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Northwestern University School of Law

THE

FEDERAL REPORTER.

VOLUME 43.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEPTEMBER—DECEMBER, 1890

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JUDGES

OF THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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HON. DANIEL CLARK, DISTRICT JUDGE, NEW HAMPSHIRE.
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HON. GEORGE M. SABIN, DISTRICT JUDGE, NEVADA.
HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.

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CASES REPORTED.

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

DISTRICT COURT, S. D. NEW YORK.

CIRCUIT COURT, D. VERMONT.

THIRD CIRCUIT.

CIRCUIT COURT, D. NEW JERSEY.

CIRCUIT COURT, E. D. PENNSYLVANIA.

FOURTH CIRCUIT.

FIFTH CIRCUIT.

SIXTH CIRCUIT.

SEVENTH CIRCUIT.

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

UNITED STATES *v.* DES MOINES RIVER NAV. & R. CO. *et al.*

(Circuit Court, N. D. Iowa, C. D. June 12, 1890.)

PUBLIC LANDS—GRANTS TO STATE—RIGHTS OF GRANTEES OF STATE.

Where the United States grants lands to a state to aid in improving a navigable river, and the state grants the lands covered by the grant to a corporation on condition that it will carry out such improvements, and afterwards, on the corporation's failure to complete the improvements, by act of legislature, releases it from the contract and confirms the grant, congress will be presumed to have notice of such act; and a subsequent resolution of congress, relinquishing to the state certain land which had been erroneously certified by the secretary of the interior as included in the original grant to the state, will inure to the benefit of the corporation, as the state's grantee.

In Equity.

Bill for cancellation of certain conveyances by the secretary of the interior, the governor of Iowa, and for the quieting of the title of the United States to certain realty in Iowa. Submitted on behalf of the Des Moines River Navigation & Railroad Company on demurrer, and as to the other defendants on the pleadings and proofs.

John Y. Stone, Asst. Dist. Atty., *D. C. Chase*, and *W. S. Clark*, for complainant.

Benton J. Hall and *Gatch, Connor & Weaver*, for defendants.

SHIRAS, J. In order that the purpose and scope of the bill filed in this cause by the United States may be fairly understood, it becomes necessary to give an outline of the legislation, national and state, affecting what are commonly known as the "Des Moines River Lands," together with the departmental action based thereon, and the construction given thereto in the decisions rendered by the supreme court of the United States in the many cases arising out of the conflicting claims made to the lands in question.

By an act approved August 8, 1846, the congress of the United States "granted to the territory of Iowa, for the purpose of aiding said territory to improve the navigation of the Des Moines river from its mouth to the

'Raccoon Fork,' (so called,) in said territory, one equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, incumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the secretary of the treasury of the United States." The remaining sections of the act provide for the method of disposing of the lands as the work of improvement should progress, declaring the river to be a public highway for the use of the government of the United States free from any toll or other charge upon the property of the United States, and providing that the lands should not be sold for a price lower than the minimum price of other public lands. Immediately after its admission as a state, Iowa, through its general assembly, accepted the grant for the purposes named, and, through commissioners appointed for that purpose, selected the odd-numbered sections as descriptive of the moiety coming to the state, which selection was approved by the secretary of the treasury, and the officers of the local land-office were instructed to reserve the odd-numbered sections from the mouth of the Des Moines to the Raccoon fork thereof, the grant being held to terminate at the latter point. Subsequently, in 1849, the then secretary of the treasury changed the ruling that the grant did not extend above the Raccoon fork, and held that it extended the entire length of the river; and hence the local land-officers were, on the 1st day of June, 1849, instructed to withhold from sale all the land situated in the odd-numbered sections within five miles of the Des Moines river above the Raccoon fork. For the purpose of carrying on the work contemplated in this grant, to-wit, the improvement of the navigation of the Des Moines river, the state of Iowa created a board of public works, under whose control some progress was made in the erection of dams upon the river, and in clearing obstructions out of the channel. In 1851 the board of public works was abolished, and the management of the improvement was intrusted to a commissioner and register. In 1853 a contract was made with Henry O'Reiley by the commissioner and register, for the carrying on by him of the work proposed to be done, which contract was by him released, under date of June 8, 1854, in favor of the Des Moines River Navigation & Railroad Company, a corporation organized on the 6th day of May, 1854, with an authorized capital of $3,000,000; the principal object and business of the corporation being the improvement of the navigation of the Des Moines river by means of dams, locks, and canals, and the construction of railroads connected with, or separate from, the same. On the 9th day of June, 1854, this company and the commissioners in charge of said enterprise, under the laws of the state, entered into a contract whereby the company bound itself "to make and finish the Des Moines river improvement from the Mississippi river to Raccoon fork, on said Des Moines river," the same to be completed on or before the 1st day of July, 1858, and further agreed to pay all the debts then outstanding by reason of the work already done towards the improvement of the navigation of said river, provided the amount thereof should not exceed $60,000, and in consideration thereof

was to be and become entitled to all moneys due and owing to said improvement from all sources; it being further provided:

"That said party of the second part, on their part, hereby covenants and agrees with said party of the first part to sell and convey to the said party of the first part, in manner and upon the terms hereinafter provided, all of the lands donated to the state of Iowa for the improvement of the Des Moines river by act of congress of August 8, 1846, which the said party of the second part had not sold up to the 23d day of December, 1853; for which said lands the said party of the first part covenants and agrees, in manner and form as fixed by this agreement, to pay the sum of thirteen hundred thousand dollars."

The contract further provided the rates to be allowed for the different kinds of work to be done and materials to be furnished in making the proposed improvements, and which, when expended, were to be credited on the sum agreed to be paid for the conveyance of the donated lands. It was also agreed that the navigation company should have the control and management of the improvement, with the right to collect tolls and water-rents for the use thereof for the period of 40 years, at the expiration of which time the works were to revert to the state of Iowa. This contract was based upon the act of the general assembly of the state of Iowa passed January 19, 1853, which authorized the commissioner and register of the Des Moines river improvement to sell the lands in question in such manner as would secure the early completion of the work; it being further provided in said act that the lands should not be sold for a less sum than $1.25 per acre, nor for less than the aggregate sum of $1,300,000, and that any contracts made should be valid only when signed by the commissioner, countersigned by the register, and approved by the governor. It does not appear that the contract of June 9, 1854, had attached thereto the signature of the governor, or that he did, at the time of the execution of the contract, execute any written evidence of his approval thereof.

The navigation company made some progress in the work contracted to be done, but it soon became evident that the company would fall far short of the completion of the work by the time stipulated in the contract. It would seem that the company had become satisfied that in all probability it would be finally held that the grant of 1846 did not extend above the Raccoon fork, and that, unless the lands above that point could be secured to the company, there would be no profit in the enterprise. Mutual charges of bad faith were indulged in between the state and company officials, not necessary to be particularized. Finally, on the 22d of March, 1858, the general assembly of the state, by joint resolution, formulated a proposition for settlement, which on the 15th day of April, 1858, was duly accepted by the company. By the terms of this agreement it was provided that the company should execute to the state full releases of all contracts with and claims against the state, including rights to water-rents, and should surrender to the state the dredge-boat belonging to the improvement, and all material prepared for use in the construction of the improvement in question, and should pay the state the sum of $20,000; and in consideration thereof the state agreed to certify and convey to the company all lands granted by the act of August

8, 1846, which had been approved and certified to the state by the general government, saving and excepting all such lands as had been sold or agreed to be sold and conveyed by the state or its officials prior to the 23d day of December, 1853, and especially excepting 25,487.87 acres lying immediately above the Raccoon fork, supposed to have been sold by the general government, but claimed by the state of Iowa. On May 3, 1858, R. P. Lowe, the governor of the state, executed to the Des Moines River Navigation & Railroad Company 14 deeds or patents describing in detail the lands claimed under the grant, and which include the lands involved in the present suit; and on May 18, 1858, executed a further deed or patent, general in its terms, but using in the granting clause the terms in substance found in the agreement of settlement of March 22, 1858. At the December term, 1859, of the supreme court of the United States, in the case of *Railroad Co.* v. *Litchfield*, 23 How. 66, that court decided that the grant of 1846 extended only to the Raccoon fork, and did not affect the lands above that point. In the year 1856, congress, by an act approved May 15, 1856, granted to the state of Iowa, to aid in the construction of certain named lines of railway from the Mississippi to the Missouri river, every alternate section, designated by odd numbers, for six sections in width on each side of the said roads. One of the proposed lines of railway named in said act was to extend from the city of Dubuque to a point on the Missouri near Sioux City. The Dubuque & Pacific Railroad Company, by grant from the state, became entitled to the lands appropriated by the act of congress to aid in the construction of the line named, and, by virtue of this grant, claimed to be entitled to the odd-numbered sections lying within five miles of either bank of the Des Moines river; the contention being that, as the grant of 1846 did not extend above the Raccoon fork, the lands above that fork were not appropriated, and were therefore covered by the railroad grant. The supreme court decided adversely to this claim of title under the railroad grant, in the case of *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, in which it was in effect held that, although the act of 1846 did not cover the lands above the Raccoon fork, yet the action of the department in charge of the lands in reserving these lands from other use or disposal had the effect of so withdrawing or reserving the same, that the railroad land grant of 1856 did not embrace the same; and that they did not pass to the state under that grant. In the unreported case of *Riley* v. *Welles*, at the December term, 1869, the supreme court held that these lands above the Raccoon fork, though not covered by the act of 1846, were nevertheless so reserved by action of the land department that they were not open to pre-emption entry or other purchase, and hence that Riley's entry gave him no title; and this ruling was reaffirmed in the case of *Grilley* v. *Burrows*, 17 Wall. 167, note.

As already stated, the commissioner of the general land-office, the secretary of the treasury, and the secretary of the interior, and the attorney general had at different times held different views as to the extent of the grant made by the act of 1846; and, when the view prevailed that the grant terminated at the Raccoon fork, the officers of the land-department

had opened the lands above the fork to pre-emption entry, and many persons had entered into actual occupancy of the lands, had improved the same, had paid the requisite price in cash, or by location of military bounty warrants, had obtained the usual certificates as evidence of their supposed rights, and had in many instances procured patents from the United States. Others had purchased lands north of the Raccoon fork, either from the state of Iowa or from the Des Moines River Navigation & Railroad Company, and had actually entered into possession, and commenced the cultivation, of the lands thus conveyed to them.

At the beginning of the year 1861 the situation was as follows: It had been decided that the act of 1846, by its terms, limited the grant of lands therein made in aid of the improvement of the Des Moines river to lands below the Raccoon fork; that the action of the department officials had reserved the lands above the Raccoon fork, so that the land grant in aid of railroads made by congress in May, 1856, did not include them, nor were the same open to entry by settlers under the pre-emption laws of the United States. The rulings thus made defeated the claims of title to the lands above the Raccoon fork made under the Des Moines river improvement grant of 1846, under the railroad aid grant of 1856, and under all pre-emption entries made by actual settlers, and thus established the fact that it was within the power of the congress of the United States to determine the future disposition to be made thereof. On March 2, 1861, congress passed the following "joint resolution to quiet title to lands in the state of Iowa:"

"Resolved by the senate and house of representatives of the United States of America in congress assembled, that all the title which the United States still retain in the tract of land along the Des Moines river, and above the Raccoon fork thereof, in the state of Iowa, which have been heretofore certified to said state improperly by the department of the interior, as part of the grant by act of congress approved August 8th, 1846, and which is now held by *bona fide* purchasers under the state of Iowa, be, and the same is hereby, relinquished to the state of Iowa."

By an act passed July 12, 1862, congress enacted:

"That the grant of lands to the then territory of Iowa for the improvement of the Des Moines river, made by the act of August 8, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon fork and the northern boundary of said state; such lands are to be held and applied in accordance with the provisions of the original grant, except that the consent of congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines & Minnesota Railroad, in accordance with the provision of the act of the general assembly of the state of Iowa, approved March 22, 1858. And if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this act, excepting those released by the United States to the grantees of the state of Iowa, under the joint resolution of March 2, 1862, the secretary of the interior is hereby directed to set apart an equal amount of lands within said state to be certified in lieu thereof: provided, that if the said state shall have sold and conveyed any portion of the lands lying within the limits of this grant, the title of which has proved invalid, any lands which shall be certi-

ted to said state in lieu thereof, by virtue of the provisions of this act, shall inure to and be held as a trust fund for the benefit of the person or persons, respectively, whose titles shall have failed as aforesaid."

In *Williams* v. *Baker*, 17 Wall. 144, it was held "that by the joint resolution of 1861, and the act of 1862, the state of Iowa did receive the title for the use of those to whom she had sold them, as part of that grant, and for such other purposes as had become proper under that grant. In *Homestead Co.* v. *Valley Railroad Co.*, 17 Wall. 153, it is said:

"It is therefore no longer an open question that neither the state of Iowa, nor the railroad companies for whose benefit the grant of 1856 was made, took any title by that act to the lands then claimed to belong to the Des Moines river grant of 1846, and that the joint resolution of 2d of March, 1861, and act of 12th of July, 1862, transferred the title from the United States, and vested it in the state of Iowa for the use of its grantees under the river grant."

In *Bullard* v. *Railroad Co.*, 122 U. S. 167, 7 Sup. Ct. Rep. 1149, it was held that the order reserving the lands above the Raccoon fork from market, issued April 6, 1850, had been continued in force until the passage of the act of congress of July 12, 1862, and the effect thereof was to defeat a title based upon a pre-emption entry permitted by the land-officers in May, 1862.

Practically, the cases cited, and others dealing with the same general questions, had resulted in holding that the settlers who had made pre-emption entries upon the lands north of the Raccoon fork, even though they had procured patents from the United States, did not thereby procure any title to the lands occupied by them, and hence had no standing enabling them to question the validity of the titles asserted against them, and derived from the act of congress of July 12, 1862, and the joint resolution of 1861. Many of these settlers had given up the contest, and had either abandoned the lands, or had purchased from the parties holding title under the navigation company. Proceedings having been instituted against the settlers still in possession, looking to their eviction, the recognition of the hardships necessarily resulting therefrom led to the bringing the present bill on behalf of the United States; the theory being that if grounds existed which would enable the United States to successfully assert its title to the lands in question, and to obtain a decree quieting the title in the United States, that it would then be placed within the power of congress to protect the settlers in possession by granting them the title thus decreed to be in the United States. Before the filing of the bill, the general assembly of the state of Iowa had, by an act passed March 28, 1888, relinquished to the United States all the title, right, or interest held by the state to the lands in controversy. It may be said that the bill proceeds upon two theories, the one being that the lands granted to the state were so granted for a specific purpose, to-wit, to aid in the improvement of the navigation of the Des Moines river, in the carrying out of which the United States had an interest; that the lands passed to the state clothed with a trust, the state receiving them in trust for the purpose named; that all per-

sons taking title under such grant to the state were charged with notice of this trust; that there was a failure on part of the state and of the navigation company to carry on the work of the improving the navigation of the river; that the company abandoned all purpose of doing the work it had contracted to do, and that under these circumstances the settlement made between the state and the navigation company, whereby it was in effect agreed that the company should no longer be required to prosecute the work on the river, and yet should receive the lands remaining unsold, was in violation of the terms and purposes of the trust under which the grant had been made to the state; and that the United States is entitled to repudiate such agreement, and all conveyances based thereon, and recover back the lands so wrongfully attempted to be conveyed to the navigation company, and through it to the other defendants hereto. The second theory of the bill is that the lands passing to the state under the grant in question could only be disposed of by the state for the purpose of the grant, and in the quantities provided for therein; that the contract of June 9, 1854, and the supplementary contracts based thereon, between the state and the navigation company, were and are void on their face because they lacked the approval of the governor; that in the settlement in 1858 the state could not bind or affect the lands above the Raccoon fork, as the state had not title or interest therein; that the settlement resolutions of 1858 are limited only to the lands actually granted and passing under the act of August 8, 1846; that the deeds or patents of May 3, 1858, were without effect, as the governor of the state had no authority to execute the same; that all of the contracts, agreements, deeds, and settlements between the state and the navigation company made prior to the year 1861 were wholly void and nugatory so far as the lands north of the Raccoon fork are concerned; that the subsequent grant in 1862 was made subject to the purposes and limitations contained in the original act of 1846; and that the principle of the inuring of a subsequently acquired title to the benefit of a prior grantee cannot apply. Any purpose to call in question the title of parties in actual possession, holding under the state or the navigation company, is expressly disclaimed in the bill; it being averred that the benefit of a decree in favor of complainant is sought only as to such lands as are now actually occupied by settlers who do not hold title under the state or the navigation company, the same amounting to 109,057 acres. To this bill the navigation company interposes a demurrer; and the other defendants, who are grantees of the company, have answered to the merits; and, issues being joined, evidence on behalf of complainant and the answering defendants has been taken, and the cause has been fully submitted on its merits, having been fully and ably argued by counsel for the respective parties.

It is earnestly contended by counsel for complainant that as this suit is on behalf of the United States, which for the first time has chosen to assert the rights and equities belonging to the government which created the original trust, the decisions heretofore made by the supreme court are not applicable in the new view which must be taken of the questions

when presented on behalf of the United States. While there is foundation for this claim, yet, in its application, it cannot be carried to the extent of wholly ignoring the many decisions of the supreme court giving a construction to the acts of congress affecting these lands. This court is precluded from giving a construction to those acts other or different from that announced by the supreme court. If any modification or new application of these rulings is to be made, it can only be had by the action of the supreme court. So far as the duty of this court is concerned, its duty is to apply the rulings already announced to the facts developed in this record. Up to the passage of the act of congress of July 12, 1862, it would seem clear that the disposition of the lands in question, north of the Raccoon fork, was wholly at the discretion of congress. The validity or invalidity of the contracts and agreements between the state and the navigation company made previous to that date is a question wholly aside from the real issue involved. The state and the navigation company knew that there was grave doubt upon the point of the extent of the grant. They knew that it was for congress to determine whether any recognition should be given by the United States to the contracts between the state and the navigation company, including the agreement of settlement of March 22, 1858. They knew, or were bound to know, that the navigation company could acquire no title to any lands situated above the Raccoon fork unless congress should thereafter make a grant thereof. It was open to the state and the navigation company to agree to a settlement of the difficulties and disputes between them. It was likewise open to the United States to wholly ignore such settlement, and to refuse to make any further grant of lands, in case it was deemed that such settlement was in contravention of the real purposes of the original trust, or was for any reason inimical to the true interests of the general government, or the interests represented by it. When congress passed the act of July 12, 1862, it was a matter of public record that the navigation company did not purpose to further prosecute the work of improving the navigation of the river, and that the state had wholly released the company from any further obligation in that respect, and had also assigned to the company all claims to lands certified under the act of congress of 1846. The act of July 12, 1862, was therefore passed with full knowledge of the actual situation, and it must be construed in that light. Whatever rights were conferred by that act upon the navigation company, as the grantee of the state, were so conferred on account of the work done and expenditures made in the past, and without any expectation that any further expenditures would be made by that company in the future in aid of the improvement of the navigation of the Des Moines river. No matter how clear it might be now made to appear that the work done by the navigation company was of little practical value towards the desired end, the fact remains that the state of Iowa, by the settlement of 1858, released the company from further performance of its contracts, and released to it all claims upon the United States for lands certified to the state in aid of the enterprise; and the congress of the United States, waiving all questions of the amount of the work

done, or its present value, or of the misapplication of the lands granted, or of the proceeds thereof, passed the act of July 12, 1862, extending the grant made by the act of 1846 to the northern boundary of the state. The grant thus made cannot be limited nor modified by arguments deduced from facts existing when the act was passed; for it must be conclusively presumed that all such facts were known to the law-making power when action was taken by it.

The courts are confined to the duty of construing the act, and determining its force and effect; and, the supreme court having held that this act conveyed the title of the United States to the state of Iowa for the use and benefit of its grantees under the river land grant, this court in this case is bound to hold that such is the true construction of the act, regardless of all considerations and arguments based upon the allegations of the inadequacy of the consideration received from the company, of the trifling value of the work done by it, of the misapplication of the property, and the proceeds thereof, thereby practically defeating the purposes of the original grant, and other like allegations. Furthermore, in May, 1858, deeds had been executed in the name of the state of Iowa conveying to the navigation company "all lands granted by the act of congress of August 8th, 1846, to aid in the improvement of the Des Moines river, which have been approved and certified to the state of Iowa by the general government," etc. When the act of July 12, 1862, was passed, the navigation company stood in the position of a grantee from the state as to these lands; and if congress had intended to except the company from among the grantees of the state, who were to be benefited by that act, would not such exception have been expressly named in the act? But this is one of the questions which is not open to discussion in this court, having been determined by the supreme court; and, if it is to be reargued and reconsidered, it can only be done before that tribunal. In view of the rulings made by the court of last resort, I am compelled to hold that by the act of July 12, 1862, the title to the lands in question passed to the state of Iowa, and to its grantees, of which the navigation company was one, and that, in view of the construction placed upon that act by the supreme court, it must be held that the United States cannot now assert title to these lands, nor can the United States be heard to assert that the grant made by the act of July 12, 1862, must be set aside for any of the reasons alleged in the bill.

I have not taken up in detail the grounds urged by counsel for complainant in support of the relief sought in the bill, mainly for the reason that, as I construe the decisions of the supreme court, these questions have been settled by that tribunal, and this court cannot reopen the controversies intended to be set at rest by the many elaborate opinions delivered by the supreme court in the cases that have come before it. If I am in error in this conclusion, it will have no effect upon the final decision of this cause, which it is understood will be promptly carried to the court of last resort, in which tribunal these questions will be fully presented, and where a final and conclusive judgment can be pronounced. As I understand the effect of these decisions, they

compel this court to hold that, notwithstanding all that has been shown in support of the allegations of the bill, the complainant has failed to make out a case entitling it to the relief sought in any of its forms, and consequently the bill must be dismissed. With this announcement of the conclusion reached, the duty of the court in this cause is fulfilled, and it may be wholly out of place to make any suggestions in the premises; and yet, in view of the facts known to the court, and in view of the fact that by the institution of this proceeding the United States has evinced a disposition to try to remedy the injustice and wrong that has been caused to the settlers in actual occupancy of these lands, resulting from the mistaken actions and judgments of the officials of the United States, I cannot refrain, in concluding this opinion, from urging upon the congress of the United States the claim of these settlers for some relief. The question is not as to the legal title to these lands as between the navigation company and its grantees and the settlers, but as to the duty and obligation resting upon the United States to remedy the wrong done to its grantees, and resulting from the acts of its own officials.

The officers of the United States in charge of the public domain in the state of Iowa threw open these lands north of the Raccoon fork to preemption entry. Settlers in good faith made their entries in the proper local land-office, received the usual evidences of entry, entered upon the actual occupancy of the lands, built their homes thereon, and in some instances completed the evidence of their titles, as they supposed, by procuring patents from the government. True, it may be said that they were bound to know that the legal effect of the reservation of these lands by order of the commissioner of the land-office was to reserve the lands from private entry, but probably none of them had ever heard of such order, or knew of its existence; and certainly, when the land-office itself treated the lands as open to entry, permitted entries to be made, and titles to be completed by the issuance of patents, it could not be expected that these frontier settlers should be more astute in that particular, or be better posted in the legal effect of the action had in the land department, than the officers of the government having charge of the business of the land department itself. Through some strange blunder, when congress came to deal with the situation in 1861 and 1862, the interests of the state of Iowa, of the navigation company, and of parties purchasing from or under the state, were carefully guarded; but the rights of actual settlers, claiming under the United States, were left wholly unprovided for. I cannot bring myself to believe that such failure was intentional. None of the parties whose interests were to be considered could present so strong and meritorious a claim to the protection of congress as these settlers in actual occupancy of the lands. It would seem far more probable that when it was provided in the act of 1862, extending the original grant from the Raccoon fork to the northern boundary of the state, that "if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this act, excepting those released by the United States to the grantees of the state of Iowa, under the

joint resolution of March 2, 1862, the secretary of the interior is hereby directed to set apart an equal amount of lands within said state to be certified in lieu thereof," it was then the belief of congress that all lands entered by actual settlers were in fact disposed of by the United States, within the meaning of this clause of the act; and by providing for the certification of indemnity lands in place thereof such disposition to actual settlers would be left undisturbed. Had this construction been placed upon the act, lands sold or otherwise disposed of by the United States would have been excepted from the grant, and indemnity lands would have been certified to the state in lieu thereof, and thus the rights of all would have been protected. When, however, it was held that the reservation by the department nullified all entries made, and prevented any rights from attaching to the lands in favor of settlers occupying and improving the same, and that such lands were not disposed of by the United States, then the settlers holding under the United States were wholly ignored, and left without protection. As I have already said, I cannot believe that such was the intent of congress; yet such is the result. No one, it seems to me, who understands the facts will question the proposition that it was most clearly the duty of congress, when it undertook to solve the situation before it in 1862, to have protected the rights of the settlers who had entered into possession of these lands, believing them to be open to entry and settlement; the same being done with the assent of the officers of the land department. That duty has never been fulfilled. The reasons for it exist in even stronger force to-day. Through some blunder or misconception, congress, when it had the power, failed to reserve to the settlers the lands occupied by them, but, on the contrary, enacted an act which, it is held, gives the lands in question to the grantees of the state of Iowa. The consequences of the failure of congress to then protect settlers, who were virtually its grantees, are now seen in the proceedings which must result in the eviction of these settlers from the lands and homes they have occupied for 30 years and more.

