicted as it is by both Yocum and the bankrupt, I do not believe it. The date of the receipt is to be explained either as a mistake of May for June, as Yocum suggests, or a dating back for some undisclosed purpose. Assuming, as testified, that the money turned over to him was $1,340—although the amount left with the bank was somewhat more than this—and taking out that which the bankrupt paid to his attorney and to his brother, there was left in his hands, including that returned to his wife, the sum of $690. The only thing he has to say of this is that he gave it to his wife, and that it has been spent for the benefit of himself and family. This, however, is not a sufficient accounting for it, nor does it seem at all probable. He stayed at Milville, according to his story, about six weeks, and then got work at Philadelphia as a motorman, and went there to live, by which time his earnings, as we have the right to assume, would largely support those dependent on him. He was only called to draw upon this money, therefore, for a brief period; and he was likely, from his reduced circumstances, to be somewhat saving of it. It is hardly to be believed that by the middle of October, when he was examined before the referee, he had made away with the whole of it, as he testifies. Money having been traced directly into his hands, he cannot swear himself free from liability by any such general and sweeping statement. The limits of a proceeding of this character are, no doubt, to be recognized and observed. It is not intended to punish the bankrupt for concealing assets from his trustee, for which the law otherwise provides, nor for frauds or delinquencies of which he may appear to be guilty. The sole purpose is to reach, and compel the surrender to the trustee of, property belonging to the estate in the actual control or possession of the bankrupt (Boyd v. Glucklick, 8 Am. Bankr. R. 393, 116 Fed. 131, 53 C. C. A. 451; In re Gerstel, 10 Am. Bankr. R. 411, 123 Fed. 166; Brandenburg, Bankruptcy, § 54), although for this the power of the court is plenary (Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. R. 224). Having regard to what is involved, it is to be exercised with caution; but, where a proper case is presented by the evidence, the court is not to allow itself to be

deceived by evasions, nor deterred by the consequences. In the present instance, while I cannot sustain the finding of the referee that the bankrupt had in his hands, at the time the order to turn over was made, the $1,340 which was so required of him, I feel compelled to find that he did have the greater part of the $690 left after deducting the payments to his brother Patrick and to his attorney. Exactly how much, to a dollar, this was, we may not be able to say; and the bankrupt, after having had opportunity, both before the referee and the court, except the bare statement that he had spent it, throws no light upon the matter. The only thing left is to estimate it; and, allowing for the time before he got work in Philadelphia, and taking into consideration that he took some money away with him (although not much), it is fair to say that he must have had at least $600 at the time of the hearing last October. This, I am constrained to hold, he must now turn over to his trustee.

Let an order be drawn requiring the bankrupt to pay to his trustee the sum of $600, moneys of the estate in his hands, within 20 days from the service of this order upon him, or, in default thereof, that he be adjudged in contempt.

In re FISHBLATE CLOTHING CO.

(District Court, E. D. North Carolina. November 28, 1903.)

1. INVOLUNTARY BANKRUPTCY — PETITIONING CREDITORS — NUMBER — COMPETENCY.

Where one of the three creditors signing an involuntary bankruptcy petition had received a preference within four months prior to the filing of the petition, which he had not surrendered, and was therefore disqualified from signing the petition, and there was no request for an amendment of the petition by including the names of other creditors, the petition will be dismissed.

In Bankruptcy.

C. F. McRae and Rountree & Carr, for petitioning creditors.
Iredell Meares, for bankrupt.

PURNELL, District Judge. This cause being before me on the petition of petitioning creditors and the verified answer of the bankrupt company, it appearing that the International Shirt & Collar Company, one of the three petitioning creditors necessary under the bankrupt act to constitute the requisite number of creditors upon which an involuntary petition in bankruptcy can be maintained, has received a payment on its claim within the prohibited period, to wit, four months of the filing of the petition in bankruptcy, and that said payment constitutes in law a preference, said preference not having been surrendered by said creditor. It further appears that said petitioning creditors have not by petition or proper motion requested that said original petition be amended by including the names of other persons as creditors, bringing said petition within the provisions of said bankruptcy law, but the only request made by

said petitioning creditors is that they be allowed to file a replication to defendant's answer, which request is as follows: "If the court is of a contrary opinion, we respectfully ask time to file a replication to the answer of bankrupt."

Upon the foregoing facts it is ordered adjudged, and decreed:

1. That the International Shirt & Collar Company, one of the petitioning creditors, has not a provable claim against the bankrupt company, as contemplated in the act; that it has received a preference, which it has not voluntarily surrendered; and that creditors in an amount as required by the act have not united in instituting the petition herein against the defendant bankrupt company.

2. The court must act upon the record as presented, and there is nothing in the record as presented (and the statements in the verified answer must be taken as true), asking for leave to amend said original petition to conform to the provisions of the bankrupt law.

The court cannot try hypothetical cases. It may be stated this is not a moot court, but sits under the law to try bona fide causes actually existing and regularly instituted between parties—questions raised and presented in the record. The seeming effort on the part of petitioning creditors to "fish out" an opinion upon a hypothetical case cannot avail.

It is therefore ordered, adjudged, and decreed that the petition herein, for the reasons stated, be, and the same is hereby, dismissed, at the cost of the petitioning creditors.

EIKREM v. NEW ENGLAND BRIQUETTE COAL CO.

(District Court, D. Rhode Island. November 17, 1903.)

No. 1,103.

1. SHIPPING—CHARTER PARTY—LIABILITY FOR FREIGHT.
Under a charter party providing that the charterer shall provide a full and complete cargo of sludge, he to pay $1.75 per ton for freight, there can be recovery only for the amount shipped; there being no evidence that the vessel could have prudently taken more of such a cargo, or that the master erred in his judgment that that was all she could prudently carry.

2. SAME—DEMURRAGE.
Complainant, on a libel for demurrage, is not precluded from proving the exact loading and discharging times by having previously presented a bill for a smaller amount.

In Admiralty.

Matteson & Healy, for libelants.
Livingston Ham, for claimant.

BROWN, District Judge. This libel is for freight and demurrage. The schooner James Duffield, described in the charter party as "of the burthen of 178 tons, or thereabouts, registered measurement,"

¶ 2. Demurrage, see notes to Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

was chartered for a voyage from Mantua Creek, N. J., to Providence, R. I. The charterer was to provide "a full and complete cargo under deck of sludge in bulk," and to pay therefor at the rate of $1.75 per ton of 2,240 pounds; the charterers to load, trim, and discharge the cargo. The vessel carried 167 tons 1,690 pounds of sludge. The claimant contends that this was not a full and complete cargo, and not a substantial performance of the agreement. The respondent's argument is that, as the vessel could carry 250 or 260 tons of soft coal, and as a cubic foot of soft coal weighs 51⅜ pounds, while a like quantity of sludge weighs 62½ pounds, 304 tons of sludge could be put into the same space as 250 tons of soft coal. By similar computations based on other evidence, he reasons that 322½ tons was the probable sludge-carrying capacity of the vessel. But this argument is obviously unsound, since it considers only the amount of space in the hold of the vessel, and disregards the facts that the sludge was of greater weight per cubic foot than soft coal, and was not a solid substance, but a substance described by the master of the vessel as "similar to thick pitch, and very easy to run from place to place. It would keep soft. It would not harden very solid in cold weather. I don't know what to call it—whether liquid or solid. It would run." It was a shifting cargo, and in fact did shift so that at one time on the voyage the vessel had a list of some 12 inches. As the vessel was to receive payment at the rate of $1.75 per ton for the amount carried, it was to her advantage to take as large a cargo as possible. There is no evidence to show that the Duffield could have taken prudently a larger cargo of this peculiar substance in bulk, or that the master erred in his judgment that between 167 and 168 tons was all that the vessel could carry safely.

According to the uncontradicted proofs, there was a delay of 4 days and 19 hours in loading, and a delay of 17 days in discharging. For each day's detention the vessel was entitled to $16. While the bill presented to the respondent, the New England Briquette Coal Company, was somewhat smaller, this does not preclude the libelant from proving the exact loading and discharging times; and no evidence has been offered to show any inaccuracy in the detailed statement annexed to libelant's brief, nor is the accuracy of the figures questioned upon the respondent's brief.

I find that the complainant is entitled to $348.66 for demurrage, with interest from the date of filing the libel, and to $1.27 unpaid balance of freight.

In re BEAVERS.

(District Court, S. D. New York. October 24, 1903.)

1. ARREST—PERSONS LIABLE—SECOND ARREST OF PERSON ON BAIL.

A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined; and a person arrested on a commissioner's warrant, and either in custody or held to bail pending his examination for removal to another district to answer to a criminal charge, is not subject to a second arrest, for removal to a different district, until the first proceeding has been terminated.

On Application for Writ of Habeas Corpus.

Morgan & Seabury, for petitioner.
Ernest E. Baldwin, Asst. U. S. Atty.

HOLT, District Judge. This is a writ of habeas corpus issued upon the petition of George W. Beavers, who alleges that he has been illegally arrested under an order of Samuel M. Hitchcock, Esq., a United States commissioner. The petitioner was indicted by the federal grand jury in the Eastern District of New York. A warrant for his arrest was issued by the judge of the Eastern District of New York, but he was not found within that district. An application was thereupon made to Samuel M. Hitchcock, a United States commissioner in the Southern District, for a warrant for his arrest and removal. A warrant was issued by the commissioner, under which the petitioner was arrested and brought before him. The petitioner demanded an examination, and gave bail for his appearance before the commissioner. Subsequent to the finding of the indictment in the Eastern District of New York, another indictment against the petitioner was found by the grand jury of the District of Columbia. A bench warrant was issued by the Supreme Court of the District of Columbia for his arrest under the indictment, but, not being found within the District of Columbia, another application was made to Commissioner Hitchcock, in the Southern District of New York, for his arrest and removal under the second indictment. A warrant on this second application was issued by the commissioner, under which he was arrested by the marshal of the Southern District of New York, and brought before the commissioner. The petitioner thereupon demanded an examination, and was again admitted to bail by the commissioner. The bail given upon the second arrest under the warrant issued upon the indictment in the District of Columbia subsequently surrendered the petitioner to the marshal for the Southern District of New York, and thereupon the petitioner filed a petition in this court for this writ of habeas corpus, alleging that his second arrest was illegal.

In my opinion, the fact that Beavers had given bail on the first arrest, and was not in the actual custody of the marshal when the second arrest took place, is immaterial. The general rule is as stated by Mr. Justice Swayne in Taylor v. Taintor, 16 Wall. 371, 21 L. Ed. 287:

"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment."

The question, therefore, in my opinion, is precisely the same as though the marshal, while holding the petitioner under the original warrant of the commissioner pending the examination as to whether he should be removed to the Eastern District of New York, had received the warrant of the commissioner issued on the indictment found in the District of Columbia. I think that in such a case, although the issue of the warrant was proper, it would be the duty of the marshal not to execute it, but to hold it pending the decision of the commissioner in the proceeding for the removal of the defendant

from this district to the Eastern District of New York. If, for any reason, the commissioner should decide in the first proceeding that the petitioner should not be removed, then it would be the duty of the marshal to arrest him and hold him under the warrant in the second proceeding; but, until the first proceeding is determined, I think that no other arrest can be permitted. As is stated in Taylor v. Taintor, 16 Wall. 370, 21 L. Ed. 287:

"It is a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

If it was the duty of the marshal to arrest him under the second warrant, it would be his duty to carry out the decision on the second warrant, as it is his duty to carry out the decision on the first warrant. If the two proceedings resulted in an order for the removal of the defendant in the one case to the Eastern District of New York for trial, and in the other case to the District of Columbia for trial, it is obvious that no such orders could be complied with at the same time. The only possible rule is that a court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined, and, if he is found guilty, until the period of imprisonment has expired. Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Matter of Troutman, 24 N. J. Law, 634; Matter of Briscoe, 51 How. Prac. 422.

My conclusion is that the arrest under the second warrant issued by the commissioner should be vacated.

In re LE VAY.

(District Court, M. D. Pennsylvania. November 27, 1903.)

No. 326.

1. BANKRUPTCY—EXEMPTIONS—TIME AND MANNER OF CLAIMING.

While, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], the right of a bankrupt to his exemption depends on the state law, by which it is primarily given, the time and manner of obtaining it are necessarily regulated by that act. Claim for its allowance in involuntary proceedings is therefore in effective time if made by the bankrupt in his schedules.

2. SAME—PERISHABLE GOODS—CLAIM ON PROCEEDS OF SALE.

Where a claim to his exemption is made by the bankrupt in his schedules, the mere fact that meanwhile the goods themselves, which he might otherwise have claimed, have been sold by a receiver under the direction of the court as perishable, will not deprive him of the right to come in upon the proceeds, notwithstanding that under the state law a debtor is not entitled to his exemption out of the proceeds of a sale, but must elect the goods he wishes to retain and have them set aside to him.

3. PERISHABLE GOODS—SALE OF—PROCEEDS—HOW DISTRIBUTED.

The sale of goods as perishable is for the benefit of all concerned; the money realized standing instead of the property itself, against which the parties interested may assert their rights, the same as if the sale had not taken place.

4. BANKRUPTCY—EXEMPTIONS—PRIORITY—COSTS AND EXPENSES OF RECEIVER.
Where the bankrupt has properly claimed his exemption, it cannot be diminished by, or put aside in favor of, the costs and expenses made in the proceedings, even where these have been incurred in steps taken to preserve the property, as by a sale of it by a receiver as perishable.

In Bankruptcy. On certificate from H. A. Fuller, Referee.

Chas. N. Loveland, for bankrupt.
W. N. Reynolds, Jr., for defendant.