But one course can be pursued that will meet the present exigency, and that is for the United States to purchase the lands in question from the defendants, and, having thus acquired the title thereto, congress can deal with the settlers upon equitable principles. It is not within the power of the courts, by any possible construction of the existing acts, to meet the difficulties of the situation. Taking into account the equities and claims on behalf of the state, the navigation company, and their grantees, congress, in 1861 and 1862, to meet the same, extended the grant of 1846 from the Raccoon fork to the north boundary of the state, but in so doing failed to protect the settlers then actually occupying portions of the lands thus granted. Should the court, in the effort to protect the settlers, now hold them entitled to their homes, a manifest wrong would be done to the grantees of the navigation company, who for many years have paid the taxes on these lands, and have sold and conveyed the same, in many instances, to parties paying full value therefor. If the courts, disregarding the many decisions heretofore made, should find some ground for holding that the United States might, at

this late day, take a decree adjudging the title to be in the government for the benefit of the settlers, Paul might be thereby paid, but Peter would be robbed. None of the defendants are in possession of the lands, and none of them have built their homes thereon. To them the lands are merely a matter of barter and sale, and doubtless all of them would gladly sell their interest to the government. By a purchase from them the United States would be placed in a position to do justice to the settlers without injuring others. The obligation resting upon the United States is not a matter of sentiment, based solely upon sympathy for the settlers. Many of these have paid the United States for the lands held by them, and hold patents for them, issued under the name and authority of the United States. It now appears that the United States, through the action of congress, has granted away these lands; and the title of the settlers, upon the faith of which they have spent their years and strength in improving their farms, is held to be only waste paper. The United States stands in the position of grantor to the settlers, and, by the action of the government officials, they have been misled on the question of their right to occupy and improve the lands held by them. The wrong thus caused can only be remedied now by the United States securing to them the title to their homes; and this can be done by purchasing, as suggested, the title of the defendants to the 109,057 acres of land described in the bill herein filed, the power to do which resides in congress alone. Upon the questions presented by the bill of complainant, the defendants are entitled to a dismissal of the bill upon the merits, and it is so ordered.

CONKLIN *v.* WEHRMAN.

(Circuit Court, N. D. Iowa, W. D. May 29, 1890.)

1. ATTACHMENT—SUBSEQUENT SUIT BY PURCHASER—RES ADJUDICATA.
Where the purchaser of land under an attachment afterwards sues in a court of competent jurisdiction to set aside a former deed of the land from the debtor in the attachment suit, as fraudulent, a judgment setting the deed aside is an adjudication of the validity of the writ of attachment, since, if the attachment proceedings had been invalid, the purchaser would have had no right to question the validity of the deed.

2. SAME—LACHES—ESTOPPEL.
In a suit to quiet title it appeared that one G., under whom complainant claimed title, purchased the land in dispute at a sale under an attachment against one W., and afterwards sued to set aside a former deed from W. to defendant as fraudulent; that both defendant and W. had notice of the suit, but failed to defend, and the deed was set aside. The evidence showed that, at the time the deed was made, W. was insolvent, and defendant had no means. The taxes were paid by G. and his grantees, including complainant, and valuable improvements were made on the land. Defendant, having full knowledge of the facts, waited 25 years before setting up any claim to the land, when he brought ejectment. *Held*, that defendant was estopped to assert title as against complainant, and should be enjoined.

In Equity. Bill to quiet title and enjoin actions at law.

E. C. Herrick, *W. L. Joy*, and *Warren Walker*, for complainant.
Chas. A. Clark, for defendant.

SHIRAS, J. From the evidence submitted in this cause the following facts are deducible: That in June, 1857, Adolph Wehrman bought the land in dispute in this case, together with other lands, from the United States, and obtained a patent therefor on or about the 1st day of December, 1859, the said realty being situated in O'Brien county, Iowa; that in 1858 said Adolph Wehrman became indebted to the firm of Greeley, Gale & Co., of St. Louis, Mo., and, as evidence of such indebtedness, executed his promissory notes to such firm; that in 1859 said Adolph Wehrman resided in Pierce county, Wis., and, having failed to pay his said notes to said Greeley, Gale & Co., the said firm brought suit thereon, in the circuit court of Pierce county, against said Wehrman, due personal service of process being made upon the said Wehrman, and also asking the foreclosure of a mortgage given by said Wehrman on a lot in Prescott, Wis.; that a decree of foreclosure was had in said cause, the realty sold, that the proceeds realized were applied to the liquidation of the amount due, in part, and that for the deficiency a judgment was duly docketed against said Adolph Wehrman on the 12th day of September, 1860, for $1,640.30; that on the 14th day of January, 1861, Greeley, Gale & Co. brought suit in the district court of O'Brien county, Iowa, against Adolph Wehrman, upon a transcript of the judgment rendered in Pierce county, Wis., and caused a writ of attachment to be issued by the clerk of said court against the property of said defendant, Adolph Wehrman; that at the time named said O'Brien county was a newly-organized county, and no seal had been as yet provided for the use of the clerk of the district court of said county; that in the writ of attachment so issued such fact was recited, and the clerk added a scroll to the writ as the only seal or semblance thereof that could be then placed thereon; that said writ of attachment so issued was levied upon the realty in question by the sheriff of said county; that the original notice of the commencement of said action by attachment was personally served upon Adolph Wehrman in Pierce county, Wis., on the 25th day of January, 1861; that on the 17th day of December, 1859, said Adolph Wehrman executed a deed of conveyance of some 2,060 acres of land in O'Brien county, Iowa, to Frederick Wehrman, including the land in controversy, which said deed was recorded in said O'Brien county on the 2d day of January, 1860; that the action by attachment pending in O'Brien county was changed by order of court to Woodbury county, upon the application of the plaintiffs therein, and on the 17th day of September, 1861, judgment was rendered in favor of the plaintiffs in the sum of $1,809.48, it being further ordered that the property attached should be sold to satisfy the judgment. No appearance for Adolph Wehrman was entered in the case. That said Greeley, Gale & Co. brought a suit in equity in the district court of O'Brien county, to the June term, 1862, against Adolph Wehrman, Augusta Wehrman, his wife, and Frederick Wehrman, for the purpose of setting aside the con-

veyance of the lands in O'Brien county by Adolph to Frederick Wehrman, on the ground that such conveyance was without consideration, and made to defraud complainants; that personal service of the original notice of such suit was made upon each of the defendants above named, in Pierce county, Wis. No appearance was made by said defendants, or either of them, in said suit, and on the 10th day of June, 1862, a default was taken, and a decree entered in said cause, setting aside such conveyance to Frederick Wehrman as a fraud upon the rights of complainants, decreeing said lands to be subject to the judgment in the attachment suit, and subject to be sold thereon as the property of Adolph Wehrman, and barring Frederick Wehrman from asserting any title or claim to said realty by virtue of said conveyance. That on the 16th day of June, 1862, an execution was issued upon the judgment in the attachment suit, under which the lands in question were sold to Carlos Greeley, and subsequently a sheriff's deed was executed to him, and duly recorded; that by proper conveyances the lands in dispute were conveyed to T. B. Conklin, the present complainant, in 1881 and 1882; that from 1861 to the time of the bringing of this suit the taxes on said lands were paid by Greeley, Gale & Co., Carlos S. Greeley, and his grantees, including complainant. It does not appear that either Adolph Wehrman or Frederick Wehrman ever paid any taxes on said lands, or any part thereof. That since 1882 the complainant, in the full belief that he was the owner of the lands in question, has erected thereon a dwelling-house, a barn, a granary, corn-cribs, and made other improvements, including breaking up and putting under cultivation 270 acres of the lands; that it is not shown what consideration, if any, Frederick Wehrman paid to his brother Adolph for the conveyance of the lands to him, nor does it appear that he had financial ability to make such purchase; that the taxes of 1858 and 1859 were not paid, and, in the year 1860, the treasurer of O'Brien county sold the lands in question for such delinquent taxes to one C. C. Orr, to whom a tax-deed was issued in due time, and the same was duly recorded, and in May, 1871, said Orr executed a quitclaim deed for said lands to Carlos A. Greeley.

From the foregoing statement of facts it appears that the complainant has made out a title to the lands, unless the contention of defendant is sustained, to-wit, that the proceedings by attachment against Adolph Wehrman, and the bill against the present defendant, and the decree based thereon are wholly void, and that the tax-title is void because of want of authority to make the sale in the manner in which it was made. The position of the defendant is that to give the court jurisdiction in the attachment suit against Adolph Wehrman it was necessary that there should be a valid writ of attachment, and levy thereof upon the land, as Wehrman was not served with notice within the limits of the territorial jurisdiction of the court. The principal objection urged against the validity of these proceedings is that the writ of attachment did not have attached thereto a proper seal to authenticate it. The general rule is well settled, as to the class of writs or process issued under seal of the court, that the absence of the seal renders the writ void.

The absence of the seal shows that the writ has not been perfected. Lacking the proper evidence of issuance, it cannot be presumed that it was intended to be issued, and it is therefore without validity. The modern tendency, however, is to a relaxation of the former strictness in regard to curing formal defects in writs or other process. By the provisions of the statutes of Iowa now in force, the failure to attach the seal could be cured by an amendment. Is the general rule to be applied to a case of the peculiar character now under consideration? It is not an instance of a failure to attach the seal of the court to the writ, thereby justifying the conclusion that the same was issued without authority, but a case wherein the court was without an engraved seal, and in lieu thereof a scroll was used, the writ on its face reciting that the court had no other seal. The only purpose of the seal is to authenticate the issuance of the writ. May not such authentication be furnished in other ways, if for any reason a court is without an engraved seal for a time? Suppose that to-day the engraved seal of O'Brien county should be destroyed or be stolen, must all the judicial proceedings therein be brought to a stand-still, awaiting the procurement of another engraved seal? Would not this be subverting substance to mere form? Would it not be permissible for the court to continue the issuance of writs of attachment and executions having attached thereto a scroll as a seal, the writ on its face showing the reason therefor? The power to issue writs of attachment is conferred by the statutes of Iowa upon the courts of the state, and is wholly independent of the mode of authenticating the writ. The latter is merely the evidence of the exercise of the power by the court, and it is certainly going to an extreme length to hold that the exercise of the power to issue the writ granted by the statute is wholly dependent upon the existence of an engraved seal, and that in the absence thereof the power of the court is in abeyance. Whatever is the solution of this question, it was involved in the issues presented by the bill of equity filed by Greeley, Gale & Co. to set aside the conveyance of the realty by Adolph to Frederick Wehrman. It is not questioned that Greeley, Gale & Co. were creditors of Adolph Wehrman. Their claim had been established by a judgment duly obtained in Wisconsin. They were seeking to enforce the collection thereof by proceedings in O'Brien county. Averring that the conveyance made to Frederick Wehrman was made in fraud of their rights, and was colorable only, being without consideration, they brought a bill in equity against Adolph and Frederick Wehrman for the purpose of setting aside the transfer to the latter. The question whether the attachment proceedings gave Greeley, Gale & Co. a standing sufficient to authorize them to question the transfer to Frederick Wehrman lay at the very threshold of these proceedings. The court was one of competent jurisdiction. It proceeded to a decree setting aside the conveyance, and declaring the land to be the property of Adolph Wehrman, and as such to be subject to seizure and sale on behalf of complainants. If there was error in such conclusion touching the validity of the attachment writ, it was not an error affecting the jurisdiction of the court in the equity case. The court de-

termined that Greeley, Gale & Co. were entitled to question the validity of the transfer of the realty, and the effect of such decision and decree cannot be avoided by urging that the court erred in holding the writ of attachment to be valid. The state court had exactly the same jurisdiction to hear and determine the question of the validity of the seizure of the land under the writ of attachment as this court now has to investigate the same question. Being clothed with jurisdiction, and having determined the question, its decision and decree are not void, but must be respected and enforced. So long as that decree remains in force, it cannot be claimed that complainants are without title to the premises in dispute, for the sale made thereof to Carlos S. Greeley was in fact made under the authority of that decree.

If, however, the court is in error in the view taken of the force and effect to be given to the decree in equity setting aside the transfer to Frederick Wehrman, there is another and sufficient ground for a decree in favor of complainant. The evidence shows that both Adolph and Frederick Wehrman had actual notice of the proceedings brought to enforce the collection of the debt due Greeley, Gale & Co. by a sale of the lands as the property of Adolph Wehrman. Frederick Wehrman knew that his title was attacked. He permitted the decree to be taken, the sale to be made, and allowed Carlos S. Greeley to appear as the owner thereof for years. He never caused the lands to be assessed to himself, nor did he ever pay or offer to pay or attempt to pay any of the taxes assessed upon the property. Parties purchasing from Greeley finally commenced improving the property by cultivating the soil and erecting buildings thereon. For more than 25 years Frederick Wehrman remained wholly silent, knowing that by his silence he must, of necessity, be misleading others to their injury. In the bill filed in this cause it is charged that the transfer to him was without consideration, and for fraudulent purposes, yet he does not testify in relation thereto. There is no evidence showing that he ever paid anything for the lands, or that he, in fact, ever claimed the same as his own property, except the bare fact that, after a delay of a quarter of a century, he brought an action in ejectment to obtain possession of the property. The evidence on behalf of complainant shows that Adolph Wehrman, when he made the transfer, was insolvent; that Greeley, Gale & Co. were pressing the collection of their claim; that Frederick Wehrman was not in the possession of the means to pay the value of the lands so transferred to him, and there is no evidence that he ever paid a dollar therefor, or ever exercised any act of ownership over the same. The evidence, therefore, entirely justifies the finding that the transfer to the defendant was without consideration, and fraudulent, as against Greeley, Gale & Co., and that Frederick Wehrman never was in fact the real owner of the lands.

Under these circumstances the complainant, on the double ground that the defendant is not, in fact, the real owner of the property, and has no interest therein which he can avail himself of as against the equities of complainant, and that defendant has, by his conduct, es-

topped himself from asserting title against complainants, is entitled to a decree quieting his title against the claims now sought to be enforced by defendant, and enjoining Frederick Wehrman from further prosecuting the action of ejectment pending in his name.

NORTH GERMAN LLOYD S. S. CO. *v.* HEDDEN, Collector.

SAME *v.* MAGONE, Collector.

(Circuit Court, D. New Jersey. May 21, 1890.)

1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—TONNAGE TAX.
   Act Cong. June 26, 1884, § 14, which levies a duty of 3 cents per ton on all vessels "from any foreign port or place in North America, Central America, the West India islands, the Bahama islands, the Bermuda islands, or the Sandwich islands, or Newfoundland," and a duty of 6 cents per ton on vessels from other foreign ports, does not entitle German vessels sailing from European ports to enter our ports on payment of a duty of 3 cents per ton, under the treaties of December 20, 1827, and May 1, 1828, which stipulate that the United States shall not grant any particular favor regarding commerce or navigation to any other foreign nation which shall not immediately become common to Germany, since the discrimination contained in said act is merely geographical, and the 3-cent rate applies to vessels of all nations coming from the privileged ports.
2. TREATIES—EFFECT OF INCONSISTENT ACT OF CONGRESS.
   Where an act of congress is in conflict with a prior treaty the act must control, since it is of equal force with the treaty and of later date.
3. CONSTITUTIONAL LAW—COMMISSIONER OF NAVIGATION.
   Act Cong. July 5, 1884, § 3, which makes final the decision of the commissioner of navigation on all questions "relating to the collection of tonnage tax, and to the refunding of such tax, when collected erroneously or illegally," is constitutional.

At Law.

Samuel F. Bigelow and *Henry C. Nevitt*, for plaintiff.

Howard W. Hayes, Asst. U. S. Dist. Atty., for defendants.

WALES, J. The plaintiff, a duly-organized corporation under the laws of the Hanseatic republic of Bremen, which is a part of the German empire, is the owner of a line of ocean steam-ships, plying regularly between the ports of Bremen and New York, and brings these actions, under section 2931, Rev. St. U. S., to recover the amount of certain tonnage dues, alleged to have been unlawfully collected from said ships during the period extending from June 26, 1884, to July 28, 1888, and while the defendants were successively collectors of customs at the last-named port. The vessels cleared from Bremen for New York via Southampton, Eng., stopping at or near the latter place temporarily, to discharge cargo and passengers, and to take on board additional cargo, passengers, and mails. The consignees of the vessels paid the dues, in every instance, under protest, and the plaintiff appealed to the secretary of the treasury, and finally, at the suggestion of the latter officer and with the concurrence of the department of justice, brought these actions to determine the authority of the defendants.

The right of the plaintiff to recover depends upon the following statement of the law and facts: Prior to the act of congress of June 26, 1884, entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade," tonnage tax was imposed upon German and all other vessels arriving in the United States from foreign ports, at the rate of 30 cents per ton per annum, and up to July 1st, of that year, it had been collected in a lump sum for a year at a time. But section 14 of the act of 1884 changed the rate and mode of collection as follows:

"That in lieu of the tax on tonnage of thirty cents per ton per annum, heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India islands, the Bahama islands, the Bermuda islands, or the Sandwich islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports." 23 U. S. St. 57.

This section was amended by section 11 of the act of congress of June 19, 1886, entitled "An act to abolish certain fees," etc. 24 U. S. St. 81. The amendment consisted in adding the following words to those just quoted:

"Not, however, to include vessels in distress or not engaged in trade: provided, that the president of the United States shall suspend the collection of so much of the duty herein imposed on vessels entered from any foreign port as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed in said port on American vessels, by the government of the foreign country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter as often as it may become necessary, by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty, if any, to be collected under such suspension: provided, further, that such proclamation shall exclude from the benefits of the suspension herein authorized, the vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and sections 4223 and 4224 and so much of section 4219 of the Revised Statutes as conflict with this section are hereby repealed."

Section 4219, tit. 48, c. 3, Rev. St., referred to in the foregoing subproviso, provides that "nothing in this section shall be deemed * * * to impair any rights * * * under the law and treaties of the United States relative to the duty of tonnage on vessels." Section 4227 of the same title and chapter is in these words:

"Nothing contained in this title shall be deemed in any wise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States, relative to the duty on tonnage of vessels, or any other duty on vessels."

By article 9 of the treaty of December 20, 1827, between the United States and the Hanseatic republics, "the contracting parties * * * engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party." Public Treaties, 400. Article 9 of the Prussian-American treaty of May 1, 1828, (Pub. Treaties, 656,) contains a like stipulation. These treaties have been held by both the American and German governments to be valid for all Germany. On the 26th of January, 1888, the president, in virtue of the authority vested in him by section 11 of the act of June 19, 1886, issued his proclamation, wherein, after reciting that he had received satisfactory proof that no tonnage or light-house dues, or any equivalent tax or taxes whatever, are imposed upon American vessels entering the ports of the German empire, either by the imperial government or by the governments of the German maritime states, and that vessels belonging to the United states are not required, in German ports, to pay any fee or due of any kind or nature, or any import duty higher or other than is payable by German vessels or their cargoes, did "declare and proclaim that from and after the date of this my proclamation shall be suspended the collection of the whole of the duty of six cents per ton * * * upon vessels entered in the ports of the United States from any of the ports of the empire of Germany, * * * and the suspension hereby declared and proclaimed shall continue so long as the reciprocal exemption of vessels belonging to citizens of the United States and their cargoes shall be continued in the said ports of the empire of Germany, and no longer." The commissioner of navigation, in his circular letter No. 19, dated February 1, 1888, and approved by the secretary of the treasury, addressed to the collectors of customs and others, decided that the president's proclamation does not apply to vessels which entered before the date of the proclamation, and that only those German vessels "arriving directly from the ports of the German empire may be admitted under the proclamation without the payment of the dues therein mentioned." The commissioner of navigation claims authority to make this decision by virtue of section 3 of the act of congress of July 5, 1884, entitled "An act to constitute a bureau of navigation in the treasury department," which reads as follows:

"That the commissioner of navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation, growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refunding of such tax when collected erroneously or illegally, his decision shall be final."

The plaintiff's vessels were German vessels, and on the 19th day of June, 1886, and thereafter until now, the government of Germany exacted no tonnage tax or taxes whatever on vessels of the United States arriving in German ports.

Upon this statement of the law and the facts, the plaintiff's counsel contend (1) that as to the dues collected between June 26, 1884, and June 19, 1886, the plaintiff's vessels should not have been charged more than the lower rate of tonnage tax fixed by the act of 1884, under the favored nation clause of the treaties, whereas the defendants charged six cents per ton; (2) that the dues collected after the passage of the act of June 19, 1886, and prior to the president's proclamation, were excessive, for the same reason; (3) that no tonnage tax whatever could be lawfully collected of the vessels of the plaintiff, after the passage of the act of June 19, 1886, because that act went into effect immediately, and without waiting for the president's proclamation; (4) that the act of July 5, 1884, in so far as it confers on the commissioner of navigation the power of deciding finally on all questions of interpretation, growing out of the execution of the laws relating to the collection of tonnage tax, and the refund of the same when illegally or erroneously collected, is unconstitutional and void.

As introductory to their argument, plaintiff's counsel referred to the policy of our government in relation to the subject of navigation, which, it is claimed, has been from the beginning to establish entire reciprocity with other nations. The practice has been to ask for no exclusive privileges and to grant none, "but to offer to all nations and to ask from them entire reciprocity in navigation." 1 Kent, Comm. 34, note. This policy has been judicially recognized by the supreme court in *Oldfield* v. *Marriott*, 10 How. 146; and it is asserted that congress had it in view in enacting the acts of 1884 and 1886, imposing the tonnage taxes. The review presented by counsel of the legislative and diplomatic correspondence touching this subject is historically interesting and instructive, and would be persuasive in the case of a doubtful meaning of an act of congress, but it cannot be held to affect the interpretation of laws which are plain and unambiguous in their terms. The questions before the court must be determined by the ordinary and well-settled rules applicable to the construction of and validity of statutes.

Soon after the passage of the act of June 26, 1884, claims were presented by the government of Germany, and of other foreign powers, having similar treaty stipulations with the United States, in relation to navigation for the benefit of the three-cent rate of tax, under the favored-nation clause. The claims having been referred to the department of justice, the attorney general, on the 19th of September, 1886, gave the following opinion:

"The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act, and entered in our ports, is, I think, purely geographical in character, inuring to the advantage of any vessel of any power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the act. I see no warrant, therefore, to claim that there is anything in the most 'favored-nation clause' of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside of the limitations of the act."