ARCHBALD, District Judge. These are involuntary proceedings instituted June 1, 1903, against the bankrupt, who was carrying on a millinery business. On suggestion that her stock, being adapted to the season, was liable to serious deterioration unless speedily disposed of, a receiver was appointed, and a sale of the goods ordered as perishable. This sale took place on June 19th, two weeks in advance of the adjudication, and realized $140.50—about one-fourth of what it was appraised at; and upon filing her schedules a few days after the adjudication the bankrupt claimed the proceeds as part of her $300 state exemption. Excepting a sewing machine, some jewelry, and a few small personal effects, valued at $50, also claimed as exempt, the money realized at the sale constituted the whole of her property. The right to the proceeds of the sale was denied the bankrupt by the referee on two grounds: First, because it was claimed too late, after the goods had been converted by a sale; and, second, because the costs and expenses of the referee and receiver, which exhausted the fund, were entitled to priority.

It is held by the courts of Pennsylvania that an execution debtor is not entitled to his $300 exemption out of the proceeds of the sale of personal property by the sheriff, but that he must elect the goods which he wishes to retain, and have them appraised and set aside to him (Hammer v. Freese, 19 Pa. 255); and that, except under certain special circumstances, a demand for an appraisement must be made before the day of the sale, or the exemption will be considered waived. Rogers v. Waterman, 25 Pa. 182; Diehl v. Holben, 39 Pa. 213. But while it is no doubt true that the right of the bankrupt to his exemption depends on the state law by which it is primarily given, the analogies derived from the practice upon execution process are not to be carried too far. The time and manner of obtaining it in this court are necessarily regulated by the bankrupt act, and it is there provided that the bankrupt shall claim in his schedules the exemptions to which he is entitled—section 7a (8), Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]—and that they are to be set apart to him by the trustee, who is to report to the court the items and estimated value thereof—section 47a (11), Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]. Where this course has been pursued, it must be regarded as effective, and in time. The mere fact that meanwhile the goods which he might otherwise have claimed have been sold by a receiver, under the direction of the court, because of their perishable character, will not deprive him of the right

¶ 4. See Beach v. Macon Grocery Co. (C. C. A.) 125 Fed. 513.

to come in upon the proceeds. The sale of goods as perishable is for the benefit of all concerned, the money realized therefrom standing in stead of the property itself, against which the parties interested may assert their rights the same as if the sale had not taken place. Taylor v. Carryl, 24 Pa. 259; Apreda v. Romano, 24 Wkly. Notes Cas. 124. It may be that the alleged bankrupt, for the purpose of more fully preserving her rights, might have petitioned the court in advance, and had the goods set off to her under her exemption; but I do not see that she was bound to do so; much less was she to apply to the receiver, who had no authority to act if she had.

Neither is the bankrupt's claim to be put aside in favor of the costs and expenses made in the proceedings. No doubt the adjudication determines that an act of bankruptcy had been committed, which, theoretically, justifies them; but, even so, the bankrupt was entitled to her exemption, which, having been properly claimed, preserves to her intact and undiminished whatever is covered thereby. Property that is exempt forms no part of the bankrupt's estate, nor does the bankrupt court acquire any right to administer upon or distribute it, even though its aid may be required to set it aside. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The title to that which is now claimed having, therefore, never passed out of the bankrupt, even though temporarily in abeyance, cannot be subjected to the costs made in the attempt to otherwise deal with it (sections 62, 64b, Act July 1, 1898, c. 541, 30 Stat. 562, 563 [U. S. Comp. St. 1901, pp. 3446, 3447]), and this is true even though the appointment of the receiver and the sale of the goods as perishable would ordinarily be regarded as preservative steps taken in the interest of all parties. So far as the bankrupt was concerned, the whole proceedings, as well as this part of them, were a useless interference with her affairs. Conceding that an act of bankruptcy had been committed, it must have been evident from the start that the small stock of millinery which she had, even if it realized $519, at which it was appraised, was little more than enough to cover her exemption and the probable costs, leaving only the barest fraction, if anything at all, for general creditors. As it turned out, it has fallen far short of this, and the expenses incurred must therefore be borne by those who made them. They cannot be allowed to still further reduce the bankrupt's already scanty claim.

The report of the referee is set aside, and it is ordered that the fund in the hands of the receiver be turned over to the bankrupt as part of her state exemption.

In re KURTZ.

(District Court, E. D. Pennsylvania. November 23, 1903.)

No. 1,587.

1. BANKRUPTCY—REFEREES—CERTIFICATION OF QUESTION—PRACTICE.

On petition of a creditor to a referee in bankruptcy to certify a question presented, to the judge, the referee's transmission of the creditor's petition for review, the notes of testimony and his own opinion, to the clerk, did not constitute a compliance with Bankr. Rule 27 (89 Fed.

xi), requiring that the referee in such case shall certify to the judge the question presented, with a summary of the evidence relating thereto, and the finding and order of the referee thereon.

2. SAME—ASSETS—OWNERSHIP.

Where, at the time of filing a bankruptcy petition, the bankrupt had a bank account standing in his name as manager, amounting to $348.02, and he had been in the habit of depositing receipts from various sources, some belonging to himself and some to others, in such account, for a long period of time, and paying therefrom various items of indebtedness and personal expenses, and, after filing the petition, he expended from such account, for his private purposes, the sum of $270, it would be presumed that the amount so expended was his personal money, and he would be required to pay over such sum to his trustee.

In Bankruptcy.

D. McMullin and Frank R. Savidge, for bankrupt.
Coyle & Keller, for trustee.

J. B. McPHERSON, District Judge. It was charged before the referee that when the bankrupt's petition was filed he had in his possession $348.02, deposited in bank to the credit of "Samuel Kurtz, manager," and that at least $270 thereof was his individual property, which should have been scheduled and turned over to the trustee. The referee was therefore asked to make an order requiring the bankrupt to pay to his trustee the sum thus improperly withheld. Testimony having been taken upon this application, the order was refused after a hearing, and the referee's refusal is before the court for review.

The referee's method of complying with the creditor's request for a certification of the question presented is not to be commended. He did not obey the plain command of rule 27 (89 Fed. xi), which requires him, upon proper petition for a review of any order, "forthwith [to] certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon," but merely transmitted to the clerk the notes of testimony, his own opinion, and the creditor's petition for review. There is no attempt to certify the precise question that was ruled upon, and there is no summary of the evidence relating thereto. Both these provisions are important, and should be carefully observed. The certification of the question prevents disputes among counsel concerning the point presented and decided, and the summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be relevant to the point immediately in hand. The summary may also be valuable as showing what evidence has been considered by the referee before coming to a conclusion. In the present case the absence of the summary is not so important as it might be in others, because all of the testimony has some bearing upon the question before the referee; but I take this occasion to call attention to the rule, with the expectation that it will be obeyed hereafter.

A careful examination of the testimony satisfies me that the order asked for should have been made. The bank account referred to was

undoubtedly treated by the bankrupt as his individual property, in spite of the fact that it was labeled with his name as "manager," and in spite of the further fact that some of the money that went into it was the income from real estate to which an insurance company, of which he was secretary and manager, held the legal title. Nominally, he was managing the property for the insurance company, but he did what he pleased with the property and its income. During the 10 years of his apparent relation, he never rendered an account, and was never asked for one. The deposit in question contained his own salary, rents from certain houses, proceeds from the sale of gas made by a plant erected upon another part of the real estate, mingled indiscriminately, and apparently not capable of being accurately separated. From this fund he has been paying out money for taxes and repairs, supplies to the gasworks, and his own personal expenses. On the day when he filed his petition in bankruptcy, he had $348.02 in this account. Of this sum, he has spent for his own private purposes $270 since that date, and it is this amount which the court is asked to compel him to restore, upon the theory that this was presumably his individual money, or he would have had no right to spend it for his personal advantage. The evidence satisfies me that this position is well taken, and that the presumption that the bankrupt was not embezzling funds belonging to the insurance company, but was using his own money, has not been rebutted by any evidence that was laid before the referee.

It is accordingly ordered that the bankrupt pay over to his trustee the sum of $270, with interest from March 11, 1903, within 20 days from the filing of this order. Service of a copy thereof to be made immediately.

JEWISH COLONIZATION ASS'N et al. v. SOLOMON & GERMANSKI.

(Circuit Court, S. D. New York. December 2, 1903.)

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—ALIENS—LIMITED PARTNERSHIP.

Where certain of the members of a limited partnership organized under the laws of New York were aliens, and such partnership was joined with a foreign corporation as a plaintiff in an action in the federal court in New York against a firm composed of citizens of New York, such limited partnership should not be treated, for the purpose of determining jurisdiction, as if it were a corporation located in New York, but the members thereof retain their individual rights as aliens entitled to sue in the federal courts.

2. TRADE-MARKS—LABELS—ACTIONS—PARTIES.

Where a bill by a corporation and a limited partnership for infringement of certain trade-marks and labels and for unfair competition showed that both plaintiffs had an actual, though not an equal, interest in the use of the marks and labels, they were properly joined as plaintiffs in such suit.

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

3. SAME — INFRINGEMENT — UNLAWFUL COMPETITION — CAUSES OF ACTION — JOINDER.
Where both the trade-mark and labels claimed to be owned by plaintiffs were made use of by defendants in the same acts that would constitute a violation of the rights of the plaintiffs as to both, plaintiffs were entitled to join in a single suit in equity a cause of action for infringement of the trade-mark and labels and for unlawful competition.

4. SAME—VALIDITY OF TRADE-MARK—GEOGRAPHICAL NAMES—DEMURRER.
In a suit for infringement of certain trade-marks and labels and for unlawful competition, an objection that the trade-marks are invalid because consisting of geographical names, etc., cannot be considered on demurrer.

In Equity.

Walter F. Rogers, for plaintiffs.
George Whitefield Betts, Jr., for defendants.

WHEELER, District Judge. The plaintiff the Jewish Colonization Association is a corporation of England doing business at Paris, in France. The plaintiff Carmel Wine Company is a firm in New York organized and doing business in accordance with the statutes of New York constituting limited partnerships. The plaintiffs Elias Wolf, Lewin Epstein, Wolf Gluskin, and Izaak L. Goldberg are citizens of Russia, and are the members of the limited partnership. The defendants, Judah Solomon and Ascher L. Germanski, are the members of the defendant firm, and citizens of New York. According to the allegations of the bill, the colonization association is an owner and dealer in wines and cognacs in Europe, and the Carmel Wine Company is the selling agent of that corporation in this country. The bill is brought for infringement and unfair competition in trade in the use of the plaintiffs' trade-mark and labels. The bill is demurred to.

One ground of demurrer relied upon is that the limited partnership is a citizen itself of the state of New York, as if it was a corporation, and that, therefore, the defendants being citizens of New York, this court has no jurisdiction, which rests in this case upon alienage or diverse citizenship. It is not understood, however, that the members of a firm constituted according to the statutes lose their individual identity in the rights and business of the firm, as they do in corporations, but it is considered that they retain their individual rights, and act accordingly as such, and bind themselves individually so far as they are bound by their acts at all in this manner, and that they, as citizens of Russia, are the plaintiffs, the same as if they were dealing ordinarily in their own name. The plaintiffs are therefore all aliens, and the defendants citizens of New York, and the jurisdiction is well founded.

Another ground of demurrer is that the plaintiffs have distinct interests in the trade-mark and labels, and therefore cannot be joined in maintaining the suit, and that infringement and unfair competition cannot be prosecuted in the same action. The bill shows that the

¶ 3. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

plaintiffs have actual, although not equal, interests in the use of the trade-mark and the labels, and that both the trade-mark and the labels are made use of by the defendants in the same acts that would constitute a violation of the rights of the plaintiffs as to both. While parties so situated might not be entitled to maintain an action at law, in equity all those having interests involved in the suit may join therein for the protection of such rights in the subject-matter as they may have, and that the same acts may be proceeded against in one action, although the rights may be diverse—as, for example, the infringement of separate patents by one machine.

The other ground of demurrer relied upon, which seems to be worthy of notice, is that the trade-marks and labels are themselves of such a nature, geographical and otherwise, that they are not the subject of rights to their exclusive use in this business. Whatever there may be to this question should apparently be raised as a matter of defense to the bill, and not by demurrer. Therefore the demurrer should, according to these views, be overruled, and the defendants be required to answer over.

Demurrer overruled; defendants to answer over by January rule day.

In re RUNKLE.

(Circuit Court, S. D. New York. November 23, 1903.)

1. DEFRAUDING UNITED STATES—POSTAL FRAUD—SUFFICIENCY OF INDICTMENT.
An indictment charging that defendant, a contractor, conspired with certain postal officials, one of whom was charged with the duty of procuring supplies through contracts let after advertisements or in open market at reasonable prices, to defraud the United States by having let to him a contract without competition, at exorbitant prices, for articles for which there was no immediate necessity, in pursuance of which conspiracy the articles were purchased from defendant thereafter, and the voucher approved by one of the officials, is sufficient to charge an offense under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], providing that if two or more persons conspire to defraud the United States in any manner or for any purpose, and one of them do any act to effect the objects of the conspiracy, all shall be liable to a penalty, etc.

2. ARREST OF PRISONER IN OTHER DISTRICT—EXAMINATION BEFORE COMMISSIONER—INDICTMENT AS PRIMA FACIE CASE.
An indictment charging on its face an offense against the government constitutes a prima facie case on an examination before a United States commissioner after accused's arrest in a district other than that in which the indictment is found, as authorized by Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716].

This matter comes up on writs of habeas corpus and certiorari directed to the marshal of the district who has the petitioner in custody under a warrant for removal issued by a District Judge of this district directing his removal from the city of New York to Washington, D. C., to plead to an indictment.