The construction thus given to the statute is clearly consistent with its terms, which grant the privilege of the minimum tax to all vessels entered in United States from certain specified foreign ports, and not exclusively to the vessels of nations to whom those ports belong, or in whose territories the ports are situate, excepting the vessels of those governments only which, in the imposition of tonnage taxes, discriminate against American vessels. In accordance with this construction, it follows that no particular favor is conferred on any nation, and that, with the exception noted, the vessels of all nations coming from the privileged ports are entered in the United States on an equal footing. Further discussion on this point would seem, therefore, to be fruitless; but it may be proper to observe that the construction of both the act of June 26, 1884, and of that of June 19, 1886, and the complicated questions growing out of the claims of foreign governments, for the lower rate of tonnage tax by virtue of their treaty rights, were brought to the attention of congress by the president's message of January 14, 1889, transmitting a report of the secretary of state in reference to the international questions arising from the imposition of differential tonnage dues upon vessels entering the United States from foreign countries, Ex. Doc. House Rep., 50th Cong., 3d Sess. The report, after mentioning the claims of the German minister for a reduction of the tax under the act of 1884, and for a proper refund of the dues charged on German ships entering the United States from German ports since the date of the act of 1886, stated: "To this suggestion the undersigned was unable to respond, the matter being one for the consideration of congress. But the request assuredly deserves equitable consideration." In respect to the claim now made by the plaintiff, that the course of its ships coming from Bremen to New York by the way of Southampton is not such as to deprive the run of its character of a voyage from a German port to a port in the United States, within the meaning of the act of 1886, the report says:

"But it has been held by the commissioner of navigation that the voyage cannot be so regarded, and that the vessels must pay dues as coming from Southampton, a British port. Similar rulings have been made in respect to other vessels of different nationality."

And the report further adds:

"Another instance of complication is that of a vessel starting from, we will say, a 6-30 cent port, and calling on her way to the United States at a 3-15 cent port, and a free port. Other combinations will readily suggest themselves, and need not be stated. But in each case the vessel is required to pay the highest rate, without reference to the amount of cargo obtained at the various ports from which she comes. Thus a penalty may practically be imposed in many cases on indirect voyages. It is conceived that in many instances the main purpose of the act may be defeated by these rulings, but it must be admitted that the law contains no provision to meet such cases. * * * This appears to be a proper subject for the consideration of congress."

From an examination of the above extracts from his report, it will be seen that the secretary of state was of the opinion that the questions re-

ferred to were to be addressed to the political, and not to the judicial, branch of the government, and that congress alone could be looked to for the redress of the class of wrongs complained of by the plaintiff, and to prevent their repetition. The plaintiff's counsel deny the correctness of the construction given to the act of 1884 by the attorney general, and insist that the difference in tonnage rates, by which certain ports specially named in the act are favored, is a particular favor to the countries to which those ports belong, "in respect to their commerce and navigation" which *ipso facto* accrues, in pursuance of treaty rights, to German vessels coming from German ports. It is also asserted that the treaty stipulations with Germany are paramount to the later acts of congress, and that the former cannot be annihilated by the latter. Admitting for the moment that the attorney general may have misconstrued the act, still it cannot be questioned that, excepting where rights have become vested under a treaty, to use the expression of Judge SWAYNE, in the *Cherokee Tobacco Case*, 11 Wall. 616, "a treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty." The commissioner of navigation held that the acts of 1884 and 1886 were inconsistent with the treaties, and being of a later date must prevail, and in so ruling he is not without authority of adjudged cases. In *Foster* v. *Neilson*, 2 Pet. 314, Chief Justice MARSHALL, in delivering the opinion of the court, said:

"Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial, department and the legislature must execute the contract before it can become a rule for the court."

The same doctrine is held in *Taylor* v. *Morton*, 2 Curt. 454; *Ropes* v. *Clinch*, 8 Blatchf. 304. In the *Cherokee Tobacco Case*, *supra*, there was an open conflict between a treaty contract and a subsequent law, and the question was as to which should prevail. The 107th section of the internal revenue act of July 20, 1868, provided "that the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same be within a collection district or not." The tenth article of the treaty of 1866 between the United States and the Cherokee Nation of Indians stipulated as follows:

"Every Cherokee Indian and freed person residing in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live-stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying the tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory."

The collection officers had seized a quantity of tobacco belonging to the claimants which was found in the Cherokee Nation, outside of any collection district of the United States, and exemption from duty was

claimed by virtue of the treaty. It was admitted that the repugnancy between the treaty and the statute was clear, and that they could not stand together; that one or the other must yield. The court decided that the language of the section was as clear and explicit as could be employed. It embraced indisputably the Indian Territory, and congress not having thought proper to exclude them, it was not for the court to make the exception; and that the consequences arising from the repeal of the treaty were matters for legislative and not judicial action, and if a wrong had been done, the power of redress was with congress and not with the judiciary. In *Taylor* v. *Morton*, the facts were these: Article 6 of the treaty of 1832, with Russia, stipulated that "no higher or other duties shall be imposed upon the importations into the United States of any article the produce or manufacture of Russia, than are or shall be payable on the like article being the produce or manufacture of any other foreign country." This was held by the court to be merely an agreement, to be carried into effect by congress, and not to be enforced by the court, and that an act of congress laying a duty of $25 a ton, on hemp from India, and $40 a ton, on hemp from other countries, did not authorize the courts to decide that Russian hemp should be admitted at the lower rate. Such a promise, it was said, addresses itself to the political and not to the judicial department of the government, and the courts cannot try the question whether it has been observed or not. The court expressly declined to give any opinion on the merits of the case, holding that the questions, whether treaty obligations have been kept or not, and whether treaty promises shall be withdrawn or performed, are matters that belong to diplomacy and legislation, and not to the administration of the laws. If congress has departed from the treaty, it is immaterial to inquire whether the departure was accidental or designed, and if the latter whether the reasons therefor were good or bad. If, by the act in question, they have not departed from the treaty, the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen or the foreigner, must be made to those who alone are empowered by the constitution to judge of its grounds and act as may be suitable and just.

As to the time when the act of June 19, 1886, went into operation, whether immediately from and after the date of its approval, or not until the date of the president's proclamation, and also whether the voyages of the plaintiff's vessels from Bremen to New York must be made "directly," and without stoppage at an intermediate port, in order to be exempted from the imposition and payment of tonnage dues, the decision of these questions by the commissioner of navigation must be held to be conclusive, unless so much of section 3 of the act of July 5, 1884, which makes his decision final in such matters, is unconstitutional. Much learning and ability have been employed by plaintiff's counsel to establish the invalidity of this portion of the act, which invests a department officer with such unlimited judicial power, and by which he is enabled to decide all contests in relation to alleged illegal dues, *ex parte*, and absolutely. On the other hand, the labor and responsibility of the court

have been increased by the omission of the defendant's counsel to furnish any assistance towards the solution of the questions, and permitting them to pass *sub silentio*. The subject, however, is not *res integra*. In *Cary* v. *Curtis*, 3 How. 236, the supreme court had under consideration the constitutionality of the third section of the act of congress of March 3, 1839, entitled "An act making appropriations for the civil and diplomatic expenses of the government for the year 1839," by which the secretary of the treasury was authorized to finally decide when more duties had been paid to any collector of customs, or to any person acting as such, than the law required, and to draw his warrant in favor of the person or persons entitled for a refund of the amounts so overpaid. The opinion of the court discusses very ably and at much length the questions involved in that case. A few sentences taken from the opinion will indicate the grounds upon which the validity of the act of 1839 was sustained:

"We have no doubts [say the court] of the objects or the import of that act. We cannot doubt that it constitutes the secretary of the treasury the source whence instructions are to flow; that it controls both the position and the conduct of the collectors of the revenue; that it has denied to them any right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the treasury department the tribunal for the examination of claims for duties said to have been improperly paid. * * * It is contended, however, that the language and the purposes of congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. * * * The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz, that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine, so often ruled in this court, that the judicial power of the United States, although it has its origin in the constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of congress, who possess the sole power of creating the tribunals (inferior to the supreme court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority. * * * The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. * * * The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori*, they can take no cognizance of matters that by law are either denied to them, or expressly referred *ad aliud examen*."

This exposition of the origin and extent of the jurisdiction of the courts of the United States was reaffirmed in *Sheldon* v. *Sill*, 8 How. 449, where it was held that courts created by statute can have no jurisdiction but such as the statute confers. The right given by section 2931, Rev. St., to sue for overpaid dues is taken away by the act of July 5, 1884, and the power to determine controversies arising from alleged exactions by collectors is deposited with the commissioner of navigation. Such is the effect of the decisions just cited, and which, as long as they are not overruled by the tribunal which made them, must be obeyed as the law of the land. The authorities referred to by plaintiff's counsel are cases where department officers, in making regulations to be observed by their subordinates, exceeded their statutory power, but in no one instance was it pretended that the officer was clothed with the power to make a final decision in contested matters. It was perhaps unnecessary, in view of *Cary* v. *Curtis*, and *Sheldon* v. *Sill*, that I should have done more than acquiesce in the doctrines there announced, and support the validity of the act of July 5, 1884, without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was at first designed. It must be borne in mind that this court is not called on to express any opinion on the justice or expediency of placing such unlimited power in the hands of the commissioner of navigation as is conferred by the act of July 5, 1884. The duty of the court is to discover whether the act is in conflict with the constitution, and, on being satisfied that it is not, to judge accordingly. To pursue any other course would be not only extrajudicial, but also improper, in assuming to criticise the wisdom of congress in making the law. Neither is the court required to say whether the commissioner of navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and congress alone can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due. Let judgment be entered in each case for the defendant.

UNITED STATES *v.* MICHIGAN CENT. R. Co. *et al.*[1]

(*District Court, N. D. Illinois.* June 23, 1890.)

1. CARRIERS—INTERSTATE COMMERCE—REBATES.
Where a railroad company which has fixed a rate of 20 cents per hundred for freight from Chicago to New York, and 22 cents per hundred for freight from points west of Chicago to New York, of which latter rate said company receives 18 cents, makes an arrangement with a Chicago firm to ship its freight from Chicago to New York at 22 cents under bills of lading purporting to come from western points, and to return to them 4 cents under pretense of paying it to the road bringing the freight into Chicago, it is guilty of a violation of the provision of the interstate commerce act of February 4, 1887, which makes it a misdemeanor for a common carrier to charge different rates from those fixed in its schedule.

2. SAME—CRIMINAL LIABILITY OF OFFICERS.
Where such arrangement was made by the assistant general freight agent, the fact that the local freight agent, and the agent who made out the bills of lading, knew that there was something unusual and out of the ordinary course of business in such shipments, is not sufficient notice to them that the company was violating said act to make them criminally liable therefor.

At Law.

W. G. Ewing, U. S. Dist. Atty., for plaintiff.

Edwin Walker and *Mills & Ingham*, for defendants.

BLODGETT, J. This is a criminal proceeding instituted under certain provisions of the interstate commerce act of February 4, 1887, and, the the offense charged being only a misdemeanor, a jury was waived, and the case tried by the court. The indictment contains six counts, charging, in substance, that the Michigan Central Railroad Company was in September, 1888, and for three months succeeding, a common carrier of passengers and property, owning and operating a railroad from Chicago, in the state of Illinois, eastward to Detroit, in the state of Michigan, and from thence having connections, by means of other railroads, with New York city, and other cities on the Atlantic coast. The said Michigan Central Railroad Company had fixed and published a schedule of rates for the transportation of passengers and property over its road, and also a schedule of rates for the transportation of passengers and property by way of its railroad and its connection with other carriers to New York city, in the state of New York, and that by such schedule of rates the rate for the transportation of grain from the city of Chicago to the city of New York was fixed at 20 cents per hundred pounds,—copies of which schedules had been filed with the interstate commerce commission,—whereby it became unlawful for said company to charge, demand, collect, or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than was specified in such published schedule of rates. But that, in violation of their duty and the law in that regard the defendants, the Michigan Central Railroad Company and Alexander Mackey, Fred. C. Nicholas, Matson P. Griswold, Arthur W. Street, and E. L. Somers, who were

[1] Reported by Louis Boisot, Jr., of the Chicago bar.

respectively the agents and persons acting for and employed by said Michigan Central Railroad Company, did unlawfully and willfully transport and cause to be transported, and willfully did suffer and permit to be transported, by said Michigan Central Railroad Company from the said city of Chicago to the said city of New York large quantities of oats and corn, the same being the property of the firm of Charles Counselman & Co., of Chicago, and did willfully and unlawfully receive and collect therefor a rate which was less than the rate and price fixed by said schedule of rates; that is to say, for the sum of 18.2 cents per hundred pounds, when the schedule rate was 20 cents per hundred pounds, which was a lower rate than was charged and received by said company to and from other persons for the transportation of like grain from Chicago to New York city, and contrary to the form of statute in such case made and provided.

The clauses of the interstate commerce act as it was passed, and as it stood at the time the acts complained of were committed, which are material for the purposes of this case, read as follows:

"Sec. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad, as defined by the first section of this act. * * * Every common carrier, subject to the provisions of this act, shall file with the commission hereinafter provided for copies of its schedules of rates, fares, and charges, which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. * * * And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

"Sec. 10. That any common carrier, subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense."

The indictment, as found, was against the Michigan Central Railroad Company, Alexander Mackey, George C. Nicholas, Matson P. Griswold,

Arthur W. Street, and E. L. Somers. The railroad company has never appeared, or been so served as to compel an appearance. On a motion for the issue of a distress warrant to compel an appearance, which was considered as a motion to quash the indictment as to the railroad company, this court held that a railroad corporation was not subject to be indicted under this act, and therefore the motion for the distress warrant asked for in the premises was overruled. Griswold pleaded a misnomer, which plea was confessed by the district attorney, and the case abated as to him; and a finding of "not guilty" was entered as to Mackey, at the conclusion of the proofs on the part of the government, on the ground that the proofs were not sufficient to and did not connect him with the offense charged; leaving the case to be yet disposed of on the evidence as to the defendants Street, Nicholas, and Somers.

There is little dispute as to the facts in the case. It is admitted that, at the time of the transaction complained of, Street was the assistant general freight agent of the Michigan Central Railroad Company, having his head-quarters in the city of Chicago; that Nicholas was the local freight agent of said company at Chicago; that Somers was the Chicago agent of the Blue Line, so far as said line was operated in connection with the Michigan Central Railroad; that in the latter part of September, 1888, the Michigan Central Railroad Company had fixed its schedule of rates under the provisions of the law, by which schedule the rate for the transportation of corn and oats from Chicago to New York by the line of said company and connecting lines was 20 cents per hundred pounds; that there was also a schedule rate for the transportation of such grain from points west and north, south and south-west, of Chicago, within certain limits, through Chicago to New York city, of 22 cents per hundred pounds,—that is, grain shipped at points west, south, south-west, and north-west of Chicago, within those limits, was carried directly through to New York at 22 cents per hundred pounds, of which the carrier which brought the grain to Chicago received its *pro rata*, and the carriers forming the through line from Chicago east to New York, respectively, received their *pro rata;* that not all the carriers reaching Chicago from the north-west, west, south, and south-west prorated on this 22-cent rate, the Illinois Central Railroad Company being one of the companies that did not so prorate; and that grain arriving in Chicago from points within the limits I have referred to, by roads that did not prorate, was charged at the rate of 25 cents per hundred pounds for transportation to New York city from those points outside of Chicago. The proof also shows that in September, 1888, Street, as assistant general freight agent of the Michigan Central Railroad Company, made an agreement with the firm of Charles Counselman & Co. by which grain which Counselman & Co. should have in their elevators, or in cars on the railroad tracks in the city of Chicago, should go forward at the *pro rata* to which the Michigan Central and its eastern connections would be entitled, at the 22-cent rate on grain shipped from points within the 22-cent limit; that is, for illustration, grain arriving in Chicago by the Chicago, Rock Island & Pacific Railroad would arrive here subject to the *pro rata* of the 22-cent rate to which the Chicago, Rock Island & Pacific Railroad Company would be entitled. This *pro rata* the

Michigan Central Railroad Company assumed, and paid the Rock Island Railroad on what was known in the business as "expense bills," and the *pro rata* of the roads thus bringing the grain to Chicago left 18.2 cents per hundred pounds as the rate to be paid the Michigan Central Railroad Company and its connecting lines east for transporting the grain from Chicago to New York. In other words, Counselman & Co., by this scheme, got their grain shipped from Chicago to New York city for 18.2 cents per hundred pounds, while other shippers were charged 20 cents per hundred pounds for transportation of the same kinds of grain.

The scheme was carried out by resorting to fictitious "expense bills," which, while they purported to come from other railroads, such as the Chicago & Northwestern Railroad Company, the Chicago, Burlington & Quincy Railroad Company, etc., and to represent actual grain which had arrived in Chicago from points on the lines of those roads within the 22-cent rate limit, for direct shipment through to New York, were, in fact, made out at the office of Counselman & Co., in this city, and were paid by the Michigan Central Railroad Company to Counselman & Co., instead of being paid to roads which had brought the grain to Chicago. The grain, thus shipped, went forward as subject to the 20-cent rate from Chicago to New York city; and these "expense bills," so paid to Counselman & Co., operated, in effect, as a drawback to them, which reduced the actual cost of transporting their grain from Chicago to New York city to 18.2 cents per hundred pounds. And the proof also shows that certain car-loads of grain which had arrived in the city of Chicago by the Illinois Central Railroad, which did not prorate with the other companies on the 22-cent rate, were also sent forward under this arrangement at the *pro rata* of the Michigan Central Railroad of 18.2 cents per hundred pounds. The proof also shows that this scheme had its inception in the latter part of September, and was carried on during the succeeding months of October and November, within which time a large number of car-loads of corn and oats were shipped by Counselman & Co. to New York city, and other eastern cities, at the rate mentioned; thus giving Counselman & Co. an advantage as against other shippers of one cent and eight-tenths on each hundred pounds of grain so shipped for them. The testimony brings the case so clearly within the prohibitory provisions of the interstate commerce act which I have quoted, as to the defendant Street, that no defense was interposed in his behalf.

This leaves the proof only to be considered as to the defendants Nicholas and Somers. Nicholas was the local freight agent of the Michigan Central Railroad, and all these shipments passed through his office, the way-bills were made at his office, and these fictitious "expense bills" paid from his office by checks to Counselman & Co. Somers, as agent of the Blue Line, seems from the proof to have done nothing except to make out the bills of lading which were delivered to the shippers. This being a criminal offense, the proofs must be clear, and leave no room for reasonable doubt of the defendants' guilt. The main inculpating proof against Nicholas is that one of his clerks noticed that there was something unusual about these "expense bills," and called Nicholas' at-

tention to them. Nicholas referred him to Street as his superior officer, and, on the clerk's presenting the matter to Street, he was told, "They are all right." This was communicated by the clerk to Nicholas, when Nicholas replied: "Well, if Mr. Street says they are all right, of course they must be so." The bills of lading made out by Somers for shipments over the Blue Line contain matter which might well have put him on inquiry, and which, were this a civil action, might be held enough to charge him with notice that the shipments were irregular, and out of the usual course of business. But in a criminal case, as this is, the proofs must be much more conclusive and convincing in order to justify a finding of guilty. And the same may be said in regard to Nicholas. He undoubtedly knew that there was something unusual, and out of the ordinary course of business, in this shipment, but I do not think that the proof in this case brings home to either of these two defendants knowledge that the Michigan Central Railroad Company was shipping this grain for Counselman & Co. for less than the tariff rates, which it must do, to justify a finding of guilty. The law intended to punish only an active and willful violator of its provisions. Men who occupy a merely clerical position, who are only the instruments which carry out an unlawful scheme or contract made by their superior officers, which they do not concoct, should not be punished, except where the proof of guilty knowledge and participation is clear. If the agents or employes of a railroad of whatever rank make an unlawful contract, or if they knowingly aid and abet in the execution of an unlawful contract, which is made an offense under the interstate commerce act, they undoubtedly subject themselves to the penalties, but the proof, as in all criminal cases, should be clear, and leave no reasonable ground for doubt as to their guilt, and of their knowledge that they were engaged in consummating an illegal contract. This is particularly true in cases which may arise under the law now under consideration, from the fact that these large common-carrier corporations are dominated, and their business arrangements substantially made, by the officers who are heads of departments, either in regard to freights or passengers, and the work of their subordinates is almost wholly clerical; that is, they are bound to do whatever their superior officers require of them. It may be said, I think, that, as a rule, men in such positions have only the alternative to either obey orders or resign; and while it is no excuse for a railroad employe who has willingly and knowingly aided and abetted in the violation of the law that he did it under the instructions of his superior officer, yet it seems to me it furnishes a cogent reason why such persons should only be convicted where the proof of their guilt is clear and beyond doubt. There will be a finding of guilty as to the defendant Street, and not guilty as to the defendants Nicholas and Somers. The indictment will also be quashed as to the defendant the Michigan Central Railroad Company, as it was understood at the time the motion for a distress warrant was argued that such motion should have the effect of a motion to quash on behalf of the company.

DAVEIS v. COLLINS *et al.*

(Circuit Court, N. D. Illinois. June 24, 1890.)

1. ADVERSE POSSESSION—ADMISSION AGAINST TITLE—HUSBAND AND WIFE.
Though the husband be a drunkard, and the wife support the family by her industry, he still continues the head of the family, and any admission by him as to whether his occupation of land is adverse concludes her right after his death.
2. SAME—ACKNOWLEDGMENT OF ANOTHER'S TITLE.
An acknowledgment by a mere squatter of ownership in another person interrupts the running of adverse possession.
3. SAME—MENTAL CAPACITY TO MAKE ACKNOWLEDGMENT.
The mental capacity of the person in possession to execute a lease, thereby acknowledging another's ownership, cannot be inquired into as against an innocent purchaser.
4. SAME—SALE FOR TAXES.
The running of prescription in favor of one holding by adverse possession is interrupted by a sale for taxes.

At Law. Ejectment.

Charles H. Aldrich, for plaintiff.

Louis Shissler, *James H. Ward*, *A. T. Powers*, and *Robert B. Kendall*, for defendants.

BLODGETT, J., (*orally charging jury.*) This is an action of ejectment to recover possession of block 111 in the original subdivision known as "Canalport," an addition to the city of Chicago. The plaintiff has offered proof showing that this Canalport subdivision was made upon a portion of section 30, in township 39, range 14 E., lying in Cook county; that this portion of section 30 was patented by the United States to one Welch; that Welch conveyed it to Hamilton and Pearsons; that Pearsons conveyed his interest in it to Hamilton; that Hamilton, in 1853, conveyed to Samuel J. Walker; that Samuel J. Walker conveyed block 111 to one H. H. Walker; that H. H. Walker made a conveyance by mortgage to one Prather; that Prather obtained title by foreclosure of his mortgage, and conveyed to Matthews, and Matthews to Cooper, Cooper to Pierce, Pierce to Bridge, and Bridge to the plaintiff,—thereby showing an undisputed chain of title from the United States to the plaintiff in this case, which entitles the plaintiff to recover unless the defendant has made out a defense. The defendant does not claim to have ever had any paper title to this property; the only title which the defendant sets up is a title by possession. It is an undisputed fact in this case—that is, the testimony on the part of the defendant tends to establish it, and there is no testimony contradicting it—that the defendant's husband in May, 1861, entered upon these premises, and built a house or shanty; that the defendant's husband continued to reside on the premises with his family until he died, in September, 1882.

It is urged, and much talk is had here about the defendant Mrs. Collins having rights here aside from her husband. I say to you, as a matter of law, that by mere possession, as long as her husband was living and the head of the family, she could gain nothing by her posses-

sion. Her possession was simply subordinate to her husband's possession. He had the right, if he entered there without right, to admit that he had no rights there, and that admission would be binding upon her. If the party owning the land found Collins in possession of the property, he was not obliged to go to his wife and ask her by what right he or she was there; but if he made negotiations with Collins to take a lease, or Collins admitted he had no rights there, such action was binding upon Mrs. Collins. Now, the testimony shows without doubt—there is no question made upon it—that Mrs. Collins was probably an industrious and hard-working wife and mother. She had a large family of children, and worked hard to support those children, and may even have done more than the husband towards supporting them; but the husband was the head of the family in the eye of the law, and whatever he did in reference to this property was binding upon her and the family, no matter if he was a drunkard, unless his drunkenness was produced or occasioned by the act of the parties now claiming as against her.