Morris H. Hayman and Franklin Bien, for the motion.
H. A. Wise, Asst. U. S. Atty.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 510.

LACOMBE, Circuit Judge. The petitioner, with two other persons, Machen and McGregor, was indicted by the grand jury in Washington for a violation of section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676], which reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

Upon an affidavit to the effect that such an indictment had been found, and a certified copy of the indictment, a warrant was issued by the United States commissioner for this District under section 1014, Rev. St. U. S. [U. S. Comp. St. 1901, p. 716], for the apprehension of the petitioner. Thereupon he was arrested and arraigned before the United States commissioner, and demanded an examination. The prosecution offered in evidence a duly exemplified and certified copy of the indictment, and, having secured an admission that the prisoner was the person mentioned in said indictment, rested.

The defendant moved to dismiss the complaint on the ground that it "appears upon the face thereof the defendant was not guilty of any offense that will warrant an indictment." He contended that the indictment could not be considered to be evidence of the commission of the offenses charged therein, and demanded that the prosecution produce the witnesses specified in the indictment for the purpose of cross-examination. Defendant, however, introduced no evidence whatsoever, and offered to introduce none, on his own behalf. The commissioner thereupon overruled defendant's objections, and refused to require the prosecution to produce the witnesses specified in the indictment. The subsequent disposition of the case has been stated supra.

Counsel for the petitioner now contends that the indictment fails to allege any crime or act against the defendant, Runkle. It does allege that at certain times therein specified one Machen was an officer of the United States, to wit, superintendent of free delivery; that he occupied a position of trust in the Post Office Department, and that during such period he was, among other things, charged with the duty of letting contracts for postal supplies and approving vouchers for the payment therefor; that one McGregor was, during the period aforesaid, an officer of the United States, to wit, a clerk, and assigned to assist Machen; that during the period aforesaid Runkle, the petitioner, was a contractor desirous of furnishing articles and supplies to the department of which Machen was superintendent; that it was Machen's duty to procure such articles through contracts let after advertisement, except in emergencies, and then to procure the same in the open market, at reasonable prices. It further charges that Machen, McGregor, and Runkle on a day certain, at the District of Columbia, unlawfully conspired to defraud the United States by letting to said Runkle a contract without competition, at exorbitant prices, for articles for which there was no immediate necessity, and that in pursuance of such conspiracy such

articles were purchased from Runkle thereafter, and as an overt act in such conspiracy Machen approved the voucher for the payment of money to said Runkle for articles purchased as aforesaid.

The above averments are set forth at great length, with a multitude of words, and conformably to the archaic methods of preparing criminal pleadings which still prevail, but nevertheless careful examination and analysis show that these averments were specifically and positively made. They certainly charge an offense within the language of the section quoted, and if the averments be considered as truthful statements of fact they sufficiently indicate that the petitioner is an offender against its provisions.

As to the effect of the indictment when presented as evidence of the facts it recites, the practice in this district has been uniform for many years. Judge Brown in Re Dana (D. C.) 68 Fed. 886, after reviewing very many earlier decisions, says:

"The above are the only cases I have found in which the effect of an indictment as evidence is considered. According to them an indictment in another district was admissible as prima facie evidence, is not conclusive, and cannot shut out evidence of the defendant to show that no offense was committed by him within the district to which removal is sought."

The attention of the court has been called to no case requiring any modification of this conclusion. The prima facie case made out by the indictment, considered as evidence, has not been rebutted or traversed by any evidence whatsoever presented on behalf of the petitioner. Therefore, in accordance with the uniform practice in this district, the commissioner properly held him, and the District Judge properly issued the warrant for his removal.

The writs are dismissed.

MORSS v. FRANKLIN COAL CO.

(District Court, M. D. Pennsylvania. November 23, 1903.)

No. 361.

1. INVOLUNTARY BANKRUPTCY — JURY TRIAL — WHEN DEMANDABLE — DENIAL THAT PETITIONERS ARE CREDITORS.

The only issues on which a person against whom an involuntary petition in bankruptcy has been filed is entitled of right to a jury trial are with respect to his insolvency and the acts of bankruptcy with which he is charged. He is not entitled to one with respect to whether the petitioners are in fact creditors, so as to be entitled to maintain the proceedings.

In Bankruptcy. Motion to limit issues.

W. J. Hand, for petitioners.
W. S. Diehl, for respondent.

ARCHBALD, District Judge. The respondent, in its answer, denies that it is insolvent, or has committed the act of bankruptcy charged; and further alleges that the petitioners are not entitled to

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 140.

maintain these proceedings, not being in fact creditors. Upon all of these three issues it demands a jury trial. But as to whether the petitioners are creditors, it is clear that it is not entitled to any, unless the court sees fit to allow it. By section 18d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]):

"If the bankrupt or any of his creditors shall * * * controvert the facts alleged in the petition, the judge shall determine as soon as may be the issues presented by the pleadings without the intervention of a jury, except in cases where a jury trial is given by this act."

Supplementing this, it is provided in section 19a that:

"A person against whom an involuntary petition has been filed, shall be entitled to have a trial by jury in respect to his insolvency * * * and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor, at or before the time within which an answer may be filed."

The combined result of these two sections is to give a jury trial of right in the two instances named, but not in others; the latter section being entirely superfluous if it was demandable in every case. Simonson v. Sinsheimer, 3 Am. Bankr. R. 824, 100 Fed. 426, 40 C. C. A. 474; In re Christensen, 4 Am. Bankr. R. 99, 101 Fed. 243. There is nothing in section 19c in conflict with this. The right which is there given "to submit matters in controversy, or an alleged offense against the act, to a jury," according to the laws of the United States then in force, or thereafter to be enacted, is simply a saving provision preserving such right as to any criminal offense created by the act as was necessary to meet the requirements of the Constitution; but leaving other controverted matters, outside of those raised by the pleadings, which, according to section 18d, are to be determined by the court, to be disposed of according to the prevailing procedure. As was pointed out in Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672, with regard to the bankruptcy act of March 2, 1867, c. 176, 14 Stat. 517:

"In cases of bankruptcy many incidental questions arise in the course of administering the bankrupt's estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. * * * The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion."

The motion is allowed, and the issues to be determined by the jury are limited to the alleged insolvency of the bankrupt, and the act of bankruptcy charged in the petition to have been committed.

MEMORANDUM DECISIONS.

ALASKA MEXICAN GOLD MIN. CO. v. BURNS. (Circuit Court of Appeals, Ninth Circuit. October 16, 1903.) No. 954. Appeal from the District Court of the United States for the First Division of the District of Alaska. Malony & Cobb, for appellant. W. E. Crews and L. S. B. Sawyer, for appellee. Appeal dismissed, for failure to print record, under rule 23.