The law provides, in substance, that unchallenged, uninterrupted possession of lands, under an assertion or claim of title, or an interest in them for the term of 20 years, protects that title; but it must be continuous, complete, and unbroken for the entire 20 years. Now, there is no doubt but what the Collins family went in there, as I said, in 1861, and that they have remained upon the premises ever since that time. If they entered upon those premises as mere squatters, without asserting any title whatever, just merely by the sufferance of the owner, they could only acquire, in the extremest point of view, a title as against that owner, by asserting that they entered there by some right of their own, and continuing that possession and that assertion of right until the expiration of 20 years. Now, is that state of facts established in behalf of this defendant, admitting that she succeeds to the rights which began to inure under her husband? The testimony on the part of the plaintiff tends to show that, in the early part of the year 1871, Mr. Henry Jones was on these premises in company with Mr. Samuel J. Walker, who was then the owner of the patent or paper title; that Mr. Walker and Mr. Jones went to the house where the Collins family resided; that they saw Collins there. Mr. Walker asked Collins what right he claimed there, or why he was there. Collins said, in substance, that he was a mere squatter; he did not claim any right. Walker then said to him: "You can stay here until I want it, or until I give you notice to leave." This is the substance of Jones' testimony as to what took place, as I remember it, and it tends to show what did take place in 1871.

The testimony further shows, without doubt,—because there is no testimony contradicting it, and the testimony is all one way on the subject,—that in May, 1877, after Walker had sold, and after the paper title had become vested in Cooper,—Cooper being represented here by the firm of Rees, Pierce & Co.,—Pierce, one of the members of the firm, went upon the premises, and found Collins and his family in possession; that he, Collins, claimed possession to a much larger tract than this block, but he finally agreed to give up the surrounding blocks if he could have a lease

for a certain term of block 111, now in controversy; and that such negotiations were had that it was agreed that he should take a lease, and that on the day this lease bears date he was at the office of Rees, Pierce & Co. with Judge Wood, (then a lawyer of this city, of high standing as an able and conscientious man,) as his attorney, and who died only a few months since, and there the lease which is now offered in evidence was executed. The testimony further tends to show that after this deed was made the witness Col. Pierce was on the premises, and saw Collins yet in possession. That afterwards the title passed from Cooper to Pierce, and from Pierce to Bridge, and then Bridge went upon the premises, and found the Collins family in possession; that he saw Collins, and he still admitted that he was there under the lease, and not under any other title; and that he was willing to stay on, even after the expiration of the lease, on the terms of the original lease, and that he was permitted to do so.

Now, if a person entering upon possession of premises without title, and as a mere squatter, acknowledges the ownership of any other person in the property, that breaks the effect of the statute at once. The moment that the person in possession of the premises acknowledges that he is not the owner, the running of the statute, in common language, is broken, and the 20 years, or whatever time has run, counts for nothing. So if the testimony is credible to your satisfaction that Collins, in 1871, acknowledged to Walker in the presence of Jones, that he was a mere squatter, then he gained nothing by the possession which had continued from the time he entered in 1861.

Then, again, if he took a written lease in 1877 from the then owner, Cooper, he has estopped himself, in the language of the law; that is, he has prevented himself from setting up any title as against Cooper, or any person claiming under Cooper. He has admitted Cooper's title. He cannot dispute his landlord's title. If either of you, being the owner of land, makes a lease of it, your tenant cannot deny your title. He has acknowledged the supremacy of your title to the premises, and he cannot set up any title in his own favor, and he cannot even acquire an outstanding title as against you while he holds a lease under you.

So, if you believe that this man, Collins, executed this lease at the time that is stated, that is the end of all claim to any title on the part of the present defendant here, the widow of this man Collins. She can take nothing except what she takes from the acts of her husband, and if the statute would not protect him if living, it would not protect her, he being dead. The mere fact that this woman was in a certain and common sense the leader of the family, the person upon whom they depended for their support, was the energetic and industrious and faithful and intelligent head of the family in a certain sense, does not count for anything in her favor; that is to her credit as a wife and as a mother, but not in obtaining title to this property.

Then, again, if, being in possession of this property, having acknowledged no other ownership to it, she allowed it to be sold for taxes before her 20 years' title had accrued, that breaks the running of her right of

possession under it, and it has got to start and run again for another 20 years before she can get another title as against the tax-title. Now, the testimony is undisputed here that in 1873 the land in question was sold for taxes, and a deed was made to the city of Chicago, which title has since passed to the present plaintiff. Further, that later on, and in the year 1874, the same premises were sold for a South Park assessment, and bid in by the South Park commissioners, and a deed made to the South Park commissioners by the county clerk, and the present plaintiff is clothed with whatever title passed by these tax-deeds, as the proof shows. These facts break the continuity of the running of the defendant's title, because no 20 years had elapsed from the time the defendant entered until the title accrued under the tax-title.

Then, the only question I can conceive of in this case, as a question of fact that is to be passed upon by you, is, was this man competent to make a contract at the time he made the lease in 1877? As against the present plaintiff, who was a stranger to him, the mental condition of this man Collins at that time cuts no figure. He had executed a paper which, upon its face, purported to be a complete acknowledgment of Cooper's superiority of title. He had made himself Cooper's tenant, and if there was any reason existing in his want of mental capacity for setting aside that lease, asserting that it was obtained when he was drunk, or not competent to make a lease, that should have been done in a court of equity in apt time after they became aware that there was such a paper. Now, the proof shows that this man Collins lived until December, 1882,—over five years after the lease was executed; and the proof also tends to show that he admitted himself in possession under the lease some two years after he had taken it. He died in December, 1882, as the proof shows; yet he takes no steps to attack this lease which he had made, and the wife has taken no steps to attack it since. They could have gone into a court of equity, if they had any foundation for doing it, but they cannot set up the defense that Collins was incompetent to make a lease in a court of law. So, gentlemen of the jury, upon the admitted facts in this case, I charge you that the plaintiff is entitled to recover; and you may render a verdict for the plaintiff without leaving your seats.

HOLLANDER v. BAIZ, Consul General, etc.[1]

(*District Court, S. D. New York.* June 24, 1890.)

1. LIBEL—ANSWER—AMENDMENT—LACHES.
In a suit for libel the defendant was granted leave to serve an amended answer setting up a justification of the alleged libel, which was not pleaded in the original answer, notwithstanding the lapse of more than seven months between the filing of the original answer and the application to amend.
2. DEPOSITIONS—COMMISSION—FOREIGN CONSUL—SAFE CONDUCT REFUSED.
Where, in a libel suit against a foreign consul by a plaintiff who had been expelled from the country which the consul represented, by order of its government, the consul applied for a commission to examine witnesses in such foreign country, the government of which refused to allow plaintiff to return there, and attend such commission, it was *held* that, as the government of such foreign country stood in the virtual relation of principal to the defendant, because the alleged libel was published by him under orders from such government, it would not be just that such an important part of the trial of the cause as involved the examination of witnesses should be transferred to the jurisdiction of the government which refused to allow the plaintiff to be present, and that, except as to the proof of documents the motion for a commission should be denied.

At Law. On motion to amend answer and for commission.

Hollander having in July, 1889, sued Baiz, as consul general of Guatemala in New York, for an alleged libel, the latter, in September, 1889, answered that he was a public minister, and as such, exempt from suit, and afterwards moved for a commission to take testimony in Guatemala. The motion for a commission having been denied unless the government of Guatemala should furnish plaintiff, whom it had expelled from Guatemala, with a safe conduct, to enable him to be present at the execution of the commission, (40 Fed. Rep. 659,) which safe conduct the government refused to give, and a motion to dismiss the complaint on the ground that defendant was a public minister having also been denied, (41 Fed. Rep. 733; approved, *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. Rep. 854,) the defendant, in May, 1890, moved to amend his answer by setting up the truth of the alleged libelous publication, and renewed his motion for a commission to take testimony in Guatemala.

Billings & Cardozo and *Joseph H. Choate*, for motion.

Robert D. Benedict, in opposition.

BROWN, J. Notwithstanding the great laches in making the application for the proposed amendment of the answer setting up the truth of the alleged libelous matter, and the changes of view which have led to the application, I think it should be granted, together with leave to issue a commission for the examination of witnesses in Guatemala so far as is necessary for the proof of any paper, document, record, report, decree, or sentence on file in the archives of the United States consulate in Guatemala, or in any court, public department, or public office in Guatemala, and filed therein prior to the decree of May 14, 1889, and referred to in the said decree, or pertinent thereto, the originals whereof cannot be produced on the trial here, and of which copies shall not be con-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

sented to be admitted on the trial by the plaintiff's stipulation, subject to the same objections as the originals, if produced; and also a photographic copy or copies of the paper purporting to be signed by Senor Herrera, but alleged to be a counterfeited signature.

Considering that the government or ministry of Guatemala stands in the virtual relation of principal to the defendant in ordering the publication of the alleged libel in this country, and that it has already shown its interest and taken part, though not in any way improperly, in the defense of this suit, by the action of its minister here; and considering that the examination of the numerous witnesses, some 30 or upwards, proposed by the defendant to be examined in Guatemala by commission, would transfer within the jurisdiction of that government a considerable and important part of the trial of this action, and would render necessary the examination of witnesses there by the plaintiff; and considering, further, that the government of Guatemala has heretofore, notwithstanding the strenuous efforts of the defendant, and of its minister in this country, refused to give to the plaintiff a safe conduct to Guatemala for the sole purpose of attending the execution of a commission for the examination of witnesses there applied for by the defendant, except on condition of an abandonment by the plaintiff of his claims against Guatemala, thereby refusing to the plaintiff the right of either facing his accusers in Guatemala, or of meeting the defendant on equal terms in the execution of any commission within that jurisdiction; and considering that that right, and the right of an oral cross-examination of witnesses, are of special importance on the trial of the issues in this action, except as to the proof of documentary evidence,—I think that the plaintiff's legal right to have the trial here, where the alleged libel was published, and where the alleged injury was inflicted, should not be abridged by an examination of witnesses in Guatemala under such disadvantages to the plaintiff as that government insists upon inflicting, and under such circumstances as the affidavits disclose, except as above permitted; but that the witnesses should be produced in this court, in order that the trial may proceed here upon equal terms, and with the plaintiff's common-law rights unimpaired; and the motion for a commission is to that extent denied.

INTERSTATE COMMERCE COMMISSION v. BALTIMORE & O. R. CO.

(Circuit Court, S. D. Ohio, W. D. August 11, 1890.)

1. CARRIERS—INTERSTATE COMMERCE ACT—PARTY-RATE TICKETS.
The issuance of "party-rate tickets," each good for a party of ten persons, at the rate of two cents per mile *per capita*, while single passengers are charged three cents per mile, is neither an unjust discrimination nor an undue or unreasonable preference or advantage, within the purview of the interstate commerce act, where such party-rate tickets are offered to the public generally, and where it appears that the rate charged single passengers is not unreasonable.
2. SAME—BURDEN OF PROOF.
Where a railroad company is charged with violating the interstate commerce act, by the issuance of "party-rate tickets" at less than the rates charged single passengers, the burden of proving that such lower charge constitutes an undue preference is upon the person making the charge.
3. SAME—CONSTRUCTION OF ENGLISH ACTS.
The interstate commerce act having adopted substantially some of the provisions of the English railway traffic acts of 1845 and 1854, the construction given to such provisions by the English courts must be received as incorporated into the act. Following *McDonald* v. *Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 142.

In Equity.

A. G. Safford and *John W. Herron*, for complainant.

John K. Cowen, *Harmon*, *Colston*, *Goldsmith & Hoadly*, and *Hugh L. Bond, Jr.*, for respondent.

Before JACKSON and SAGE, JJ.

JACKSON, J. This is an application or proceeding under the provision of the interstate commerce act, by the interstate commerce commission, for the issuance by this court of a writ of injunction, or other proper process, mandatory or otherwise, to restrain the Baltimore & Ohio Railroad Company from further continuing in its violation of certain orders of said commission, and for a decree requiring said railroad company to pay such sum of money, not exceeding the sum of $500, for every day after a day to be named in the decree that said defendant shall fail to obey said injunction or other proper process. The orders of the commission, which this court is asked to enforce by its injunction or mandatory process, were made upon a complaint filed before the interstate commerce commission by the Pittsburgh, Cincinnati & St. Louis Railway Company, against the Baltimore & Ohio Railroad Company, which set forth and alleged that the petitioner was duly incorporated under the laws of Pennsylvania, West Virginia, and Ohio, and was engaged as a common carrier in operating a system of railroads, extending from Pittsburgh, Pa., to various towns and cities in said state; that the Baltimore & Ohio Railroad Company was duly incorporated under the laws of the state of Maryland, and was also a common carrier operating a system of railroads, a part of which extended from said city of Pittsburgh to many of the important towns and cities in the above-named states, which were reached by petitioner's lines of road, and thus made it a competitor of petitioner in respect to business between said points; that upon its lines of road on which business competitive with

that of petitioner was transacted the Baltimore & Ohio Railroad Company had put into effect, and had then in operation, so-called "party-rates," whereby parties of ten or more persons traveling on one ticket were transported over said lines of road, between stations located thereon, at two cents per mile *per capita*, which was less than the rate for a single person, the rate for a single passenger being about three cents per mile; that said Baltimore & Ohio Railroad Company was also in the habit of selling round-trip excursion tickets, good between points on its lines of railway, at less than rates charged for ordinary tickets, without publicly posting in its ticket offices, or elsewhere, the rates at which said excursion tickets were sold; that the issuance of said "party-rate" tickets, and the selling of excursion tickets without posting the rates therefor, were in violation of the interstate commerce act, in petitioner's judgment, and for that reason it had declined to place the same in effect upon its lines; that by reason of said "party rates" and excursion rates so allowed and issued by said Baltimore & Ohio Railroad Company traffic was diverted from petitioner's lines to those of the Baltimore & Ohio Company; and that petitioner was greatly damaged by loss of revenue thereby,—wherefore petitioner prayed that the Baltimore & Ohio Railroad Company should be required, by an order of the commission, to withdraw from its lines of road in which business competitive with that of petitioner was transacted said "party rates," and to decline to give such rates in future; and also requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate unless the rates for such tickets were posted in its offices. The Baltimore & Ohio Railroad Company answered said complaint, admitting the corporate character and business of the two companies as stated in the petition, admitting that it had and did sell, on or between special dates, round-trip excursion tickets at less rate than those charged for ordinary tickets without posting notice of the same in its ticket offices, except by way of advertisement. It claimed that said excursion tickets so sold were such excursion tickets as are mentioned in the twenty-second section of the act to regulate commerce, which the act did not require should be posted, and which it would be practically useless, if not impossible, to post, but that defendant published such rates through the usual means employed by all other railroad companies, as by newspapre advertisements, hand-bills, etc.

The defendant admitted that it had issued the so-called "Party Rates," which, it claimed, were in no way a violation of the act to regulate commerce, but, on the contrary, were an accommodation to the public, necessary to the business of theatrical and amusement companies and others traveling together in a large body. The defendant also denied that the petitioner had any right to institute said proceedings before the commission; that it was not such a complainant as the act to regulate commerce authorized to make complaint, its alleged injury from defendant's acts arising or resulting to it only as a competing carrier; and defendant moved to dismiss said petition on said ground, and because petitioner did not allege facts sufficient to bring it within any of the classes

of persons, firms, corporations, or associations who could properly institute such proceedings. This motion was either not insisted upon, or was denied, as the commission proceeded to hear and consider the complaint, and on February 21, 1890, filed its report in the premises, holding—*First*, that passenger excursion rates are required to be published according to the provisions of section 6 of the act to regulate commerce, and that the practice of the Baltimore & Ohio Railroad Company of selling round-trip excursion tickets at less than rates charged for ordinary tickets, without publicly posting in its ticket offices the rates at which such excursion tickets were sold, was in violation of the law; and, *secondly*, that "party-rate" tickets are not commutation tickets within the true meaning of section 22 of the act, and when party rates to 10 or more persons traveling together on a single ticket are lower than contemporaneous rates for single passengers, they constitute discrimination, and are illegal. It was thereupon ordered and adjudged by the commission —*First*, that the Baltimore & Ohio Railroad Company "be and it is hereby required to print, post, and file schedules showing the rates, fares, and charges now or hereafter established by it for round-trip passenger excursion tickets between points on its lines or between points on its lines and points on the lines of other common carriers with whom it joins or hereafter may join in establishing rates, fares, and charges therefor, in conformity with the provisions of section 6 of the act to regulate commerce;" and, *secondly*, "that the Baltimore & Ohio Railroad Company do forthwith wholly and immediately cease and desist from charging rates for transportation over its lines of a number of persons traveling together in one party, which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points." Notice embodying said orders, together with a copy of the commission's report and opinion, was duly sent to and received by the defendant. Thereafter, on May 1, 1890, the interstate commerce commission filed its petition or bill in this court against the Baltimore & Ohio Railroad Company, setting forth the foregoing proceedings before and orders made by the commission, and charging that the defendant, since the issuance and service upon it of said orders, had wholly disregarded and set at naught the authority and commands of said commission; that it had neglected and refused, and still does neglect and refuse, to furnish the commission, and to print, post, and file, schedules showing the rates, fares, and charges established by it for round-trip passenger excursion tickets, as required by law, and as in and by the order of the commission it was enjoined and required to do; and, further, that defendant had not ceased and desisted from charging rates for the transportation over its lines of a number of persons traveling together in one party, on a single ticket, which are less for each person of such party than rates contemporaneously charged by it under schedules lawfully in effect for the transportation of single passengers between the same points, as in and by said order of the commission it was required to cease from doing. After setting out various instances in which the defendant had,

since the promulgation of said order, issued such "party-rate" tickets, the petition or bill invokes the aid of this court to compel obedience on the part of defendant to the requirements of said orders and to punish it as prescribed by the statute for its continual disregard thereof. The defendant duly entered its appearance and filed its answer. After admitting the proceedings before the commerce commission, which resulted in the foregoing orders, the defendant denies that it had failed and neglected, since the issuance thereof, to furnish to the commission, and to print, post, and file, schedules showing the rates fixed and charges established by it for round-trip passenger excursion tickets issued by it, as required by law, or even as required in and by the said order of the commission. It admitted that it had not ceased and desisted from charging rates for transportation over its lines for a number of passengers traveling together in one party upon one ticket, which are less for each person of such party of ten or more than rates contemporaneously charged by it for transportation of single passengers between the same points. The particular instances of the issuance by it of such "party-rate" tickets set out in the bill were admitted to be substantially true. Respondent, however, denies that said "party-rate" tickets for ten or more persons traveling together as one party constituted any unjust discrimination, or are in violation of the law, and insists that, so far as said order of the commission enjoins and requires it to desist from the issuance of such "party-rate" tickets at less rates than are contemporaneously charged for single passengers between the same places, it is alleged that respondent has not complied and should not be required to comply therewith, because it rests upon an improper finding that said "party-rate" tickets are not "commutation passenger tickets" within the true meaning of section 22 of said act to regulate commerce, because it is based upon an erroneous construction of said act, and because it was beyond the power of the commission to make it.

After referring to the general practice on the part of railroads, before the passage of the act to regulate commerce, of issuing special rate passenger tickets of various kinds and forms, such as mileage, excursion, party, monthly, or quarterly, a specified number of trips for one person, or one trip by the specified number of persons, and ten, twenty, or thirty trip tickets, lower than the regular single fare charges, based upon the principle that when the amount of travel thereby encouraged or developed would more than make up to the carrier for the reduction of the *per capita* rate, then such special rate was reasonable and just in the interests of both the carrier and the public, the respondent proceeds to state "that since the passage of said act to regulate commerce this respondent has continued as theretofore the practice above stated of making a lower charge on passenger travel in consideration of the amount and frequency of travel, and with that purpose, and to accommodate the various classes of passengers, it has continued in use all the forms of ticket described in the next preceding section; that the charge fixed by it for the transportation of parties of ten or more on a single ticket has been two cents per mile *per capita*, which is the same rate charged on thousand-mile

tickets, and is a higher rate than it charges on long-distance passenger travel, and excursions, and higher than its general rates for suburban travel, on time or other suburban tickets; that the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carriers and of the public, because any higher rate would destroy the business; that the business reasons, circumstances, and conditions which induce respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances, and conditions that induce it and make it its interest to fix a lower charge for transportation of passengers buying mileage tickets, time or trip tickets, and excursion tickets; that, while so called 'party-rate' tickets are used principally by traveling amusement companies, because no other form of ticket meets the requirements of such companies, yet this respondent has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large; that this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket brokers, by issuing only one ticket for the whole party; and respondent avers that as such tickets are now issued by it they are not and cannot be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket brokers. This respondent further avers that it may rightly and legally make a charge *per capita* for persons traveling on said party-rate tickets lower than its charge for a single passenger making one trip between the same points, the character, circumstances, and conditions of the service being substantially different, and that the making of such lower charge *per capita* to the members of the party makes or gives no undue or unreasonable preference or advantage to them, and subjects no person, company, firm, corporation, or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever." The charge that defendant has neglected and refused to print and post its rates for round-trip excursion tickets after the issuance and service of the commission's order, was denied by respondent, was unsustained by proof, and was practically abandoned at the hearing. It is therefore unnecessary for the court to express any decided opinion upon the question, as to which we have considerable doubt, whether a railroad company's rates on mileage, excursion, or commutation passenger tickets, or other special rates allowed by section 22 of the act to regulate commerce, are required to be printed and posted in its offices and furnished the commission in conformity with section 6 of said act. Under section 22 of the act as originally passed, it was declared "that nothing in this act (including section 6) shall apply to the * * * issuance of mileage, excursion, or commutation passenger tickets." The section, as amended by the act of March 2, 1889, provides "that nothing in this act shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets." How far this change of phraseology operates to bring such tickets within the provision of sec-

tion 6 of the statute, so as to require railroad companies to post their rates for such tickets, is by no means free from difficulty and doubt. But as the determination of the point is not necessary to a decision of the case before us, we do not deem it proper to pass upon it.

The real controversy in this case is confined to the validity of the commission's order requiring the defendant to desist from the issuance of "party-rate" tickets for ten or more persons traveling together on one ticket at a lower rate per mile and *per capita* than is contemporaneously charged for a single passenger between the same stations. This issue represents two leading and important questions, which involve the proper construction of sections 1, 2, 3, and 22 of the act to regulate commerce, under the facts established by the pleadings and evidence: *First*, Are the "party-rate" tickets in use by defendant embraced or included in the general designation of "commutation passenger tickets," which section 22, as amended by the act of March 2, 1889, does not "prevent" the railroad company from issuing? And, *secondly*, if such "party rates" are not "commutation passenger tickets" within the true meaning of said section, do they constitute either an unjust discrimination, as defined and prohibited by section 2, or an undue or unreasonable preference or advantage, as forbidden by section 3, of said act?

The last clause of section 1 of the act to regulate commerce, adopted and established for the United States, in respect to interstate traffic, the general rule of the common law that all charges made by common carriers, subject to the provisions of said act, for any service rendered in the transportation of passengers or property, should be "reasonable and just," and that every "unjust and unreasonable" charge for such service should be prohibited and declared unlawful. No claim is made that defendants charges for parties of ten or more or for single passengers have violated the provisions of said section. The report and opinion of the commission does not find that the rates in use by defendant for either "party-rate" or single passenger tickets are in any way unjust or unreasonable charges for the services rendered in transporting either class; and the proof before this court establishes that said "party-rates" of two cents per mile are reasonable and just, that they are promotive of the interests of the railway companies issuing them, and a convenience to the public. The right of the defendant to make and collect reasonable charges for its transportation service is a property right under its franchises, of which it cannot be deprived without due process of law. This is settled by the recent decision of the supreme court in the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *State of Minnesota*, 10 Sup. Ct. Rep. 462.