ANGLO-CALIFORNIAN BANK, Limited, v. EUDEY et al. (Circuit Court of Appeals, Ninth Circuit.) No. 910. In Error to the Circuit Court of the United States for the Northern District of California. Jesse W. Lilienthal, for plaintiff in error. George W. Towle, Jr., for defendant in error. For former opinion, see 123 Fed. 39. Petition for a rehearing denied October 12, 1903. Motion to modify judgment argued and submitted October 19, 1903. Judgment modified October 20, 1903, as follows: "The judgment is reversed, and the cause remanded to the court below for further proceedings not inconsistent with the foregoing opinion, with costs to the plaintiff in error."

A. P. OLZENDAM HOSIERY CO. v. LUCE et al. (Circuit Court of Appeals, First Circuit. October 23, 1903.) No. 493. George R. Nutter (J. Butler Studley and Brandies, Dunbar & Nutter, on the brief), for plaintiff in error. Charles E. Shattuck, for defendants in error. Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PER CURIAM. The judgment of the Circuit Court is amended, so that it will show a dismissal for want of allegations of the citizenship of the defendants in that court, without costs, and, as thus amended, the judgment is affirmed. Neither party recovers costs in this court.

BEARDSLEY v. CITY OF LAMPASAS. (Circuit Court of Appeals, Fifth Circuit. November 23, 1903.) No. 1,260. In Error to the Circuit Court of the United States for the Western District of Texas. Ben B. Cain and J. C. Chamberlain, for plaintiff in error. Robt. G. West, Thos. B. Cochran, and Walter Acker, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed.

BOTTSFORD et al. v. SHEA. (Circuit Court of Appeals, Seventh Circuit. October 7, 1903.) No. 529. Appeal from the District Court of the United States for the Eastern District of Wisconsin. C. H. Van Alstine, for appellants. H. W. Nickerson, for appellee. Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. This is a libel filed by Patrick Shea in the District Court of the United States for the Eastern District of Wisconsin against the propeller Osceola. The appellants intervened as owners and bonded the vessel, which was discharged from custody. The District Court entered a decree for the libelant on the 4th day of March, 1898, from which the owners appealed to this court, and the case was here argued. We certified certain questions therein to the Supreme Court of the United States, asking its advice thereon. The cause was there argued, and the mandate of the Supreme

Court, this day filed here, answers the first and third questions submitted in the negative, which denies the right of the appellee to any recovery. The cause in the Supreme Court is reported sub nom. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760. The mandate of the Supreme Court leaves nothing for us to do, except to proceed in conformity with the opinion of that court. It is therefore ordered that the decree of the District Court be reversed, and that the cause be remanded to that court, with the direction to dismiss the libel.

CABLE v. ENGLEMAN et al. (Circuit Court of Appeals, Eighth Circuit. October 12, 1903.) No. 1,994. Appeal from the United States Court of Appeals for the Indian Territory. Morris & Hayes and Gilbert & Gilbert, for appellant. H. M. Wolverton, John Guest, and Potter & Potter, for appellees. Docketed and dismissed, with costs, pursuant to rule 16, on motion of counsel for appellees

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CENTRAL R. & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Fourth Circuit. November 5, 1903.) No. 460. Appeal from the Circuit Court of the United States for the District of South Carolina. Augustine T. Smythe and A. M. Lee, for appellant. Henry C. Cunningham and Henry A. M. Smith, for appellees. Before GOFF, Circuit Judge, and MORRIS and KELLER, District Judges.

KELLER, District Judge. This case comes up on an appeal from a decretal order entered on the 3d day of March, 1902, dismissing the intervention of the Charleston & Western Carolina Railway Company. In the record in this case appears the elaborate opinion of the learned Circuit Judge who tried this case in the court below, and as that opinion contains a full statement of the material facts, and as its conclusions are approved by this court, we adopt that opinion (113 Fed. 405) as the opinion of the court herein. The decree of the Circuit Court of the United States for the district of South Carolina dismissing the intervention of the Charleston & Western Carolina Railway Company is affirmed.

CITIZENS' LIGHT & POWER CO. v. SEATTLE GAS & ELECTRIC CO. (Circuit Court of Appeals, Ninth Circuit. September 15, 1903.) No. 974. Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington. H. R. Clise, John B. Hart, Harold Preston, L. C. Gilman, and E. M. Carr, for appellant. Samuel Hill, for appellee. No opinion. It appearing that, since the taking of the appeal, the complainant abandoned its proceedings against the appellant, etc., the order of Circuit Court (123 Fed. 588) granting injunction is reversed, with costs to the appellant.

COLER v. CITY OF LAMPASAS. (Circuit Court of Appeals, Fifth Circuit. December 14, 1903.) No. 1,270. Appeal from the Circuit Court of the United States for the Western District of Texas. Ben B. Cain, for appellant. Robt. G. West, Thos. B. Cochran, and Walter Acker, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As to the ownership or possession of the original waterworks in the city of Lampasas, the claim of the appellant herein is without equity. The decree of the Circuit Court is affirmed.

DAUGHERTY et al. v. BROWN. (Circuit Court of Appeals, Eighth Circuit. August 17, 1903.) No. 1,972. In Error to the Circuit Court of the

United States for the Western District of Missouri. W. D. Tatlow, C. W. Hamlin, and John D. Porter, for defendant in error. Writ of error docketed and dismissed, with costs, pursuant to rule 16, on motion of defendant in error.

DIMMICK v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 27, 1903.) No. 887. George D. Collins, for plaintiff in error. Marshall B. Woodworth, for the United States. No opinion. Motion for reversal of judgment denied.

EDWARDS v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. (Circuit Court of Appeals, Fifth Circuit. October 17, 1903.) No. 1,292. In Error to the Circuit Court of the United States for the Northern District of Georgia. Reuben R. Arnold, for plaintiff in error. W. S. McHenry, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed.

THE EUDORA. (Circuit Court of Appeals, Third Circuit. October 12, 1903.) No. 26. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. J. H. Brinton, for appellants. Horace L. Cheyney, for appellee. Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. In this case we certified to the Supreme Court the following questions: First. Is the act of Congress of December 21, 1898 (30 Stat. 755, c. 28 [U. S. Comp. St. 1901, p. 3079]), properly applicable to the contract in this case? Second: Under the agreed statement of facts above set forth, upon a libel filed by said seamen, after the completion of the voyage, against the British vessel, to recover wages which were not due to them under the terms of their contract or under the law of Great Britain, were the libelants entitled to a decree against the vessel? The mandate of the Supreme Court (23 Sup. Ct. 821, 47 L. Ed. 1002) has come down to us, certifying that in the opinion of that court "the questions certified must each be answered in the affirmative." Accordingly we hold that the District Court erred in dismissing the libel. The decree of the District Court (110 Fed. 430) is reversed, and the cause is remanded to that court for further proceedings in accordance with the opinion of the Supreme Court.

FARREL et al. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO. (Circuit Court of Appeals, Ninth Circuit. October 5, 1903.) No. 965. Appeal from the Circuit Court of the United States for the District of Montana. H. A. Seymour and John H. Miller, for appellants. Upon motion of counsel for appellants, the appeal is dismissed.