In considering the foregoing questions, on which the proper determination of the present case rests, the fact established by the proof, and not controverted by or on behalf of complainant, that defendant's charges for both the single passenger and the party of ten or more are reasonable and just in themselves, should be kept in view. Do "party-rate" tickets come fairly within the letter and spirit of the general terms "commutation passenger tickets," as used in section 22 of the statute? Railroad experts, many of whom were examined in this case, differ considerably

when they undertake to give an exact, technical definition of the words "commutation passenger tickets." Their testimony, however, shows that prior to the passage of the interstate commerce act railroad companies were in the constant habit of issuing a variety of special-rate tickets, such as mileage, excursion, monthly or quarterly, family, school children, twenty or fifty trips, good for the specified number of trips by one person or for one trip by the specified number of persons, round-trip and party tickets for ten or more persons traveling together on a single ticket, either one way or for the round trip, and that all these different classes and forms of tickets come within the designation or general description of "commutation" tickets, or "commutation" rates. This prevailing practice of the common carriers before the passage of said act, and which has been continued by many, if not by most, of them since the act went into effect, may properly be looked to in placing an interpretation upon the words "commutation passenger tickets" which follow, and were manifestly intended to enlarge the special classes covered by the "mileage" and "excursion" passenger tickets. After enumerating two varieties of special-rate tickets under the heads of "mileage" and "excursion," which come within the commutation principle, the language is broadened by the addition of the general terms "or commutation passenger tickets," thereby clearly indicating an intention on the part of congress to allow, or not to prevent, the continuance of the general practice of common carriers to adapt their rates and charges to meet the wants and convenience of the different classes of the community while developing and enlarging their traffic. The proof before the court fails to show that mileage and excursion tickets differ in any essential particular from "commutation passenger tickets," so as to make them a different class of tickets from the latter. On the contrary, the evidence establishes that they are particulars of the general class covered by the more comprehensive terms of commutation tickets or fares, which we think defendant's witness William B. Shattuc has most correctly and properly defined in saying that "a commutation ticket is a ticket for one passenger, good for more than one ride, or for more than one passenger for one ride, sold at a reduced rate." When, therefore, the particular classes of tickets (mileage and excursion) falling within the commutation principle, are followed by the general terms "or commutation passenger tickets," this latter clause of the sentence, upon no sound rule of construction, should be taken or treated as presenting something in contrast with or differing in character from the previously enumerated particulars, but should rather be regarded and interpreted as enlarging such particulars, so as to make the statute cover the whole subject of commutation tickets or rates, in all their variety of forms and classes, as were then in use by common carriers subject to the act, provided only that such charges were reasonable and just. It is clearly shown by the proof that the same business reasons, considerations, circumstances, and conditions which induce the most enlightened railroad management, having due regard both to the interests of their lines and to the convenience of the public, to make reduced rates on mileage, excursion, long distances, round trip,

time trip, or specified number of trip tickets, apply in all their force to "party-rate" tickets for ten or more persons traveling together in one body on a single ticket. Reduced rates to these several classes or descriptions of passenger traffic rest upon the same general principle, which the act to regulate commerce nowhere calls in question, that common carriers may rightfully so adjust their charges as to encourage and develop travel; that the amount or volume of such traffic is a legitimate element to be considered in determining what reduction should be made over local or ordinary rates, so as to make both correspond with the cost of service and the fair profit which the carrier is entitled to earn from each class of travel. Quantity of traffic affects both the costs of service and the legitimate profit which may be demanded for such service. When the profit on frequency of trips or on larger numbers transported at reduced rates reasonably corresponds with the fair profit of the carrier on a single trip, or smaller number transported at the ordinary higher rate, the carrier making such an adjustment of its charges with a view of encouraging and developing its legitimate business is only putting into practice the reasonable and well-settled business principle of every avocation or trade, which recognizes quantity, whether arising from the number or size of the transactions, as a proper element in the consideration and adjustment of the price. No complaint was ever made against common carriers acting upon this principle. The complaint made against them, and which the act to regulate commerce sought to remedy and correct, was the practice of showing favoritism and partiality between their customers or localities under the same or substantially the same circumstances and conditions. The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not, and was not intended to, restrict the common-law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates, based on increased quantity or amount of service. No case arising under the English railway acts of 1845, 1854, and 1873, so far as we have been able to find after careful examination, has ever called in question or impeached the right of carriers to fix rates and issue tickets based upon the consideration of the amount or volume of the traffic, nor disputed the reasonableness and sound business propriety

of railroad companies granting reduced rates to parties traveling often, or furnishing increased traffic in the way of numbers. On the contrary, their right so to regulate and adjust their rates is universally recognized. While the English statutes relating to railway traffic embody the same general principles, and seek to accomplish the same leading objects, as our act to regulate commerce, they contain no such affirmative provision or declaration as found in section 22, excluding from the operation of the law the enumerated general and particular cases in which special rates were not intended to be prevented or interfered with. Said section 22 should be regarded as a legislative declaration that not merely mileage and excursion, but passenger tickets generally, based upon the commutation principle of conceding a reasonable deduction from regular local rates in consideration of the frequency or quantity of the traffic, if reasonable and just in their charges, did not come within the evils so to be remedied. To contend that a "party-rate" ticket to ten or more persons traveling together on a single ticket at reduced rates per mile does not come within the reason or principle of commutation tickets, which are generally issued for only one way, because generally needed for only one direction, while admitting, as counsel for complainant does, that a round-trip ticket for ten or more persons, traveling together at the same reduced rate, would be considered as coming within the meaning of a commutation ticket as explained by complainant's expert witnesses, is drawing a distinction without any substantial difference. It rests upon no reasoning, involves no public policy or convenience, and is altogether too narrow and refined, to suppose that congress intended to make any such nice discriminations in the language employed to express, in a general way, what the law was intended not to prevent.

The commission seems to have treated and construed section 22 as designating certain cases and instances of discrimination which are to be considered as exceptions, and which, but for being so excepted, would fall within the operation of sections 2 and 3 of the act; and that, because "party-rate" tickets are not specially and particularly named, they should be excluded from the list of exceptions. We cannot, in view of the whole scope and manifest purpose of the act, assent to this construction of said section. It should be given a broader and more liberal interpretation for the reasons already stated, and, as thus interpreted, we think that the section fairly recognizes, in respect to passenger traffic, the general principle of commutation, and that "party-rate" tickets for ten or more persons traveling together in one body on one ticket at reduced rates per mile, which are reasonable and just, as issued by defendant, are within the letter and spirit of "commutation passenger tickets" as those terms are employed in the statute. This construction of the section neither disregards the duties and obligations of the carrier to the public, nor ignores its just rights in the reasonable management of its business. The evidence before us shows that, if "party-rate" tickets, as described and used by defendant, cannot be lawfully issued, or should be discontinued, the revenues of common carriers derived from passenger traffic will be seriously impaired, while the convenience and benefit

to the public, traveling in parties or bodies of ten or more, such as amusement companies, associations, clubs, organizations, delegates, and representatives attending conventions, religious, educational, or political, will at the same time be greatly interrupted and prejudiced. Our conclusion on the first question presented is that said "party-rate" tickets as used by defendant are "commutation passenger tickets" within the true meaning of section 22 of the act to regulate commerce.

Secondly. But suppose it be assumed that the defendant's "party-rate" tickets are not commutation tickets, as ruled by the commission, then the question remains whether they constitute an unjust discrimination, as defined by section 2, or an undue or unreasonable preference or advantage to, or any undue or unreasonable prejudice or disadvantage against, any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever. The evidence discloses that originally "party-rate" tickets were issued only to theatrical or amusement companies, just as mileage tickets were to commercial travelers only; that since the passage of the interstate commerce act said "party-rate" tickets are no longer confined to one class of passenger traffic, but, like mileage, time-trip, and excursion rates, are regularly scheduled and posted, and offered to the public at large, so that any and all parties of ten or more traveling together, who choose to apply for the same, have equal rights and privileges of securing such tickets at the same reduced rates. Does this concession to the public, traveling in parties of ten or more, and open indiscriminately to all persons of the requisite number who choose to avail themselves of the reduced rate by applying for a single ticket for the party, violate, in letter or spirit, the provisions of either section 2 or 3 of the act? In other words, may the defendant lawfully transport a party of ten or more persons on a single ticket at a less rate per mile and *per capita* than it charges for carrying a single passenger between the same stations? Does the fact that defendant charges the single passenger for a single trip a somewhat higher rate per mile than it charges for transporting ten or more passengers as one party on a single ticket over the same distance, constitute unjust discrimination, as defined in section 2, or undue or unreasonable preference or advantage in favor of such party of ten or more, or any undue or unreasonable prejudice or disadvantage against the single passenger as prohibited by section 3 of the act? The decision of this question involves the proper construction and interpretation of said sections, which must be read and considered in connection with the provisions found in sections 1 and 22 in order to arrive at their true scope and meaning. When thus considered, it is perfectly manifest that congress did not intend to impose upon common carriers, subject to the provisions of the act, any rule or duty of absolute equality of rates in their charges for transportation services. Subject to the requirement of section 1, that all charges made for any service rendered in the transportation of passengers or property shall be reasonable and just, the language of section 2 clearly recognizes and implies that there may be discriminations which are not unjust and not prohibited. So, too, the language employed in

section 3, declaring it unlawful to make or give any "undue or unreasonable preference or advantage" to any particular person, etc., or to subject the same to any "undue or unreasonable prejudice or disadvantage," clearly implies that there may be a preference or advantage on the one hand, or a prejudice or disadvantage on the other, which is not undue or unreasonable, and therefore not in contravention of the law. To be within the statute the discrimination must be "unjust," and the preference or prejudice must be "undue" or "unreasonable." The discrimination which is declared "unjust" is the charging and collecting, directly or indirectly, from any person or persons a greater or less compensation for any service rendered in transporting passengers or property than is charged, collected, or received by the carrier from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of like traffic, "under substantially similar circumstances and conditions." When the traffic is not of like kind, or when the service is not "alike and contemporaneous," or when the transportation is not rendered "under substantially the same circumstances and conditions," differences in charges do not constitute "unjust discrimination." The evil which said sections intended to remedy was the prevailing practice of railroad companies of favoring or showing partiality in the matter of charges to one person, firm, company, or locality as against another person, firm, company, or locality, for like and contemporaneous services rendered under the same or substantially the same circumstances and conditions. Said sections were intended to prohibit favoritism and partiality in traffic rates, where the circumstances and conditions were substantially similar and the service contemporaneous. Persons in like situations, requiring or desiring like and contemporaneous service on the part of carriers, were to be treated, in the matter of rates, impartially. This is expressed both affirmatively and negatively in the language of section 3. The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company, or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier. When and so long as their relations are similar or "substantially" so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service. It thus appears that the intention of congress, as expressed in sections 1, 2, and 3, was to secure two leading objects, or effect two main purposes, viz.: *First*, to establish, and impose upon

railroad companies engaged in interstate commerce, the duty of conforming to the general rule of the common law in making their charges for transportation services rendered reasonable and just; and, *second*, to prevent unjust inequality, partiality, favoritism, or unfairness, so far as concerned their charges for contemporaneous transportation services, as between persons, traffic, or localities similarly circumstanced. When the carrier's charges are in themselves unjust and unreasonable, the public is injuriously and unduly prejudiced, and put at disadvantage, and the commission may on behalf of the public, upon complaint made by any one, investigate such charges, and order their correction, subject to the right of the carrier to a judicial determination of the question whether or not its charges are reasonable and just. When the qualified requirement of impartiality in charges as between persons, traffic, or localities similarly circumstanced is disregarded or violated by the carrier, the prejudice or disadvantage is personal or local, and the party or locality injured by the undue preference or the undue disadvantage can alone make complaint or institute proceedings for its correction and for proper redress.

Now, it is neither claimed nor proved in the present case that defendant's charges, either for single passenger or "party-rate" tickets, are in themselves unjust and unreasonable. On the contrary, both rates are shown to be just and reasonable. The public has, therefore, no ground of complaint on that score, nor has any legitimate complaint been made on its behalf, either by the original petitioner or by the commission. Who is unjustly discriminated against by defendant's difference in charges for the party of ten or more and the single passenger? Who is given an undue preference or advantage, or subjected to an undue prejudice or disadvantage, by reason of said difference in rates? If any one, it is manifestly the single passenger. But no complaint of undue prejudice or disadvantage and of consequent personal injury comes from that quarter. When this court is called upon, either by the commission or others, to enforce the provisions of the act to regulate commerce, it is indispensably necessary to show either a case of individual grievance or of public inconvenience resulting or arising from acts of the carrier done in violation of the statute. The proceeding in this case is not based upon any individual injury, but rests upon the alleged inconvenience to and undue prejudice against that portion of the public represented by the single passenger traffic in being charged by defendant a somewhat higher rate per mile than it demands and receives of and from a party of ten or more purchasing a single ticket for the party. But how can this position be sustained, if, as we have already stated, both single passengers and "party-rate" charges in use by defendant are in themselves "reasonable and just" towards each class of such traffic? When a carrier's charges are "reasonable and just" in compliance with the requirement of section 1, how can they be regarded or treated as constituting an unjust discrimination under section 2, or an undue preference or undue prejudice under section 3, of the act? The provisions of sections 2 and 3 were certainly not intended to restrict or qualify the rights conceded,

and the duty imposed by the first section of making charges "reasonable and just."

In the case of *Attorney General* v. *Birmingham, etc., Ry. Co.*, 2 Eng. Ry. Cas. 124, a railway company (whose act contained an equality clause) charged a smaller fare to passengers who traveled from D. to N., intending to proceed from N. to London by another railway, than they charged passengers from D. to N. who had no such intention. On motion for an injunction it was held by Lord Chancellor COTTENHAM that the equality clause was meant only to prevent the exercise of a monopoly to the prejudice of one passenger or carrier and in favor of another, and that, even if he had jurisdiction to interfere, he would not do so unless it was clear that the public interest required it; and, it being admitted in the case that the higher charge was not more than the act authorized, it did not appear that the public were prejudiced by the arrangement.

In the present case, it being neither claimed nor shown that the higher charge of three cents per mile for the single passenger on a single-trip ticket is unjust and unreasonable, or more than the defendant is authorized to charge by section 1, it is difficult to see in what respect the public are prejudiced or unjustly discriminated against by the arrangement.

But, aside from this view of the subject, in what respect does the difference which defendant makes in the rate charged the single passenger and the party of ten or more traveling together on a single ticket conflict with the provisions of sections 2 and 3 of the act? Under the flexible and elastic rule prescribed by said sections, construed in the light of section 1, a difference in charges, while an element in the proper definition of unjust discrimination or undue preference, is by no means the sole or controlling factor. To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. In respect to passenger traffic, the position of the respective persons or classes beween whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality, resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination. The sections substantially adopt the principle laid down in *Hays* v. *Pennsylvania Co.*, 12 Fed. Rep. 309, where the court, after stating that a common carrier had no right to make unreasonable and unjust discriminations, said:

"But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to any case that may arise. It may, however, be said that it is only where the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another that the law interferes for the protection of the latter."

It cannot be properly said in the case under consideration that the lower rate given to a party of ten or more confers upon such party an undue advantage in consequence of injustice inflicted upon the single passenger. There is nothing competitive in the traffic of the single pas-

senger and the party of ten or more, which would make lower rates to the latter operate prejudicially to the former. It is well understood that the cost of transportation service to the carrier decreases as distance increases, as trips are multiplied, and as the numbers transported are enlarged. It costs the carrier less proportionately to transport a party of ten or more than it does a single passenger. The carrier is entitled to a fair profit for its services, and when the profit derived from the larger number carried at reduced rates reasonably corresponds with that resulting from the carriage of an individual at a somewhat higher rate, what unjust discrimination is made, or in what respect is the individual subjected to undue prejudice or disadvantage? A single passenger desiring or proposing to make ten or more separate trips may procure a ticket for the designated number of trips at rates lower per mile than are charged the single passenger on a single-trip ticket between the same points. Has it ever been held that this would operate to confer an undue advantage upon the one, or subject the other to undue disadvantage? A passenger on a through ticket from New York to Cincinnati travels at a lower rate per mile between Pittsburgh and Cincinnati than is charged the passenger traveling only between said places. The two may travel on the same train and in the same car, but the difference in the rates each is paying over the same distance is not unjust discrimination or undue preference, because the service is not identical. *Railway Co.* v. *U. S.*, 117 U. S. 355–363, 6 Sup. Ct. Rep. 772. But what is the real underlying principle which sanctions and justifies the differences in charges in such cases? It is that the carrier may make reasonable concession in the way of reduced rates in consideration of longer service and of more frequent trips. The reason and the principle equally apply to an adjustment of rates based upon numbers transported. What difference or distinction is there between transporting a single passenger a given distance at reduced rates, as compared with the single-trip rates, in consideration of his making ten or more trips, and the transportation of ten or more persons traveling together on a single ticket over the same distance on one trip at the same reduced rates? There being no competitive relation between the single passenger and the party of ten or more, the relative cost of service in their transportation being different, the profit derived from one fairly corresponding with that received from the other, and the inducement on the part of the carrier for making the reduction in favor of party rates being the development and maintenance of a class of traffic which the evidence shows cannot and will not stand a higher rate than two cents per mile, we cannot properly compare the single passenger with the party class of ten or more, nor find that the reduced charges allowed the latter constitute, under the circumstances, undue preference in favor of such parties, or undue prejudice against the single individual. Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as

they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services? In *Nicholson* v. *Railway Co.*, 1 Nev. & McN. 147, which involved the "undue preference" clause of the act of 1854, ERLE, C. J., said:

"I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as freely as any merchant, subject only (as to this court) to the duty of acting impartially without respect of persons; and this duty is performed when the offer of the contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations."

It will be seen from an examination of the English railway traffic acts of 1845 and 1854 that section 90 of the former and section 2 of the latter were substantially adopted and embodied in sections 2 and 3 of our act to regulate commerce. Section 90 of the English act of 1845 required that "tolls were at all times (to be) charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and of all goods and carriages of the same description * * * passing only over the same portion of the line of railway under the same circumstances; and no reduction or allowance in any such tolls should be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway." Section 2 of the act of 1854, after requiring every railway company subject to the law to afford all reasonable facilities, according to their respective powers, for receiving, forwarding, and delivering of traffic, provided that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; 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." The English cases upon the question of "undue preference" which have arisen under said sections will be found to confirm the construction we have placed upon sections 2 and 3 of the act, and also show the elements which may properly be considered in determining whether "undue preference" has been given or "undue disadvantage" has been imposed. The history and bearing of the equality clause of the act of 1845 is elaborately discussed by BLACKBURN, J., in the case of *Railway Co.* v. *Sutton*, L. R. 4 H. L. 238, 38 L. J. Exch. 177. With respect to the "undue preference" forbidden by section 2 of the act of 1854, which was a mere enlargement of section 90 of the act of 1845, the English cases, stated generally, hold that a preference to be

"undue" must be a preference of a person similarly circumstanced and bringing a similar profit to the company. In *Hozier* v. *Railway Co.*, 1 Nev. & McN. 30, where the passenger rates between certain stations were complained of as constituting undue preference, the lord president said: "It [the act] provides for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." In *Jones* v. *Railway Co.*, Id. 45, the undue preference complained of was a preference given to the inhabitants of Harwich over those of Colchester in the matter of season tickets, lower rates being conceded to the former on longer distance than was allowed to the latter; but the court held that the difference did not constitute a case of "undue preference" within the act. In the cases of *Painter* v. *Railway Co.*, 2 C. B. (N. S.) 702, and *Ex parte Ilfracombe Public C. Co.*, Wkly. Notes, (1868,) 289, it was said that regard must be had to the general conveniences of the public, rather than to the wishes or interests of individuals, and that it must be clearly shown that the course complained of occasioned some substantial injury or inconvenience to the public. In case of *Ransome* v. *Railway Co.*, (No. 1,) reported in 1 C. B. (N. S.) 437, 26 Law J. C. P. 91, CRESSWELL, J., in considering the meaning of the expressions "undue or unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage," says:

"Are these words to be construed with reference to the interests of the parties using the railway only? or may the interests of the railway owners be taken in any manner into consideration? *Ex. gr.*, if 1,000 tons can be carried for a lower sum per ton per mile than 100 tons, yielding an equal profit per ton to the railway company, may they so regulate the charges as to derived such equal profit? Would the lower rate charged for the larger quantity give an undue preference? * * * If that may be done without giving what the statute calls an undue or unreasonable preference, may not the company, in fixing rates, consider the whole profit, and not the mere profit per mile, and, in order to induce people to carry more on their lines, and longer distances, agree to make a reduction in such case? It is true that the sender of the smaller quantities for a shorter distance will pay more per mile and more per ton in the respective cases, but will that be an undue or unreasonable prejudice or disadvantage? * * * After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account, and then the question suggested assumes a very complicated and difficult character."

In *Oxlade* v. *Railway Co.*, 1 C. B. (N. S.) 454, 26 Law J. C. P. 129, it was held that a railway company was justified in carrying goods for one person at a less rate than that at which they carried the same description of goods for another, if there were circumstances which rendered the cost to the company of carrying for the former less than the cost of carrying for the latter. In *Nicholson* v. *Railway Co.*, 5 C. B. (N. S.) 435, 28 Law J. C. P. 89, it was held to be competent for a railway company to enter into special agreement, whereby advantage may be secured to individuals in the carriage of goods, where it appeared that, in entering into such agreement, the company had only the interests of the proprietors and the legitimate increase of the profits of the railway in view,

and the consideration given to the company in return for the advantage afforded by them was adequate, and the company were willing to afford the same facilities to all others upon the same terms. In *Bellsdyke Coal Co.* v. *North British Ry. Co.*, 2 Nev. & McN. 105–110, it was said by the court that "a railway company pays no more than a due regard to its own interests if it charges for its services in proportion to their necessary cost, and has only such variation in its rates as there is in the circumstances of its customers." In *Baxendale* v. *Railway Co.*, (Reading case,) 5 C. B. (N. S.) 336, 28 Law J. C. P. 81, COCKBURN, C. J., after stating that if it were made to appear that the disproportion (in rates) was not justified by the circumstances of the traffic, the court would interfere, proceeds as follows:

"So, again, if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantages were extended to all persons under the like circumstances, yet it would assuredly insist on the latter condition."

And, while recognizing the duty on the part of the court to redress any injustice or inequality prohibited by the law, he makes the further pertinent observation:

"At the same time we must carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary right (subject to the above-named qualifications) which a railway company, in common with every other company or individual, possesses, of regulating and managing its own affairs, either with regard to charges or accommodation as to the agreements and bargains it may make in its particular business."

As regards the "undue preference" branch of the English acts, "the effect of the decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, from imposing such condition as may incidentally have the effect of favoring one class of traders, or one town or one portion of their traffic, provided the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company." Report of Amalgamation Committee of 1872, p. 13. Our act to regulate commerce having adopted substantially sections 2 and 90 of the English railway traffic acts of 1854 and 1845, the settled construction which the English courts had given to their terms and provisions must be received as incorporated into our statute. *McDonald* v. *Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 142. The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circum-

stances of the respective customers with reference to each other, as competitive or otherwise. The English decisions cited, and the case of *Denaby Main Colliery Co.* v. *Manchester, etc., Railway Co.*, L. R. 11 App. Cas. 97, 55 Law J. Q. B. 181, further establish that the burden of proving the undue preference or the undue prejudice rests upon the complaining party. In the latter case, the Earl of SELBORNE, after referring to the objection that it was not shown by the carrier that the reduced rates corresponded with the reduced cost to the company, said:

"I do not find in the act that, when there is a real difference of circumstances, and nothing to show any want of good faith, the burden of justifying the exact difference of charge, (or, what is the same thing, the deduction or allowance,) by showing a numerical or 'necessary relation' between it and the actual saving, is cast upon the company."

Section 27 of the act of August 10, 1888, (51 & 52 Vict. c. 25,) for the better regulation of railway and canal traffic, changed this rule by providing that, where inequalities in rates exist, "the burden of proving that such lower charge or differences in treatment does not amount to an undue preference shall lie on the railway company." As no such provision is found in our act, the burden of showing that the difference in defendant's "party" and single passenger rates constitutes undue preference in favor of the former, or undue prejudice or disadvantage against the latter, devolves upon the complainant, and must be established as the reasonable and legitimate result of the various elements on considerations above mentioned. There is no pretense or suggestion that there is any want of good faith in defendant's action, or that the difference in rates complained of was made or is continued with a view to any actual disadvantage of the single passengers, or to subject the public to any injury or inconvenience.