HARGADINE-McKITTRICK DRY GOODS CO. et al. v. BRADLEY. (Circuit Court of Appeals, Eighth Circuit. September 19, 1903.) No. 1,985. In Error to the United States Court of Appeals for the Indian Territory. W. A. Ledbetter, for plaintiffs in error. W. F. Bowman, for defendant in error. Motion of plaintiffs in error for leave to file and docket record denied. Writ of error docketed and dismissed, with costs, pursuant to rule 16, on motion of defendant in error.

INSLEY v. GARSIDE et al. In re SHARICK. (Circuit Court of Appeals, Ninth Circuit. October 22, 1903.) No. 989. Malony & Cobb, for appellant. Charles B. Marks and Lewis P. Shackleford, for appellees. No opinion. Decree of court below affirmed, with costs.

THE JAMES TUFFT. (Circuit Court of Appeals, Ninth Circuit. October 14, 1903.) No. 992. Appeal from the District Court of the United States for the District of Hawaii. T. C. Van Ness and L. A. Redman, for appellants. Upon filing of stipulation of counsel therefor, and upon motion of counsel, the appeal is dismissed; T. McCants Stewart signing stipulation as counsel for the appellee.

JORGENSEN v. YOUNG et al. (Circuit Court of Appeals, Ninth Circuit. November 6, 1903.) No. 972. In Error to the District Court of the United States for the First Division of the District of Alaska. John G. Heid and A. K. Delaney, for plaintiff in error. R. W. Jennings and L. S. B. Sawyer, for defendants in error. Motion of defendants in error to dismiss granted, and cause dismissed.

KILPATRICK et al. v. SEVERAIN. (Circuit Court of Appeals, Eighth Circuit. October 12, 1903.) No. 1,981. In Error to the Circuit Court of the United States for the District of Nebraska. T. J. Mahoney, N. K. Griggs, Alfred Hazlett, and Fulton Jack, for plaintiffs in error. Smyth & Smith, for defendant in error. No opinion. Reversed, at costs of plaintiffs in error, per stipulation of parties, and remanded to the Circuit Court, with directions to dismiss the case on the merits, with prejudice to any further action thereon.

MEXICAN CENT. RY. CO., Limited, v. RICHMOND. (Circuit Court of Appeals, Fifth Circuit. November 23, 1903.) No. 1,291. In Error to the Circuit Court of the United States for the Western District of Texas. Waters Davis and T. A. Falvey, for plaintiff in error. Geo. E. Wallace, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case we find no reversible error, and the judgment of the Circuit Court is affirmed.

In re MEYER. (Circuit Court of Appeals, Ninth Circuit. October 16, 1903.) No. 1,005. George D. Collins, for petitioner. Motion for leave to file petition granted, and petition filed. Thereupon the petition was denied. Further appeal allowed to the Supreme Court.

MOBILE TRANSP. CO. v. CITY OF MOBILE et al. (Circuit Court of Appeals, Fifth Circuit. November 23, 1903.) No. 1,257. Appeal from the Circuit Court of the United States for the Southern District of Alabama. Frederick G. Bromberg, for appellant. Harry T. Smith and Gregory L. Smith, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After a careful examination of this case and the very exhaustive briefs filed, we are of opinion that the learned judge of the Circuit Court rendered the proper decision, and his decree is affirmed.

MONTANA ORE PURCHASING CO. et al. v. BUTTE & BOSTON CONSOL. MIN. CO. (Circuit Court of Appeals, Ninth Circuit. October 20, 1903.) No.

1,006. Petition for writ of supersedeas directed to the Circuit Court of the United States for the District of Montana to stay execution of decree, etc. John J. McHatton and James M. Denny, for petitioner. Crittenden Thornton, for respondent. No opinion. Petition denied.

MOORE et al. v. DALTON et al. (Circuit Court of Appeals, Ninth Circuit. October 28, 1903.) No. 1,009. In Error to the District Court of the United States for the First Division of the District of Alaska. Lorenzo S. B. Sawyer, for defendants in error. Upon motion of Mr. Sawyer, cause docketed on certificate of the clerk of the District Court, under rule 16, and dismissed.

MOORE et al. v. DALTON et al. (Circuit Court of Appeals, Ninth Circuit. November 9, 1903.) No. 1,009. In Error to the District Court of the United States for the First Division of the District of Alaska. Charles B. Marks, for plaintiffs in error. L. S. B. Sawyer, for defendants in error. Motion to vacate judgment dismissing writ of error and to recall mandate denied

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NATIONAL R. CO. OF MEXICO v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 23, 1903.) No. 1,259. In Error to the Circuit Court of the United States for the Eastern District of Texas. Thos. W. Dodd, for plaintiff in error. M. C. McLemore, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As by written stipulation a jury was waived in this case, the finding of the court was general, and no bills of exceptions were taken to the rulings of the court during the progress of the trial. The record presents no question to this court for review. Rev. St. §§ 649–700 [U. S. Comp. St. 1901, pp. 525, 570]. The judgment of the Circuit Court is affirmed.

NORTHERN PAC. RY. CO. v. DENSE. (Circuit Court of Appeals, Ninth Circuit. November 16, 1903.) No. 920. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. James F. McElroy and B. S. Grosscup, for plaintiff in error. James Hamilton Lewis, for defendant in error. Pursuant to stipulation of counsel, cause dismissed.

NORTHERN PAC. RY. CO. v. PALMER. (Circuit Court of Appeals, Ninth Circuit. November 16, 1903.) No. 919. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. James F. McElroy and B. S. Grosscup, for plaintiff in error. James Hamilton Lewis, for defendant in error. Pursuant to stipulation of counsel, cause dismissed.

RUCKER, Collector, v. COCO-COLA CO. (Circuit Court of Appeals, Fifth Circuit. October 17, 1903.) No. 1,239. In Error to the Circuit Court of the United States for the Northern District of Georgia. E. A. Angier, Geo. L. Bell, and C. D. Camp, for plaintiff in error. Reuben R. Arnold, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As we find that the taxable character of Coco-Cola, under the revenue act, was settled adversely to the United States in the former ad-

judication (117 Fed. 1006, 54 C. C. A. 248), duly pleaded on the trial, the record herein presents no reversible error, and the judgment of the Circuit Court is affirmed.

In re SEAY BROS. DUNSON v. S. LOWMAN & CO. (Circuit Court of Appeals, Fifth Circuit. December 14, 1903.) No. 1,146. Appeal from the District Court of the United States for the Northern District of Georgia. John M. Slaton and Benj. Z. Phillips, for appellant. Wm. P. Hill, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The decision in this case has been withheld to await action of the Supreme Court on appeal in Kahn v. Cone Export & Commission Company, 115 Fed. 290, 53 C. C. A. 92, decided by this court March 15, 1902, on appeal from the District Court, whose opinion is found in 111 Fed. 518, and wherein the same question of preference was involved; and, said appeal having been dismissed, we now affirm the decree of the District Court in this case (113 Fed. 969), with costs.