Subjecting defendant's rates for single passengers and for parties of ten or more traveling together on a single ticket to the test of the various considerations indicated above by the English decisions as elements in the question, does it clearly appear that such rates are so adjusted as to give an undue or unreasonable preference to one or impose an undue or unreasonable preference or disadvantage upon the other class? We think not. In view of the established facts that it is not claimed or shown that the single passenger rates are unjust and unreasonable, that the "party rates" are just and reasonable, that there is no competition or competitive relation between the two classes, that the "party rates," open to all who choose to avail themselves of the same, are a convenience and benefit to a considerable portion of the traveling public, that the interests of the carrier are reasonably promoted by their use, that the cost of service is relatively or proportionately less for the party of ten or more than for the single passenger, and that the difference in charges does not appear to be improperly adjusted with reference to or unjustified by the actual saving or profit to the company, it cannot be properly said that the traffic is of like kind, and that the service is identical, or "under substantially the same circumstances and conditions." The decisions of the state courts on the subject of unjust dis-

crimination, and the considerations that may be properly looked to in passing upon the question, are, we think, in harmony with the view above expressed, and with the conclusions reached. See *Ragan* v. *Aiken*, 9 Lea, 609; *Scofield* v. *Railroad Co.*, 43 Ohio St. 571, 3 N. E. Rep. 907; *Johnson* v. *Railroad Co.*, 16 Fla. 623; *McDuffee* v. *Railroad Co.*, 52 N. H. 430; *Killmer* v. *Railroad Co.*, 100 N. Y. 395, 3 N. E. Rep. 293; *Shipper* v. *Railroad Co.*, 47 Pa. St. 338; *Christie* v. *Railroad Co.*, 94 Mo. 453, 7 S. W. Rep. 567; *Bayles* v. *Railroad Co.*, (Colo.) 22 Pac. Rep. 341; and *Root* v. *Railroad Co.*, (N. Y.) 21 N. E. Rep. 403.

We think there is no force in the suggestion that "party-rate" tickets, as used by defendant, are more liable to abuse than ordinary or regular single passenger tickets. In the present case it is clearly shown by the evidence of railroad superintendents and experts, familiar with the subject, that such "party-rate" tickets are less liable to abuse than ordinary single tickets. It is manifest from a moment's reflection that the fewer the tickets on which the carrier's transportation services are arranged and conducted the better it can protect itself and the public against speculators and ticket brokers. It is also manifest that the larger the number of passengers embraced in a single ticket the greater will be the difficulty of "scalpers" or ticket brokers dealing therein. But, if the single tickets for parties of ten or more traveling together were liable to the abuses suggested, that fact would hardly control the proper construction of the law, nor tend to establish that their issuance at reduced rates constituted undue preference or advantage on the one hand, or undue or unreasonable prejudice or disadvantage on the other. Our conclusion upon the whole case is that "party-rate" tickets, as used by defendant, are not in contravention of sections 2 and 3 of the act to regulate commerce, and that the order of the commission requiring and enjoining the defendant to cease and discontinue the use of said tickets is not lawful, and should not be enforced by this court. It follows that the complainant's bill should be dismissed, with costs to be taxed. It is accordingly so ordered and adjudged.

SAGE, J., (*concurring.*) The bill is filed to enforce the opinion and order of the interstate commerce commission against the respondent, upon the complaint of the Pittsburgh, Cincinnati & St. Louis Railway Company, that the respondent had put into effect and had in operation so called "party rates," whereby parties of ten or more persons traveling together on one ticket were transported over its lines of road at two cents per mile *per capita*, the regular rate for a single person being about three cents per mile. The complaint was, further, that the respondent was in the habit of selling round-trip excursion tickets over its lines without publicly posting the rates therefor, which were less than rates for ordinary tickets. The respondent admitted the facts as alleged, but denied that they were in conflict with the law.

The bill contains, in substance, the averments of the complaint, with the further averment that the respondent, in disregard of complainant's order, and in violation of the act to regulate commerce, persists in doing each of the acts complained of, wherefore an injunction is prayed to

restrain the respondent from further continuing said disregard, under a penalty of $500 for every day after a day to be named in the decree of this court.

The respondent admits the averment of fact in the bill relating to the sale and use of party-rate tickets, and justifies as in its answer to the complaint aforesaid, but denies that since the order made thereon it has failed or refused to post its rates for excursion tickets. No testimony was taken in support of the averments of the bill denied by the answer, and at the hearing this part of the complainant's cause was abandoned, leaving as the only questions to be decided those relating to the sale of party-rate tickets, as conducted by the respondent.

The facts are not in dispute. A single ticket is issued to a party of ten or more at the fixed rate of two cents per mile *per capita*, which is a reduction of about thirty-three and one-third per centum from the regular fare for a single person. This rate is scheduled, and posted, and open to the public at large. A question was made whether these tickets were known and recognized in railroad circles before and at the date of the passage of the act as "commutation tickets." The evidence of railroad men of experience and prominence was taken upon this point. It clearly establishes the negative of the proposition. Some of the witnesses went further, and undertook to settle, by their testimony, whether party-rate tickets are commutation tickets; but that is a question of construction, to be determined by the court, and not by witnesses. Whether they were, at and before the passage of the act, generally known and recognized by those engaged in railroad business as "commutation tickets," and how those words were then understood and used by railroad men, is competent, for the reason that the presumption is that congress employed terms used in that business in the sense in which they were so used. Construing the testimony according to this rule, my conclusion is that party-rate tickets are not included in the letter of the provision in favor of commutation tickets in the twenty-second section of the act. Their use was confined chiefly to traveling theatrical troupes. They were not on sale to the public. Although kept at the larger stations, they could not usually be obtained without an order from the general office, or from some authorized sub-office of the passenger department. They were not regarded as, nor understood to be, commutation tickets, nor are they such within the meaning of the word "commutation," which, as applied to railroad tickets, is defined by Webster to be "the purchase of a right to go upon a certain route during a specified period for a less amount than would be paid in the aggregate for separate trips." The Century Dictionary gives the following definition: "A ticket issued at a reduced rate by a carrier of passengers, entitling the holder to be carried over a given route a limited number of times, or an unlimited number during a certain period."

There is a general sense in which the party-rate ticket may be said to be a commutation ticket, although no more so than a mileage ticket or an excursion ticket. But the twenty-second section recognizes mileage, excursion, and commutation tickets each as distinct from the others, using the designations in their technical sense. The difference between commutation and

party-rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured. The party-rate ticket is more like the excursion ticket, the apparent difference being that the excursion ticket is to return to the starting point; but, as the return is frequently over another line, so that the excursionist is not carried both ways over any portion of the entire route, the difference is not material. For the purposes of this opinion, however, the party-rate ticket will be regarded as separate and distinct from mileage, excursion, and commutation tickets.

It is claimed that section 22 makes certain exceptions from the operation of the act, specifying mileage, excursion, and commutation passenger tickets, and that, as party-rate tickets are not mentioned, and cannot be classed as commutation tickets, the inference, under a well-known rule of construction, is that congress intended to exclude them. Let us look into this matter. The first section of the act contains the general provision upon which the entire act is founded. It requires that all charges for the transportation of persons or property shall be reasonable and just, and prohibits every unjust and unreasonable charge. The provisions of the second, third, fourth, and fifth sections are specific, in the nature of definitions, and in aid of the provisions of the first section. In this case we have to deal particularly with the provisions of the second and third sections, which prohibit unjust discriminations, and undue and unreasonable preferences. The second section makes it unlawful, by any special rate or other device, to demand, collect, or receive from any person or persons a greater or less compensation for any service rendered in the transportation of persons or property than is charged, demanded, collected, or received from any other person or persons for a like contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions. The third section forbids any undue or unreasonable preference, in any respect whatsoever, to any particular person, company, firm, corporation, or locality, or any particular description of traffic; and to the same extent it forbids any undue or unreasonable prejudice or disadvantage. Now, it is to be observed at the outset that the act does not provide that there shall be no discrimination. The prohibition is against unjust discrimination, undue and unreasonable preference or advantage, and undue or unreasonable prejudice or disadvantage. Apparently recognizing, as the law has recognized, that discrimination, within just limits, is essential to the successful conduct of the business of the common carrier, as it is to the successful conduct of every other business, but, beyond those limits, destructive, congress attempted nothing more than to fix and enforce the limit; and this consideration furnishes the key to the proper construction of the act.

Now, let us turn to section 22. It is referred to as specifying exceptions to the operation of the act. But are they exceptions?

Did congress intend to say that certain unjust discriminations, and undue and unreasonable preferences and advantages,—that is to say, those mentioned in the twenty-second section,—should be excepted? What are they? Here is one of the first: "The free carriage of destitute and homeless persons transported by charitable societies." Would that be an unjust discrimination, but for the "exception" in its favor? Unjust to whom? Would it be less unjust to leave it to the other passengers to take up a collection and pay their fare, or submit to see them put off the train? "Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national or state homes for disabled volunteer soldiers, or of soldiers' and sailors' orphans' homes." Are these unjust discriminations, or undue or unreasonable preferences or advantages, and was the twenty-second section necessary to legalize them? These provisions seem to be rather by way of recognition that the free carriage and reductions referred to are returns, slight and inadequate indeed, but proper to be made by railroad companies, for the great franchises bestowed upon them without money and without price. Again: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employes." Can it be possible that without this provision it would be necessary for the president and directors of the company to provide themselves with tickets before starting out on a tour of inspection of the road, and that every conductor and locomotive engineer and fireman would have to pay full fare for every trip? Yet this follows logically if the twenty-second section is a section of exceptions. The analysis might be applied with like results to every specification contained in the section, but these will suffice. The language is "that nothing in this act shall prevent," and "nothing in this act shall be construed to prohibit,"—expressions evidently used interchangeably. The word "exception" is not to be found in the section, but there is the significant provision that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," indicating that the act was understood by congress to be declaratory, and for the prevention of abuses and evasions of the unwritten law, which was adopted and incorporated into the statute that its construction and operation might be uniform throughout the land, and that it might be enforced by sanctions of federal legislation. Mileage, excursion, and commutation tickets are mentioned in the section. All these were universally regarded as just and necessary discriminations, but, mileage tickets especially, subject to abuse. No significance ought to be attached to the fact that party-rate tickets are not mentioned, for, as is above shown, they were not in general use, but were limited almost exclusively to traveling theatrical troupes.

The true construction of the section appears to be that it specifies certain discriminations, not regarded by congress as within the letter or the spirit of the act, and therefore it provides that the act

shall not be construed to prevent them; and the instances given are illustrative, rather than exhaustive. It is a section furnishing an express rule of construction. It follows that the maxim *expressio unius est exclusio alterius* does not apply, but that the true rule is to look to the section as a guide to the proper interpretation of the prohibitory clauses of the preceding sections, and exclude from their operation every discrimination which is within the principle of the particular cases mentioned in the twenty-second section. It is all wrong to cite it as authority for precisely such misconceptions and misconstructions as it was intended to prevent. Any construction which makes the statute a mere enactment of arbitrary rules, to be so administered as to force a rigid inflexible equality, is in conflict with the objects which its framers had in mind, and a constant obstacle to the further development of a vast system of transportation, in which new situations and conditions, continually occurring, and requiring new adaptations and regulations, can be moulded into harmony with the provisions of the act only by regarding it as declaratory of principles founded upon wisdom and experience, and to be made beneficial and effective by being so expounded as to apply those principles to every new case that may arise.

This case, then, depends upon the question whether party-rate tickets, as issued by the respondent, are, upon a proper construction, prohibited by the preceding sections. It is claimed that they are obnoxious to the first section, because they are not just and reasonable. While it is admitted that, if their issue be confined to parties of ten or more, the injustice would not be so apparent, it is urged that it would be left to the carrier to determine what number should make a "party," and that under the law, so construed, a reduced rate could be accorded to a party of two, as it is said was done before the act. The testimony on this point is that almost without exception ten was the smallest number of persons to whom they were issued. At one time, upon the Union Pacific Railroad, from the Missouri river to Colorado, they were issued to parties of two. It is explained, however, by the witness who testifies to this fact, that the concession was made for the benefit of variety people who traveled in pairs, but that the rate was more than three cents per mile. The one other exception testified to was made by the Wabash Railroad Company, which gave a reduced rate to four theatrical persons traveling as a party; but this reduction was granted to theatrical persons only. It appears in evidence, also, that before the law there were voluntary traffic associations, to which the leading railroad companies were parties, organized to prevent cutting of rates and undue competition. Party-rate tickets were then in vogue, and if, under those circumstances, the only departures from the rule of ten were those cited above, there would seem to be little ground for the apprehension expressed on behalf of the complainant that to permit the continued sale and use of these tickets would open the door to all the evils which formerly existed. But suppose, for the sake of the argument, that the apprehension be well founded, the answer is twofold: (1) It cannot be doubted that whenever the sale of party-rate tickets is by any means made a mere pretext for

evading the law,—as, to take the illustration put, when a ticket is issued to two at a reduced price, merely to cut rates,—the courts will so treat it, and apply the remedy. The suggestion that if railroad companies have the right to issue party-rate tickets to companies of ten or more persons, they may issue them to two, is like the old objection to the right of transit with slaves,—that if the master could hold his slave on free soil for an hour, he could for a day, or a year, and therefore for life,—which, although it puzzled many for a time, needed but a touch of common sense to explode it. (2) Nothing in the future of legislation is more certain than that whenever that abuse becomes prevalent the legislatures of the states will promptly reduce the individual rate to the same figure. The history of railroad passenger travel for the last forty years illustrates the constant tendency of special rates, including mileage, excursion, and commutation tickets, to reduce regular individual rates upon the one hand, especially for long distances, and, upon the other hand, to increase facilities and accommodations, thus rendering the service cheaper and better for the general public.

The next objection is that party-rate tickets are obnoxious to the second section of the act, because they furnish to one class of passengers transportation for lower compensation than is charged to others for like and contemporaneous service, under substantially the same circumstances and conditions; and to the third section, because they give to one class of passengers an undue and unreasonable preference and advantage.

If this objection be true in statement,—that is, if those traveling under party-rate tickets are charged less than individuals for like and contemporaneous service, under substantially the same circumstances and conditions,—it is conclusive, and the issuance of the tickets must be adjudged unlawful. But how do they compare with mileage tickets, which, by the twenty-second section, are declared to be in harmony with the act? The rate for each is two cents per mile. The coupons of mileage tickets are for two miles each, but they are sold in blocks of five hundred, or for one thousand miles. The holder can use them at pleasure, for long or short rides. He may ride for any distance within the limit of his ticket, in the same car, and occupy the same seat, with a passenger who is charged three cents per mile for his ticket. The holder of the mileage ticket is a wholesale purchaser; the other buys at retail. The difference is recognized in every kind of business, and no intelligent, fair-minded person thinks of complaining of it. The mileage ticket, so the testimony declares, is especially liable to abuse, and to be used by brokers for speculative purposes. The party-rate ticket, if not, as some witnesses testify, altogether unavailable for either purpose, is less so than any other ticket, and reduces the opportunity for either to the minimum. It, too, is a wholesale ticket. It is open to purchase to all, at the one fixed price. It has one peculiarly distinguishing feature,—it is almost proof against fraud upon the company which issues it. The purchaser having a party of less than the number named in his ticket may, unless restricted by the terms of his ticket, fill up his party from the outside. That he would have a right to do, provided they

all travel together, on the same train, as a party, and under the one ticket, for but one ticket is issued, and whoever of the party misses the train must buy an individual ticket at full rates, or lose the trip. Suppose a car-load of sixty persons be made up of passengers traveling on party-rate tickets, how much of the receipts from the sale of those tickets will fail to reach the treasury of the company? Not one dollar. Suppose the next car in the same train contains sixty passengers traveling on individual tickets, or cash fares. What would be the comparative percentage of opportunity in the two cases for peculation at the expense of the railroad company? If a perfect safeguard against such peculations could be provided all over the country, to what extent would it tend to reduce railway passenger fares, and to benefit railway shareholders? Again, the testimony establishes that party-rate tickets secure patronage that yields large revenues to the respondent, and that the withdrawal of those tickets would almost entirely destroy that patronage; for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers. Are all these considerations to be left out of the account in determining whether there has been "like and contemporaneous service" "under substantially similar circumstances and conditions?" Does it depend solely upon whether party-rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are traveling from the same point to the same destination? Is that the full meaning of "similar circumstances and conditions?" The answer—which the question itself seems to suggest—is that the phrase has a much larger and more comprehensive meaning, else congress could not consistently have recognized mileage or excursion or commutation tickets, for all these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation, the phrase must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons; or, in other words, circumstances and conditions of a commercial character, which, while they they should not exclude or override the consideration of what is just and reasonably advantageous to those not so situated as to be able to avail themselves of reductions offered to the general public, should be so recognized as not to be prejudicial or unjust to any, and yet, upon the whole, to promote the interest of all concerned in the beneficial operation of the act. Aside from the consideration that these tickets are in principle in no wise different from mileage, excursion, and commutation tickets, which is decisive, the fact that they are on sale to all, without discrimination, and without advancing rates for single tickets, and the considerations above mentioned in favor of those who are upon the road continually, and whose business is upheld by bringing the cost of necessary travel within their reach, and those in favor of the carrier, including many not mentioned above, are ample for the vindication of the respondent against the charge that it is guilty of unjust discrimination, and undue or unreasonable preference, and therefore of violation of the provisions of the second and third sections of the act.

The further objection is made that the sale of party-rate tickets is obnoxious to the fourth section, because it permits the carrier to charge and receive a greater compensation for the transportation, under substantially similar circumstances and conditions, of passengers holding single tickets for a shorter distance, than for the transportation of others holding a party-rate ticket for a longer distance; but this objection is fully met by the answers to the objections relating to the second and third sections. The bill should be dismissed at the costs of the complainant.

In re VITO RULLO.[1]

(*Circuit Court, S. D. New York.* May 29, 1890.)

1. HABEAS CORPUS—REVIEW OF FACTS.
This court, on *habeas corpus* proceedings, is not authorized to take evidence as to facts, which another tribunal, of a *quasi* judicial character, is constituted by law for the purpose of inquiring into and determining.

2. SAME—CONTRACT LABOR LAW—ACT FEB. 23, 1887—STATE OFFICERS.
Where immigrants have been prevented from entering the country on the ground that they have come contrary to the provisions of the contract labor law, the finding as to the facts by the superintendent of immigration, when confirmed by the collector, acting pursuant to the regulations of the secretary of the treasury, is a finding of a tribunal duly constituted by law, and is not subject to review by this court. Under the act of February 28, 1887, the secretary of the treasury has the right to appoint a superintendent of immigration, in lieu of state officers.

At Law. On petition for *habeas corpus*.

L. Ullo, for petitioners.

Daniel O'Connell, Asst. U. S. Atty., in opposition.

BROWN, J. The petitioners, immigrants from Italy, having been forbidden to land, on the ground that they came here on contracts for labor prohibited by the statutes of 1885 and 1887, seek a release upon *habeas corpus*, on the grounds—*First*, that there has been no investigation of their case by any competent legal tribunal; and, *second*, that the statements in their affidavits, upon which the refusal to permit them to land was based, were incorrectly understood or incorrectly translated, and that they did not come here under any contract of labor. It has been repeatedly held in immigration cases that, under the statutes above referred to, and others similar, the court upon *habeas corpus* is not authorized to take evidence upon the original question as to the facts concerning the immigrant's right to land, where another tribunal of a *quasi* judicial character is constituted by law for the purpose of inquiring into such facts, and determining the immigrant's right; but that the office of the writ of *habeas corpus* is to inquire into the jurisdiction exercised by that tribunal, and whether it has kept within its legal limits, and proceeded according to law. Inquiry into the facts may be had so far as

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

is necessary to determine that question. *In re Dietze*, 40 Fed. Rep. 324; *In re Cummings*, 32 Fed. Rep. 75; *In re Day*, 27 Fed. Rep. 681, and cases there cited.

In the present case the return to the writ shows that an examination of the immigrants was had by the superintendent of immigration. The affidavits of the petitioners translated from Italian into English, and signed by their mark, and certified to the collector by the superintendent along with his report, show plainly that the petitioners came within the prohibition of the law. It is alleged that a mistake was made in the language of the affidavits, either in understanding what the petitioners stated, or in the translation of it. This is a matter, however, which, as held in the *Case of Dietze, supra*, cannot be inquired into before this court; it being admitted that an examination at the time stated was had, the affidavit made, and no fraud or imposition being charged in the proceeding. The correction of such errors, if they were errors, can only be made upon a rehearing, which can be allowed at his discretion by the collector, and on his direction by the superintendent, or upon appeal, under the regulations, by the secretary of the treasury; and it is to be presumed that such discretion will be exercised in favor of applicants, whenever they present a reasonable and proper case therefor.

The examination into the right of the immigrants to land was made in this case by the superintendent of immigration, an officer appointed by the secretary of the treasury, and not by the state commission, board, or officers designated by the governor of the state, as provided for in the sixth section of the act of February 23, 1887, (24 St. at Large, 415.) The authority of the secretary of the treasury to substitute such an appointee in place of that board rests upon the general power given him in the first two lines of that section, which charge the secretary with the duty of "executing the provisions of this act." No doubt, question may be made as to the construction of that section, and of the secretary's authority in this respect. But if the secretary, in examining into the immigrant's right to land, had no power to proceed except in the particular manner provided in the residue of that section, viz., through the state officers, then, in case of a refusal by those officers to act, the law would become nugatory, so far as respects landing, from the want of any means of enforcing it. Such a result would be plainly contrary to the intent of the act, and the construction of the language of the act is not necessarily such as to entail that result. I deem it my duty, therefore, to sustain the construction given to it by the department, and its authority to appoint a superintendent of immigration, in case of dissatisfaction with the state officers, to perform the same duties the latter had previously performed, and to act as a *quasi* judicial tribunal for the determination of the right of the immigrant to land in the same manner, and with the same effect, as the state commission or board of officers mentioned in the sixth section above referred to were authorized to act. The finding of the superintendent, when confirmed by the collector, acting pursuant to the regulations of the secretary of the treasury, I must therefore hold a finding by the tribunal duly constituted by law,

as to the facts in question. The proceeding being regular, and within its jurisdiction, is binding here. Relief must be sought there. The *habeas corpus* is therefore discharged, and the petitioners remanded.

UNITED STATES *v.* KONKAPOT *et al.*

(Circuit Court, E. D. Wisconsin. July 9, 1890.)

1. PUBLIC LANDS—CUTTING TIMBER—CRIMINAL LAW.
   Rev. St. U. S. § 2461, which forbids the cutting of timber growing on land of the United States which has been reserved or purchased for supplying timber for the navy, and the cutting or removal of timber from any other land of the United States with intent to export or dispose of the same otherwise than for the use of the navy, does not apply to Indian reservations in Wisconsin, since its object is to protect timber suitable for the use of the navy.
2. SAME.
   Rev. St. U. S. § 5388, as amended June 4, 1888, which forbids the cutting or wanton destruction of timber upon military or Indian reservations, does not apply to one who removes and uses for building purposes timber which has been cut on an Indian reservation by another person without his aid or encouragement.

At Law. Error to district court.

Charles W. Felker, for plaintiffs in error.

W. A. Walker, U. S. Dist. Atty.

GRESHAM, J. The defendants were convicted and sentenced for cutting and removing timber from an Indian reservation. The first count of the indictment charges that on the 1st day of January, 1889, the defendants unlawfully entered upon an 80-acre tract,—describing it,—part of the unallotted lands of the reservation, belonging to the Stockbridge tribe of Indians in Wisconsin, and cut and carried away 75 pine trees, and other trees then and there standing, of the value of $700, with intent to use and dispose of the same in the open market for their own benefit, gain, and profit, and not for the use of the navy of the United States. The second count differs from the first in omitting the charge that the trees were not cut with the intention of disposing of them for the use of the navy. Section 2461, Rev. St., declares that if any person shall cut or cause to be cut, or aid or assist in cutting, or shall wantonly destroy, or cause or aid in wantonly destroying, any live oak or red cedar trees, or other timber standing, growing, or being on any lands of the United States which have been reserved or purchased for the use of the United States for supplying or furnishing therefrom timber for the navy of the United States; or if any person shall remove, or aid or assist in removing, from any such lands any live oak or red cedar trees, or other timber, unless duly authorized so to do by order in writing of a competent officer, and for the use of the navy of the United States; or if any person shall cut, or cause to be cut, or aid or assist in cutting any live oak or red cedar trees, or other timber on, or shall remove, or cause to

be removed, or aid or assist in removing, any live oak or red cedar trees, or other timber from, any other land of the United States, with intent to export, dispose of, or employ the same in any manner whatsoever other than for the use of the navy of the United States, he shall pay a fine of not less than treble the value of the trees and timber so cut or removed, and be imprisoned not exceeding 12 months. Section 5388 declares that every person who unlawfully cuts or aids in cutting, or wantonly destroys or procures to be destroyed, any timber standing on lands of the United States which have been or may be reserved or purchased for military or other purposes, shall pay a fine of not more than $500, and be imprisoned not more than 12 months. This section was amended June 4, 1888, (25 St. at Large, 166,) by inserting before the penalty the following clause: "Or upon any Indian reservation or lands belonging to or occupied by any tribe of Indians under authority of the United States."

The evidence showed that on or about the 1st day of January, 1889, the defendant Aaron Konkapot, a Stockbridge Indian, and a member of that tribe, cut and felled 53 pine trees of the value of $100, then standing upon an 80-acre tract of the unallotted lands of the reservation, and that the defendant Edwin Miller, an Indian of the same tribe, and a member of it, on the 1st day of May of the same year removed part of the timber so cut; that prior to the cutting and removing there had been allotted to each of the defendants out of the reservation 80 acres, which tracts were four miles from where the timber was cut; that Konkapot cut the trees for the purpose and with the intention of using them in building upon his 80-acre tract a house and barn, and that some months later Miller removed part of the logs with the intention and for the purpose of building a house upon his 80-acre tract; that none of the timber was sold or offered for sale by either of the defendants; and that the Indian agent in charge of the Stockbridge tribe and the reservation forbade the cutting by Konkapot and the removal by Miller. The court instructed the jury that the defendants held the lands allotted to them in severalty, and they had no right to cut or remove timber from the unallotted lands for the purpose of erecting upon their allotted land any buildings or tenements whatever; and that the reservation, or unallotted land, was held by the United States in trust for other Indians entitled to allotment, or in trust for the common benefit of the tribe, and could not be despoiled for the purpose of improving allotted land, or erecting buildings upon it.

The first two clauses of section 2461 relate to the cutting and destruction of timber on lands "which have been reserved or purchased for the use of the United States for supplying or furnishing therefrom timber for the navy of the United States." The defendants neither cut, destroyed, nor removed timber on or from such land. The remaining clause, fairly construed, does not embrace Indian reservations such as the Stockbridge reservation. This section was enacted to protect live oak, red cedar, and other timber fit for the use of the navy upon lands purchased or reserved by the government for that purpose. Section 4751 provides that all penalties and forfeitures incurred under section 2461 shall be sued for, recovered, and distributed under the direction of the secretary of the

navy, and paid over, half to the informers, if any, or captors, where seized, and the other half to the secretary of the navy for the use of the navy pension fund. It would hardly be contended that the secretary of the navy could claim under this section any portion of a fine or forfeiture incurred under any statute for cutting, removing, or destroying timber standing upon the Stockbridge reservation, or any other Indian reservation. The defendants were not guilty under section 2461. The unlawful cutting or wanton destruction of timber standing upon lands of the United States which have been or may be reserved or purchased for military or other purposes is made an offense by section 5388. Miller was not a party to the cutting of the trees. He simply removed some of the trees that Konkapot had cut and left lying on the ground some months before. The evidence shows that Konkapot felled the trees, and Miller removed part of them, and it fails to show that either aided or encouraged the other. The indictment is for cutting and carrying away timber, and section 5388, in both its original and amended form, is for unlawfully cutting or wantonly destroying standing timber. Miller did not remove standing timber from the reservation to build a house upon his allotted tract, and, if he had done so, he would not have been guilty of wantonly or otherwise destroying it. It is insisted by the attorney for the government that Indian reservations were embraced in section 5388 as it originally stood, such being land of the United States reserved for other than military purposes. If that construction be correct, the section was not enlarged or broadened by the amendment of 1888. It is plain that by cutting trees on the reservation Konkapot brought himself within the letter of the section as amended. He did not, however, cut the trees for sale or profit. To occupy and cultivate the tract allotted to him in severalty he needed a house and barn, and the trees were cut for the sole purpose of erecting such buildings upon his premises. It seems harsh to visit upon him the penalty of the statute for this act; but the court must administer the law as it finds it. The judgment of the district court against Konkapot is affirmed, and as to Miller it is reversed, and remanded for further proceedings.

UNITED STATES v. EDWARDS.[1]

(Circuit Court, S. D. Alabama. April 14, 1890.)

PERJURY—INDICTMENT—"WILLFULLY."

An indictment for perjury under Rev. St. § 5392, must allege, among other things, that the false oath was taken willfully; and an allegation that it was corruptly taken does not embrace the element of willfulness.

Demurrer to Indictment for Perjury.

M. D. Wickersham, Dist. Atty., for the United States.

J. J. Parker, for defendant.

TOULMIN, J. To constitute perjury, it is essential that the oath was administered in the manner prescribed by law, and by some person duly authorized to administer the same, in the matter wherein it was taken. The false statement must be material to the issue in the case in which it was made, and it must be willfully made. *U. S.* v. *Stanley*, 6 McLean, 409. Perjury cannot be committed unless the person taking the oath not only swears to what is false, or what he does not believe to be true, but does so willfully. *U. S.* v. *Dennee*, 3 Woods, 39; *U. S.* v. *Evans*, 19 Fed. Rep. 912; 3 Greenl. Ev. § 189; 2 Bish. Crim. Law, §§ 1017–1046; *U. S.* v. *Hearing*, 26 Fed. Rep. 744. Rash or reckless statements on oath are not perjury, but the oath must be willfully corrupt. Authorities *supra*, and *U. S.* v. *Moore*, 2 Low. 232. The Revised Statutes of the United States, § 5392, under which this indictment is found, makes it of the essence of the offense of perjury that it be committed willfully. *U. S.* v. *Shellmire*, Baldw. 378. But it is contended by the district attorney that the word "corruptly," used in the indictment, is the equivalent of "willfully." The understanding of the court is that the two words have an entirely different meaning. "Corruptly" means viciously, wickedly. "Willfully" means with design, with some degree of deliberation. To say that testimony was corrupt is to say that it was wicked or vicious, whereas, to say that it was willful is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence, or mistake, but to design. The statute uses the word "willfully," and makes it of the essence of the offense; and the court is not persuaded that the averment that a false oath was corruptly taken is of the same import as the averment that it was willfully taken. The court being of the opinion that willfulness is an essential ingredient for the offense of perjury under section 5392, Rev. St., it must be charged in the indictment, or the indictment will be bad.

The first count in the indictment under consideration does not aver with distinctness before what tribunal, officer, or person the oath was made, or by whom it was administered; and it fails to aver that the matter subscribed and stated by the defendant was so subscribed and stated by him willfully, and contrary to such oath. And the second

[1] Reported by Peter J. Hamilton, Esq., of the Mobile bar.

count in the indictment also fails to aver that the defendant willfully, and contrary to the oath taken by him, stated and testified to matters which he did not believe to be true. The demurrers to the indictment on the grounds stated are well taken, and they are sustained.

UNITED STATES *v.* UPHAM *et al.*[1]

(Circuit Court, S. D. Alabama. June 26, 1890.)

INDICTMENT—NAME—INITIALS.

An indictment against a man by the initials of his Christian name only is subject to plea in abatement, unless the grand jury add that his name is unknown to them otherwise than is set out.

At Law. On demurrer to plea in abatement to indictment for conspiracy.

M. D. Wickersham, U. S. Atty.

G. L. & H. T. Smith, for defendant.

TOULMIN, J. An indictment which sets forth the defendant's Christian name by initials only is subject to plea in abatement, unless it is alleged that the Christian name was unknown to the grand jury otherwise than as laid in the indictment. As said by the court in the case of *Gerrish* v. *State*, in 53 Ala. 476:

"If the grand jury knew only the initials of defendant's first names, and could not have found out by reasonable diligence what these names were, it would have been legal for them to have indicted him as * * * [E. R. Upham,] using the initials as such, if they had added that his name was unknown to them otherwise than as set out. But this they have not done, and so the indictment is left subject to the plea in abatement."

See *Gerrish* v. *State*, 53 Ala. 476; *Washington* v. *State*, 68 Ala. 85; 1 Bish. Crim. Proc. §§ 566, 676, 677, 680. Demurrer to the plea is overruled. Upon issue to the plea, which was then joined, it was admitted that the letters "E. R." used in the indictment were used as the initials of the true Christian name of E. R. Upham, and not as his baptismal name, whereupon the court instructed the jury to find the issue in favor of the defendant. *Gerrish* v. *State*, *supra;* 1 Bish. Crim. Proc. § 677; *Smith* v. *State*, 8 Ohio, 294.

[1]Reported by Peter J. Hamilton, Esq., of the Mobile bar.

UNITED STATES v. CLASSEN.

(*Circuit Court, S. D. New York.* July 5, 1890.)

CRIMINAL LAW—NEW TRIAL—CONTINUANCE OF MOTION.

A motion for a new trial in a criminal case may properly be postponed to a later term on defendant's application, because of the absence of his principal counsel, where the defendant is in custody, and waives his right to apply to be released on bail.

At Law.

Edward Mitchell, U. S. Dist. Atty.

Benj. B. Foster, for defendant.

BENEDICT, J. In this case, application is made by the defendant to postpone the hearing of the motion in arrest of judgment, and for a new trial, until the October term, upon the ground that the counsel mainly responsible for the conduct of the defense at the trial is compelled to join his family in Europe, and will be unable to take part in the argument unless the same be postponed until the time of his return. The defendant is now imprisoned, and accompanies the application for a postponement with a waiver of any right to apply to be released from confinement on bail. The district attorney declines to consent to the postponement. It seems to me, however, that the desire of the accused to have the counsel mainly responsible for the conduct of his defense at the trial already had, take part in argument for a new trial, is reasonable; and inasmuch as the accused is now confined in prison, and under his waiver must remain in confinement during the delay applied for, I am unable to see that the ends of justice will suffer by granting the application. The motion for a new trial, and in arrest of judgment, is therefore set down to be argued on the first day of the October term.

MACK v. LEVY *et al.*

(*Circuit Court, S. D. New York.* May 20, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—OPERA-GLASS HOLDER.

Letters patent No. 268,112, issued November 28, 1882, to William Mack, for an improved opera-glass holder, consisting of a detachable handle made in telescopic sections, the end section being provided with a fastening device consisting of a piston hook and a notch on the end of the cylinder, brought together by a spring, are infringed by an opera-glass handle made in telescopic sections with a fastening device like the one in the patent operated by means of a screw.

2. SAME.

Letters patent No. 399,543, issued March 12, 1889, to William Mack, for an improved opera-glass holder, having its upper end longitudinally forked so as to spring apart slightly, and thus fit tightly into a socket in the bar of the opera-glass, is not infringed by a holder which does not have this longitudinally forked end, though it is otherwise similar to the patented device.

In Equity. Bill for infringement of patent.

H. A. West, for complainant.

James A. Hudson, for defendants.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of two letters patent to William Mack, each for an improved opera-glass holder; the first being No. 268,112, dated November 28, 1882, and the second being No. 399,543, dated March 12, 1889. The principal object of the invention described in the patent of 1882 was to enable persons who use opera-glasses to hold them to the eyes in such a manner as not to raise the hand higher than the breast when using the glass, or to permit the arm to rest upon the arm of the chair. A second object was to construct the handle so that it could be folded up in a small compass. It was a detachable handle, made in telescopic sections. The upper end of the handle was a cylinder, in which was a piston, and upon the lower end of the piston was a spring. A hook was upon the other end of the piston, which was adapted to clutch one side of the transverse bar of an opera-glass, while the other side was grasped by a bifurcated slot or notch on the upper end of the cylinder. The spring pulls the hook towards the notch, and clutches between them the bar of the opera-glass. The claims are as follows:

"(1) The combination of an opera-glass with a detachable handle for holding said glass to the eyes of the holder, substantially as described. (2) The combination of an opera-glass with a detachable handle, the handle being arranged at any suitable angle that will adapt the glass to the position of the eyes when held in either hand, as shown and described. (3) The combination of an opera-glass with an adjustable handle, the said handle being adapted to be elongated at will, substantially as described. (4) The combination with an opera-glass, A, of the handle, B, in sections, as described and arranged, to close telescopically, the end section thereof provided with a fastening device or clutch in the manner set forth. (5) The combination with an opera-glass of the handle made in telescopic sections, and adapted to close telescopically, the end section forming a cylinder in which are placed a spring, piston, and hook, all arranged as set forth. (6) The combination with an opera-glass of a handle made in sections, and arranged to close telescopically, the end section being provided with clutching devices, and the section itself at its end being provided with a bifurcated slot, for the purpose set forth and described. (7) As an article of manufacture, an opera-glass handle, made in sections, and provided at its end with clutching devices, substantially as described."

Prior to the patentee's invention there had been in use a non-extensible detachable opera-glass handle, made by one Standike, which consisted of two cross-pivoted jaws, which grasped the transverse bar of the opera-glass, and a sliding hollow handle, which opened and closed the cross-pivoted jaws. The same mechanic had made a telescopic detachable spy-glass handle, which had been in use, and is known in this case as "Standike's cane and spy-glass." Both these articles were made and used in this country. The patentee was not, therefore, the pioneer inventor in either detachable or in telescopic detachable opera-glass handles, and his patent is to be construed accordingly. His invention consisted in a detachable opera-glass handle, made in telescopic sections, the end

section being provided with the fastening device, consisting of a piston hook and slot, or their equivalent, the hook and slot being brought together by means of a spring; but the means by which the hook and slot are fastened together are not of the essence of the invention. It is not necessary that a spring should be used to cause the hook and slot to approach one another; other like means are properly within the scope of a portion of the claims of the patent.

The first, second, third, and seventh claims are very broad, and, unless limited to the patentee's clutching device upon the end section, are anticipated by one of the Standike devices which have been mentioned. The fourth claim is for a sectional, telescopic, detachable opera-glass handle, the end section of which is provided with the described fastening device or clutch, which consists of the hook and slot, secured by a spring or other means. The construction of the fifth claim is not important in this case, as the claim requires a spring, and therefore was not infringed. The sixth claim was intended to be a narrower claim than the fourth, in that the end of the end section must have a bifurcated slot; but, as I consider the fastening device upon the end of the section, which consists of the piston with its hook and the slot, or their equivalent, to be the important portion of the invention, and to be included in the fourth claim, the fourth and sixth claims are substantially alike. The defendants have made and sold four kinds of holders, known as "A," "B," "C," and "Specimen Respondent's Manufacture." Each one, except C, is a detachable handle, made in telescopic sections, the upper section being cylindrical, in the upper end of which is a piston, upon one end of which is a hook. A bifurcated slot or notch is upon the end of the section. In A a set-screw, fitted in the collar at the outer end of the inner tube, locks the piston when the hook portion is brought in contact with the cross-bar of the opera-glass. In B a screw and nut upon the piston are used. In "Respondent's Manufacture" a screw is used, which is operated by a nut projecting from the cord of the inner section, and which moves the piston and hook out and in. In C the hook and slot do not exist, but there is a detachable screw-loop, the open ends of which are screwed together. All the exhibits, except C, have the essential elements of the invention, and are infringements of the fourth and sixth claims.

The patent of 1889 describes another kind of detachable handle, made in telescopic sections or in one section. The upper end section has a longitudinally forked end, which fits into a socket on the bar of the opera-glass. The arms of the fork spring apart slightly, so as to fit tightly into the socket. The interior of the tubular sections are longitudinally corrugated or serrated, and their inner ends, upon their outer peripheries, are provided with collars having longitudinal corrugations, which slide in the interior corrugations of the sections, and thus prevent the sections from turning or twisting. The inner ends of the sections are provided with outwardly springing ends, which cause sufficient friction between the parts to hold the sections at the desired adjustment. The claims are as follows:

"(1) An opera-glass holder, consisting essentially of a rigid body portion having its upper outer end longitudinally bifurcated, forming spring legs or arms tending to spring apart, and adapted to snugly and removably fit in the herein-described tube or socket of an opera-glass, and thereby rigidly hold the same in position, as set forth. (2) An opera-glass holder, comprising telescope sections having exterior and interior intermeshing corrugations, the section at one end having its outer end longitudinally bifurcated to engage the yoke-piece of an opera-glass, said bifurcated end having a soft lining, and the section at the opposite end serving as a handle, substantially as described. (3) An opera-glass holder, comprising telescopic sections, one or more of which are provided with exterior corrugated collars having outwardly springing ends, and sliding in adjoining sections, the section at end being longitudinally bifurcated to hold the yoke-piece of the opera-glass, and the opposite end section serving as a handle, substantially as described. (4) An opera-glass holder, comprising telescopic sections, the section at one end serving as a handle, and the opposite end section adapted to removably hold the glass, for the purpose set forth, the inner ends of said section being provided with serrations or corrugations sliding in similar corrugations in the interiors of the adjoining sections. (5) An opera-glass holder, comprising telescopic sections, the section at one end serving as a handle, and the opposite end section adapted to be removably secured to a cross-piece of a glass, the inner ends of said sections being provided with exterior or interior intermeshing corrugations and outwardly springing ends, as described."

The important part of the improvements consisted in the longitudinally forked end of the upper section of the detachable telescopic handle. The corrugated collars and outwardly springing ends are frictional devices to hold the sections together and prevent twisting, are well known, and have been often used in pencil cases and similar articles made in telescopically sliding sections. There is nothing patentable in adding these collars and springing ends to the opera-glass holder of 1882. The fourth and fifth claims are those which are said to have been infringed. If these claims manifest patentable invention, in view of the patent of 1882, and of the previous state of the art, it is only when they are limited to a handle in telescopic sections, having a longitudinally forked attaching device at the end of the upper section. The defendant's handles, which have already been described, do not have this longitudinally forked end, but have the slot and hook of the 1882 patent, and consequently do not infringe. Let there be a decree for an injunction against the further infringement of the patent of 1882, and for an accounting as to the infringement of the fourth and sixth claims thereof. So much of the bill as relates to the patent of 1889 will be dismissed. Each party prevails upon one of the patents, and the question of costs will be reserved until final decree.

MACK v. LEVY *et al.*

(Circuit Court, S. D. New York. June 26, 1890.)

H. A. West, for plaintiff.
James A. Hudson, for defendants.

SHIPMAN, J. These are two petitions, one by the plaintiff, and one by the defendants, for a rehearing of the above-entitled cause. I have examined the papers and the briefs, and see no reason for a rehearing, and therefore each application is denied. I had intended to state, as usual, my reasons for the denial, but, upon further consideration, it appears to me that the main questions depend entirely upon the proper construction of the patent; that I have clearly, though briefly, stated my construction; and that I can hardly hope to express my idea with more clearness by additional observations on the subject.

ROOT v. THIRD AVE. R. CO.

(Circuit Court, S. D. New York. July 12, 1890.)

PATENTS FOR INVENTIONS—NOVELTY—ANTICIPATION.

The claim of letters patent No. 241,044, granted May 3, 1881, to S. R. Matthewson for cable tramway for carrying cars around curves, consisting of a series of vertical rollers with intervening vertical plates, as a means for supporting and guiding the cable around the curve, is void for want of novelty, having been anticipated by an English patent of September 6, 1872, in which vertical rollers are placed in recesses at the sides of the curve; the intervening parts of the sides taking the place of the vertical plates in the Matthewson patent.

In Equity.
George Harding and *George J. Harding*, for complainant.
Herbert Knight, for defendant.

WALLACE, J. The only claim of the patent in suit (No. 241,044, dated May 3, 1881, granted to Sebra R. Matthewson, for "cable tramway for carrying cars around curves") which is alleged to be infringed by the devices employed by the defendant, is the first, which is as follows:

"In combination with a curved tube or tunnel having a traveling cable moving within it, the means for supporting and guiding said cable around the curve, consisting of a series of vertical rollers with intervening vertical plates, supported so as to form a nearly continuous moving and guiding surface upon the inside of the curve, substantially as described."

The rollers of this claim are not the rollers, H, mentioned in some of the other claims, but are any rollers which will revolve on vertical axes, and relieve the cable from friction; and the intervening plates are

not the vertical plates of some of the other claims, but are any vertical plates, whether integral with the tube itself, or fastened removably to the sides of the tube, which will close the spaces between the rollers so as to form a practically continuous bearing surface around the curve on the plane of the roller faces. The plates have no function of value as respects the cable itself; but, when a grip is used with the cable, they may serve to prevent it from sagging between and striking against the rollers as it passes the curves. The grip, however, is not an element of the combination of the claim; and the merit and patentability of the invention are to be tested by the considerations which would prevail if it were designed for use in a cable tramway where a grip like that of the defendants is used. The grip employed by the defendants is so long as to reach from roller to roller, and consequently is not guided by the intervening plates. Vertical rollers employed in cable tramways in combination with guides for enabling the cable and grip to travel without unnecessary friction around the curve of the tube were old prior to the invention of Matthewson, as sufficiently appears by reference to the United States patents to Chubb and to Casebolt. The English patent to Roberts of September 6, 1872, describes a cable tramway in which the cable is carried on floats in a curved trough below the rails, which is, substantially, a tunnel or tube wherein vertical friction rollers are placed in recesses at the sides of the curve. The tube is preferably made of iron, and the parts of the side which intervene between the friction rollers serve the purpose of the intermediate plate of Matthewson in forming, with the faces of the rollers, a practically continuous bearing surface around the inside of the curve. None of the prior patents describe the specific combination of rollers and plates which is the subject of the present patent, unless it is the patent to Roberts. Irrespective of the Roberts patent, it would be doubtful whether it would involve invention to make a continuous bearing surface in the curve of a tube from the face of one roller to another, in order to guide an object passing along, when no peculiarity of characteristics in the object to be guided enters into the problem. All that would have to be done would be to fill up the spaces between the rollers by building out the wall of the tube on a line with their faces, or insert the rollers in offsets, so that their faces would form a continuous line with the wall of the tube. It would not seem to require anything more than the ordinary skill of the calling to do this. If done in either of these ways the invention of the claim would be present. The expert for the complainant states as his opinion that if the rollers were set into the side of the conduit, or located in offsets, and the spaces between them bridged across so as to form a practically continuous guiding surface, this would embody the invention of the claim. He states, also, what is perfectly obvious as a matter of mere mechanical adaptation, that in a gentle curve the rollers can be located further apart than in a sharp curve. In view, however, of the Roberts patent, it seems perfectly clear that there is no patentable novelty in the claim. The devices in combination are essentially the same as those in the Roberts patent. His rollers are located in offsets; and when his tube is made of

iron, as it is to be, preferably, the spaces between the offsets are practically the iron plates between the rollers, which are preferably used by Matthewson. The devices of both patents have the same mode of cooperation. In each patent the devices are used in the curve of a tramway cable tube, and form a practically continuous guiding surface on a plane with the faces of the rollers. It is true that in Roberts' patent they are used to guide a float around the curve, while in the present patent they may be used to guide a grip around the curve; but, as no element of form, size, weight, movement, or detail of construction enters into the characteristics of the object to be guided, the circumstance that one of them is a float, and the other a grip, is wholly immaterial. The bill is dismissed.

H. TIBBE & SON MANUF'G CO. *v.* HEINEKEN.

(*Circuit Court, S. D. New York.* July 12, 1890.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—INVENTION.
Letters patent No. 205,816, granted July 9, 1878, to Henry Tibbe for a pipe made of corn-cob, the interstices of which are filled from the outside with cement, is not invalid for want of invention.
2. SAME—ANTICIPATION.
The Jackson pipe, which was a corn-cob pipe having the inside of the bowl lined with cement, was not an anticipation of said patent.

In Equity. Bill for injunction and accounting.

Paul Bakewell, for complainant.

Louis Raeyener, for defendant.

WALLACE, J. The claim of the patent in suit (No. 205,816 to Henry Tibbe, dated July 9, 1878) is:

"As a new article of manufacture, a smoking pipe made of corn-cob, in which the interstices are filled with a plastic, self-hardening cement, substantially as and for the purposes set forth."