SOUTHERN BANK OF STATE OF GEORGIA v. RUCKER, Collector. (Circuit Court of Appeals, Fifth Circuit. October 17, 1903.) No. 1,233. In Error to the Circuit Court of the United States for the Northern District of Georgia. George A. Mercer and M. M. Jackson, for plaintiff in error. E. A. Angier, Geo. L. Bell, and C. D. Camp, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed.

SULLIVAN v. MILLIKEN. (Circuit Court of Appeals, Fifth Circuit. November 23, 1903.) No. 1,229. In Error to the Circuit Court of the United States for the Northern District of Florida. John H. Jones and Thomas H. Watts, for plaintiff in error. William A. Blount and A. C. Blount, Jr., for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Since the argument of this case we have carefully examined the record and briefs, and we have come to the conclusion that no reversible error is shown by the record. The judgment of the Circuit Court, therefore, is affirmed.

SWEETSER, PEMBROOK & CO. v. ABBOTT. (Circuit Court of Appeals, Eighth Circuit. September 7, 1903.) No. 1,939. Appeal from the District Court of the United States for the Eastern District of Missouri. Nathan Frank, for appellants. M. N. Sale, for appellee. Dismissed, pursuant to the stipulation of the parties, at the costs of appellee.

THE TALLAHASSEE. THE SENATOR SULLIVAN. (Circuit Court of Appeals, Second Circuit. November 7, 1903.) Nos. 179, 180. Appeals from the District Court of the United States for the Eastern District of New York. Eugene Carver, for appellant. Herbert Barry, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges. No opinion. Affirmed, on opinion of District Court. 117 Fed. 176.

TAYLOR v. DECATUR MINERAL & LAND CO. (Circuit Court of Appeals, Fifth Circuit. December 14, 1903.) No. 1,115. Appeal from the Cir-

cuit Court of the United States for the Northern District of Alabama. Milton Humes, for appellant. Lawrence Cooper, for appellee. Dismissed, as per stipulation.

UNITED STATES ex rel. JOHNSTOWN MIN. CO. v. CIRCUIT COURT OF UNITED STATES FOR DISTRICT OF MONTANA et al. (Circuit Court of Appeals, Ninth Circuit. November 9, 1903.) No. 1,011. Petition for Writ of Certiorari to Stay Execution of Order of Circuit Court. R. B. Smith, for petitioner. Crittenden Thornton and J. F. Riley, for respondent. No opinion. Application denied.

UNITED STATES ex rel. MONTANA ORE PURCHASING CO. et al. v. CIRCUIT COURT OF UNITED STATES FOR DISTRICT OF MONTANA et al. (Circuit Court of Appeals, Ninth Circuit. October 20, 1903.) No. 1,007. Petition for Writ of Certiorari to the Circuit Court of the United States for the District of Montana. John J. McHatton and James M. Denny, for petitioners. Crittenden Thornton, for respondent. No opinion. Petition denied.

AMERICAN ALKALI CO. v. SALOM. (Circuit Court, E. D. Pennsylvania. December 11, 1903.) No. 67. Burr, Brown & Lloyd, for plaintiff. Joseph C. Fraley and Richard C. Dale, for defendant.

DALLAS, Circuit Judge. The learned counsel of the plaintiff, in their brief in support of their motion for a new trial, asked "that the court will write an opinion which will not only determine the law of this case, but will also furnish counsel a guide as to the law in the many other cases dependent upon it"; and upon the oral argument I remarked that this request was in accordance with my usual practice and would be complied with. But upon reflection I have come to the conclusion that no practical result would be attained by either the reiteration or retraction by myself of the views I entertained upon the trial. As is said in the brief to which I have referred, the court ruled upon a very obvious theory of the case, and no opinion other than that of the appellate court can really determine the law with respect to it, or furnish a guide which could be confidently followed upon the trial of the many others which are said to be dependent upon it. The plaintiff has presented and will be allowed a bill of exceptions, and is therefore in position to be heard by the Court of Appeals at its ensuing March term; whereas, if a new trial were awarded, the cause could not be brought before that tribunal by either party until the following September. This delay, I think, should be avoided. The plaintiff's rule for a new trial is discharged.

MOREHEAD v. STRIKER et al. (Circuit Court, S. D. New York. August 5, 1903.) John D. Townsend, James B. Ludlow, and Max J. Koehler, for the motion. Louis Marshall and John F. Doyle, opposed.

LACOMBE, Circuit Judge. Besides the papers specifically referred to, there may be filed with this decision the various affidavits submitted by the ex-receiver, Barse, and also the affidavit of Haskell, supplementary to his testimony. Counsel for respective parties will see to it that all papers which either party conceives bear upon the question be recited in the order. There is great conflict as to the facts between Barse and Haskell; but, as was intimated in the memorandum filed June 3, 1902, the court does not deem it necessary to decide all such questions. It clearly appears that Roser and Haskell entered into the contracts proceeded upon, and that the stock sold by order of the court passed into the possession of Haskell. That he entered into some improper agreement with Barse (if he did so, Barse denies

it) that he should disregard the terms of his contract, which was really with the court, and become the instrument whereby Barse, receiver, should turn over the stock without payment therefor to Barse personally, selling the same to outsiders for money not turned in to the court's officer, seems immaterial. (1) The application of Roser and Haskell to be relieved from their contracts is denied. (2) The exceptions to master's report are overruled. (3) The master's report is confirmed. (4) The order filed March 12, 1902, is vacated and set aside, and a new order in same terms (except as to leave to move to be relieved) is made as of this date, so as to avoid any question as to time for appeal having expired. (5) Twenty days' time is given (after entry of order on this decision) to comply with the provisions of the new order as to payment. (6) And in the event of default execution will issue against the estate of Roser, and against any property of Haskell, and attachment for contempt against Haskell. (7) Should an appeal from this order be taken within said 20 days, execution of said order will be suspended until decision of Circuit Court of Appeals.

In re BATES. (District Court, D. Connecticut.) Specifications of Objections to Discharge.

TOWNSEND, District Judge. As to the first ground of objection, the bankrupt testified on his examination that he paid $100 to his attorney, while in his schedule he stated that no sums were paid to counsel. The referee finds that the $100 was really paid by bankrupt's father, by check made to the order of bankrupt's attorney, and delivered to the attorney either by the father personally or by the hand of the bankrupt. The referee finds that there was no intention to give false testimony in the case, and that the bankrupt was not under obligation to include said $100 in his schedule; and I concur with the referee, and hold that no criminal intent is to be inferred from the facts brought out. As to the other specification, the describing a private as a partnership indebtedness, I concur in the opinion of the referee that it was an erroneous statement, from which the bankrupt obtained no advantage, and which was purely due to oversight and mistake, and not due to criminal intent. The exceptions to the referee's report are overruled, and the report is accepted, and the discharge granted.

END OF CASES IN VOL. 125.