Upon first impression, it would seem that the old Jackson pipe is substantially the same thing as the pipe of the present patent. But that was a corn-cob pipe in which the inside of the bowl was lined with a plastic cement, to fire-proof it, whereas the pipe of the patent is one in which the interstices of the cob are filled with cement. These interstices, or cells which hold the corn, are on the exterior of the cob; and although, in some instances, they could be filled from the inside of the bowl, that would not be a practical way of filling them, and when cobs of large or medium size are used for the bowl, as they generally are, the interstices can only be filled from the outside. The specification is addressed to those skilled in the art, and the claim is to be interpreted, as its language naturally imports, as one for a pipe in which the exterior interstices of the cob are filled with a plastic cement. Such a pipe supplies a sweet and porous receptacle for tobacco, having characteristics

which are well understood by smokers to be desirable, and is a very different thing from one with a cement-lined bowl. It did not involve invention of any high order to make such a pipe; but there was enough to convert a poor article into a good one, and supply something to the trade which was new, and the merits of which were immediately and generally recognized. If the defendant chooses to sell the old Jackson pipe, he is at liberty to do so; but he has appropriated the rights of the complainant by selling the pipe of the patent, and must take the consequences. A decree is ordered for an injunction and accounting.

DELAMATER *et al. v.* REINHARDT.

(Circuit Court, S. D. New York. July 7, 1890.)

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—PRACTICE.

The defendant may be compelled to state whether he has in his possession the machine which is alleged to be an infringement of plaintiff's patent, though the plaintiff has not previously made out a *prima facie* case of infringement.

In Equity.

Witter & Kenyon, for complainants.

Shipman, Barlow, Larocque & Choate, for defendant.

LACOMBE, J. This is an application to compel the defendant, called as a witness for the complainants, to answer two questions. The suit is for infringement of a patent for a hot-air pumping engine. The questions are directed to the ascertainment of whether or not the defendant, subsequent to the date of the patent, and prior to the commencement of the suit, had upon his premises, at No. 171 Avenue C, in this city, a hot-air pumping engine. The manifest intention is to follow up these questions by others, showing that the engine which it is supposed he had and used was an infringing machine. It is objected that this cannot be shown by the defendant's testimony until the complainants first makes out a *prima facie* case of infringement. Reference is made to a decision in the third circuit, (*Celluloid Co.* v. *Crane Co.*) in which it is said that a similar objection was sustained. As there was no opinion filed in that case, however, there is nothing to show upon what ground that court excluded it. Certainly there is no rule or practice in this circuit which would require the exclusion of the questions which have been certified in this case. It is not claimed that defendant is the manufacturer of the machine, and the simplest and most efficient way to discover whether he had one is to ask him. The witness himself declined to answer on the ground that the question was an "inquiry into his private affairs." To sustain such an objection would no doubt be very convenient for those who buy and use infringing machines, but no good ground for so doing is shown here.

COMERFORD v. THE MELVINA.

(District Court, N. D. Illinois. March 31, 1890.)

1. COLLISION—VESSEL AT ANCHOR.
A schooner at anchor hoisted her sails in order to assist in loosening the anchor. When the anchor broke from the bottom, the schooner started with the master alone on deck, the entire crew being engaged at the windlass, and collided with another vessel lying at anchor a third of a mile to leeward. The evidence showed that the master of the schooner could have avoided the collision by putting his wheel hard to port. *Held*, that the schooner was responsible for the collision.
2. SAME—MEASURE OF DAMAGES.
Where a schooner's jib-boom is broken off by a collision, the vessel responsible therefor is also liable for demurrage caused by going into a port of repair, where there is any increase of risk in continuing the voyage without a jib-boom; though it is possible that the schooner might have made the voyage, successfully, but it is not liable for additional delay caused by want of skill in making the repairs.

In Admiralty.

Thomas Hood, for libelant.

Schuyler & Kremer, for respondent.

BLODGETT, J. This is a libel by the owner of the schooner Blazing Star for damages sustained by his schooner from a collision with the schooner Melvina in the waters of Lake Huron on the morning of October 17, 1888. The proof shows that, on the morning in question, the schooners Melvina and Blazing Star lay at anchor in the shelter of the east side of Cove island, in the entrance to the Georgian bay, where they had taken refuge from a gale about 36 hours before. The weather had become pleasant, with a moderate wind from the S. W. or S. S. W., and about 8 o'clock in the morning the crews of both schooners began preparations to get away, both being bound for Cheboygan, Mich., for cargoes of lumber to transport to the port of Chicago. The Melvina lay nearer the shore than the Blazing Star, and each was in from 16 to 17 fathoms of water. They were, as nearly as I can make it from the proof, about one-third of a mile apart, and each had out its heaviest anchor, with about 50 fathoms of chain. The crew of the Melvina were unable to break her anchor clear from its hold on the bottom by the windlass alone, and the sails were set to aid them in doing so, the result of which was that, when the anchor broke from the bottom, the schooner was standing on the port tack with her main boom a few feet over the starboard quarter, in a direction which took her close across the bows of the Blazing Star. The crew of the Blazing Star were at that time engaged in heaving at her anchor, but had not got it off the bottom, so that she was swinging on her chain with her bow in the wind. All hands, but the master of the Melvina, continued heaving at her anchor after it left the bottom for the purpose of getting it on board, and the master had the wheel, he alone attending to the navigation of his vessel. Possibly she made a little leeway without the master's being aware of it, but, whether that be so or not, she passed so close to the Blazing Star that her main lift caught the end of the jib-boom of the Blazing Star, and broke it off at the junction with the bowsprit, which is the direct damage complained of.

The master of the Blazing Star, instead of continuing his voyage after the collision, made sail for Owen's sound, which was in a contrary direction from Cheboygan, his port of destination, but, as the proof shows, was the nearest port of repair, where he arrived that evening. He ordered a new jib-boom, and the workmen set about making one, which it would seem, by good dispatch, should have been finished and in place by the evening of the next day, but, after working upon it nearly all the next day, it was found that the stick was defective, and a new stick had to be obtained and finished and put in place,—thus necessitating a delay of two days for repairs at Owen's sound; and it is for the cost of the new jib-boom, and the time lost in going to and from Owen's sound, and the detention there, that damages are claimed by libelant.

The defenses urged are: (1) That the collision was an unavoidable accident, caused by the direction of the wind and the positions of the two vessels in relation to each other at the time the Melvina's anchor broke from the bottom; (2) that there was no maritime necessity for the Blazing Star to seek a port of repair merely to have her jib-boom replaced, but that she could have safely pursued her voyage to Cheboygan, and had a new jib-boom put in while taking in her cargo of lumber there.

In support of the first proposition, it is contended by respondent that, when the aid of the sails of a vessel is resorted to for the purpose of breaking her anchor from its hold on the bottom, she will necessarily go off on whatever tack she may be standing at the time the anchor breaks; and that with this heavy anchor, and some 17 fathoms of chain hanging in the water, the steerage of the Melvina was so much interfered with that it would have been unsafe to attempt to carry her astern of the Blazing Star, as, with the short distance she had to run, the Melvina would almost inevitably have struck the hull of the Star instead of going astern of her.

It is also contended that the crew of the Blazing Star should have seen there was danger of collision with their jib-boom, and should have slacked off on their windlass, which would have let the Star fall astern, and thereby enabled the Melvina to have gone clear. I do not think either of these positions is well taken. The master of the Melvina knew, or should have known, as a skillful and experienced seaman, that, when he resorted to his sails to assist him in weighing anchor, his vessel would go off on whatever tack she stood when the anchor broke, and with this other vessel to the leeward of him, and consequently in peril of collision with her, it was his duty to have taken such precautions as would have averted the collision. He must have seen the moment his anchor broke, and his vessel began to make headway, that his direction would take him very close to the forward end of the Star's jib-boom; and that passing so close to her involved, not only the peril of carrying away the Star's jib-boom and bowsprit, but also that his anchor might foul with the Star's chain if he passed with his anchor hanging in the water across the chain of the Star. He was one-third of a mile away from the Star. He could have dropped his anchor back upon the bottom, and so retarded the speed of his vessel that she would have swung enough upon her chain to

change her direction, or he could have called help enough from the windlass to aid him in the navigation of his vessel until she was past danger of a collision. The proof shows that, if a single man had been on deck, to have hauled in the main boom from over the starboard quarter of his vessel, she would have gone clear of the Star's jib-boom, for, as it was, the main lift barely caught the tip end of the Star's jib-boom, but enough to break it. But with what, it seems to me, was an act of recklessness, the master of the Melvina undertook to navigate his vessel without any help on deck to enable him to properly manage her, when he must have seen that he was endangering both vessels by attempting so close a passage across the Star's bow.

As to the alleged negligence of the crew of the Star in not slacking off their chain so as to allow their vessel to fall astern, and thereby escape the collision, I do not think the point is supported by the proof. The crews of both vessels seem to have thought the Melvina would pass safely, although so close, until she was nearly one-half her length past the Star's jib-boom; and I do not think, from the proof, that the Star would have settled back soon enough to have averted the collision if her chain had been slacked. As I understand the situation from the proof, the Star was not using her sails to help break her anchor, so that the only force to carry her astern was the wind acting upon her hull and rigging as she lay in the eye of the wind; and it is not probable that this force would have acted with sufficient rapidity to carry her out of danger,—at least, it is doubtful if such would have been the effect of slacking off upon the Star's chain; and, with the palpable want of due care shown by the master of the Melvina, I do not think he, or those responsible for his acts, are in a position to closely criticise the conduct of the crew of the Star.

The proof also satisfies me that, after the danger of collision became imminent, the master of the Melvina could have averted it, and passed clear of the Star, by putting his wheel hard to port, which would have swung his stern to port, and thereby cleared the Star's boom. He was certainly bound to think and to act as quickly, under the circumstances, as the crew of the Star, and he has no right to complain if they did not adopt measures when *in extremis* while he was himself guilty of neglecting measures at the same moment which probably would have been effective.

As to the contention that the master of the Star should have pursued his voyage to Cheboygan without his jib-boom, and made his repairs there, I think that, under the circumstances, the master of the injured vessel was the judge as to whether he would take the risk of making the run to Cheboygan without the aid of the sails dependent upon the jib-boom, or seek a port of repair. It is possible that he would have made the run successfully, but, if to the mind of a prudent seaman there was any increase of risk in attempting it, then he had the right to decide whether he would take that risk or not, and it does not lie in the mouth of the party by whose negligence he has been disabled to criticise his exercise of discretion. It is true that the proof shows that good seamen

have made trips the whole length of Lakes Michigan and Huron with the jib-booms of their vessels gone, but this only proves that they were fortunate in not encountering such winds as would have made the sails dependent on the jib-booms necessary for safety. Undoubtedly many of the members of a full-rigged schooner may be temporarily dispensed with, but this does not prove that it is prudent seamanship to attempt the continuance of a voyage after so essential a part of a schooner as the jib-boom has been carried away. At the most, it only proves that the man who has taken such a risk may be deemed lucky if he gets through in safety. We must bear in mind that this collision occurred after the middle of October, when severe storms are to be anticipated, especially on Lake Huron; and I think the master of the Star only acted with proper prudence in running to the nearest port of repair, which, in this case, he was able to do with a fair wind, and mostly in a protected course. As to the damages to be awarded, the libelant is entitled to be paid all expenses for repairs made necessary by the collision. These are the cost of replacing the jib-boom and the portions of rigging which were broken. He is also entitled to be made good, as far as possible, for the time necessarily lost in going to the port of repair, waiting there for repairs, and returning to the point where the collision occurred, or as far on the voyage as the point where the collision occurred. The proof shows that the Star reached Owen's sound the evening after the accident, but too late to get men at work on the new jib-boom that night. The next day the new jib-boom would have been made and put in place in time for him to have left the morning of the third day, but the party who undertook the repairs chose a bad stick of timber, the defect of which was not discovered until they had worked nearly all day upon it, when the stick was rejected, and a new stick obtained, which took them a day longer. This loss of a day, by the want of skill of those who undertook the making of the new jib-boom, ought not to be charged to the respondent. I therefore find that the detention of the Star in going to Owen's sound, and returning to a point on her voyage equivalent to the place of accident, was three days, and that her time and expenses were equal to $50 per day, making the amount of her recovery the cost of the repairs, and the three-days demurrage, at $50 per day.

It is also contended that, as the Star reached Cheboygan, got in her cargo, and left there for Chicago as soon as the Melvina and the Fellowcraft, another schooner which lay at Cove island with the Star and Melvina, and left there with the Melvina, therefore no demurrage should be allowed her, because she might not have got there, taken on her cargo, and got away any sooner if the injury by the collision had not occurred; but, as the proof shows that the Star did not load at the same dock as the other two vessels, I do not think the court can presume she would have been detained in Cheboygan as the other vessels were. A decree may therefore be prepared, finding the Melvina in fault, and awarding damages to be made of the actual cost of repairs, and the three-days demurrage, at $50 per day.

BAILEY *et al.* v. SUNDBERG.[1]

(*District Court, S. D. New York.* June 26, 1890.)

1. JUDGMENT IN REM—RES JUDICATA—QUESTION NECESSARILY INVOLVED.
In a suit *in rem* before a court of competent jurisdiction, fairly prosecuted, all persons having an interest in the subject-matter, and their privies, are deemed parties, and are bound by the decree, both as respects the *res* itself, and the questions necessarily involved in the adjudication.
2. SAME—LIBEL FOR COLLISION—SUIT AGAINST MASTER IN PERSONAM.
Hence, where owners of a vessel brought suit *in rem* against a steam-ship, alleging that the steam-ship had negligently collided with and sunk their vessel, and on the trial the court found that there had been no collision between those two vessels, which decision was affirmed by the appellate court, and subsequently the owners, joining with themselves an insurance company, brought suit against the master of the steam-ship, to recover the same damages, nearly six years after the alleged collision, it was *held*, that the question of the negligence of the master was *res adjudicata*, and that the suit should not be entertained.
3. SAME—PARTIES—ALL HAVING LIEN ON RES.
In a suit *in rem* for damages caused by collision, all persons having a lien on the *res*, growing out of such collision, are deemed parties to the suit, and are bound by the decree.

In Admiralty.

Action against the master of the steam-ship Newport to recover damages for the sinking of the schooner John K. Shaw, alleged to have been caused by collision with the Newport.

Geo. A. Black, for libelants.

Goodrich, Deady & Goodrich and *R. D. Benedict*, for defendant.

BROWN, J. On the evening of February 23, 1884, the libelants schooner John K. Shaw was sunk and wrecked off the Jersey coast, and all on board lost. On the 24th of April following the owners of the Shaw filed in this court their libel *in rem* against the steamer Newport, alleging that the Shaw had been sunk through collision with the Newport, and claiming upwards of $20,000 damages. The case was prosecuted in this court with most elaborate care, and a decree rendered that the Newport did not collide with the Shaw, and the libel was accordingly dismissed. 28 Fed. Rep. 658. On appeal to the circuit court, the case was again elaborately considered, and upon additional evidence for the libelants, and the decree of this court was affirmed. 36 Fed. Rep. 910. A rehearing was afterwards had in the circuit court, and further testimony offered, and the decision reaffirmed. Id. 913. On the 5th of February, 1890, the owners of the Shaw filed the present libel for the recovery of the same damages against the defendant, John P. Sundberg, *in personam*, as master of the Newport, joining with them as co-libelants the insurers of the cargo, who claimed $3,000 more for the loss of coal on board. The defendant pleads *res adjudicata*. I am of the opinion that the plea of *res adjudicata* is good, and must prevail as against both libelants. In a suit *in rem* before a court of competent jurisdiction, fairly prosecuted, all persons having an interest in the subject-matter, and their privies, are

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

deemed parties, and are bound by the decree, both as respects the *res* itself, and the questions necessarily involved in the adjudication. 1 Greenl. Ev. §§ 522, 525. Freem. Judgm. § 615; 2 Smith, Lead. Cas. 750; per Lord KENYON in *Geyer* v. *Aguilar*, 7 Term R. 696. In *Gelston* v. *Hoyt*, 3 Wheat. 246, the question was elaborately examined by the supreme court of the United States. There a vessel had been seized by the collector for a supposed violation of the neutrality laws. A suit for her condemnation was thereupon instituted in the name of the United States *in rem* against the vessel, and upon the trial it was adjudged that there was no cause of forfeiture, and the vessel was acquitted. In a subsequent suit against the collector in trespass, brought by the owner of the vessel, the former adjudication was held conclusive that there was no cause of forfeiture. In pronouncing judgment, STORY, J., says, (pages 312, 313, 317:)

"If a sentence of condemnation be pronounced, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and, in either case, the question cannot be litigated in another forum. This was the doctrine asserted by this court in the case of *Slocum* v. *Mayberry*, 2 Wheat. 1, after very deliberate consideration, and to that doctrine we unanimously adhere. The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject-matter, whether as seizing officers or informers or claimants, are parties, or may be parties, to such suits, so far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon all the world, upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons, *toties quoties*, for the same offense, and the claimant be loaded with ruinous costs and expenses. * * * It cannot be pretended that a new seizure might, after an acquittal, be made for the same supposed offense; or, if made, that the former sentence would not, as evidence, be conclusive, and, as a bar, be peremptory against the second suit *in rem*."

The same general doctrine was asserted in the case of *The Apollon*, 9 Wheat. 362, where a similar suit in trespass was brought by the master of a vessel previously seized against the collector; and the court again held that the acquittal in the suit was conclusive evidence in every inquiry before every other tribunal that there was no cause of seizure.

These principles seem to me applicable to the present case, as respects the adjudication that there was no collision with the Newport. The conclusiveness of a former adjudication may apply to the whole cause of action, or only to some question arising on the trial. In this case, the former adjudication, that there was no collision with the Newport, if binding upon the libelants, leaves them no possible cause of action. *Cromwell* v. *County of Sac*, 94 U. S. 351. If there was any such collision by the Newport's fault, all the libelants had a direct legal interest in the *res*, which was the subject of the former suit, because all had a lien upon the ship for their damages. That suit

being *in rem*, all persons having such an interest are deemed parties to the suit, and are bound by it. All, under the practice in admiralty causes, had a right to come in and be heard upon the trial. Had the vessel been condemned in the former suit, and sold, either before or after decree, and the proceeds brought into court, the present insurers, if they came in before a final decree, would have shared equally in the distribution of the fund; or, if after a decree, they would have been entitled to claim any surplus remaining. In either of such proceedings by the insurers, neither the question of collision nor of the Newport's fault, after an adjudication against her in the suit *in rem*, could have been again litigated. The former adjudication would have been binding in their favor, both as to the fact of collision and as to her fault; and, if conclusive in their favor, it must be equally conclusive against them that there was no collision, when such was the former adjudication. The insurers are therefore concluded as much as the former libelants.

The fact that the present suit is against the master *in personam* does not render the former adjudication any the less binding. As respects responsibility to third persons for collision, the relation of the master to the ship is not merely a relation of ordinary "privity," but one of substantial identity. The owners might not be liable, though the ship were held; for the ship might have been sailed by charterers. But the liability of the ship and of the master is identical; they are convertible terms. That is probably why both ship and master, under rule 15 of the supreme court, may be co-defendants in collision cases. By the practice of most maritime countries in admiralty causes, the naming of the ship alone as a defendant is unknown. The suit in proceeding against foreign ships is against the master also, in his character as master. Ord., etc., 1681, lib. 1, tit. 14, arts. 2, 3; Code, etc., Commerce, §§ 200, 201; 1 Valin, Com. Sur. L'Ord. 343, 345. A judgment in such a suit binds the ship, whenever the ship is legally held for the master's acts. So when, under our practice, the ship is seized *in rem*, and taken from the master's possession for alleged negligent navigation by the master, and the master had knowledge of the suit, and is a witness in the cause, as in this case, how can it be said that he is not in privity with the ship, or with the suit in which the ship is sought to be held solely for his acts as master? He is at liberty to defend equally with the owners. In a foreign port, he is bound to defend. He is treated by the maritime law, not as an agent only, but, says Story, (Agency, § 116,) as "in some sort and to some extent clothed with the character of a special employer or owner of the ship, and as having a special property in it." There is no reason, therefore, why the master should not be bound by such an adjudication *in rem* as respects his acts which involve the ship as much as the owner is bound. There is no question that the general owner in this case, who defended the former suit, would be protected by that adjudication against any such suit *in personam* as this. See *The Jessie Williamson, Jr.*, 108 U. S. 305, 311, 2 Sup. Ct. Rep. 669. It is immaterial whether the defense to the suit *in rem* is made by the master, as the special owner, or by the

general owners, when both have knowledge of the litigation and the means of taking part in it. In the court of errors, in *Gelston* v. *Hoyt*, 13 Johns. 580, Chancellor KENT held that the officers by whose procurement the original seizure was made were not strangers, but privies to the subsequent suit *in rem* to enforce a forfeiture brought by the United States. The privity here is much closer; for it is the master's acts alone that are concerned; and, as I have said, the liability of ship and of master is identical, and he is bound to indemnify the owners. I have no doubt, therefore, that the master would have been bound by an adjudication in the former suit that he did collide with the Shaw, and he is consequently entitled to the benefit of the adjudication of acquittal. In the present case, the owners of the Shaw have had their day in this court, and upon appeal. The maxims that no one shall be vexed twice in the same matter, and that it is the interest of the state that there shall be an end of litigation, apply with special emphasis.

The policy of the admiralty law and practice, sanctioned by the supreme court in its adoption of the 59th rule in admiralty, (see *The Hudson*, 15 Fed. Rep. 162,) furnishes an additional reason why this court should refuse to entertain what, in substance and effect, is but a new trial of an old adjudicated issue. If, after such full and exhaustive hearings in a suit *in rem* as have been had in this case, any other person who may claim to have been damaged by the same collision, such as any part owner of the vessel injured, not an actual party to the record in the former case, or any one of a score of owners of different parts of the cargo, could bring a new suit, and try the whole question of the collision *de novo*, there would be no end to trials and retrials of the same issue short of the period of limitation, if there were any such definite period in admiralty. There is no such definite period of limitation in admiralty causes, but only that full and reasonable opportunity for the enforcement of demands that common justice and equity require. *The Nestor*, 1 Sum. 85; *The Bristol*, 11 Fed. Rep. 163, and cases there cited.

Upon the merits of the present case, there is no pretense that there has not been the fullest opportunity for the presentment of the insurers' claim, as well as that of the owners of the Shaw, in the former litigation. The insurers doubtless voluntarily awaited its result; and in that case they are equitably, as well as legally, concluded by it.

So far as I apprehend the nature of the new evidence desired to be offered, it does not differ in kind from what was previously produced. There is no peculiarity in the case that can be taken to distinguish it from so many others in which the defeated party finds, after one or more hearings, that there is additional evidence on one or more points, which might be produced. No precedent in the admiralty is cited for such a suit as the present after such a previous adjudication. To entertain this suit would evidently involve, not merely a great change in the practice hitherto as to collision causes, but greatly extend the scope of litigation, which it has been the aim of the courts to diminish. Rule 15 of the supreme court in admiralty, which states against what parties suits for collision may be brought, permits libels against the ship and master,

against the ship alone, or against the master alone, or the owners alone. Though under this rule contemporaneous or successive different suits may be brought against the different defendants named, so far as may be necessary to procure satisfaction of a legal demand, (*The Normandie*, 40 Fed. Rep. 590, and cases there cited,) in my judgment it was not the intent of this rule to admit of any such successive suits against the different defendants named after an adjudication *in rem*, upon a full and impartial hearing, that there was no such collision as alleged; but the opposite intent should rather be inferred. On these several grounds the exceptions to the plea of *res adjudicata* are therefore overruled.

THE CITY OF RICHMOND.[1]

WESTERN UNION TEL. CO. *v.* INMAN & I. S. S. CO., Limited.

INMAN & I. S. S. CO., Limited, *v.* WESTERN UNION TEL. CO.

(*District Court, S. D. New York.* June 24, 1890.)

OBSTRUCTION TO NAVIGATION—TELEGRAPH COMPANY—SUBMARINE CABLES—NAVIGABLE MUD.

A telegraph company, whose submarine cables are laid in the soft mud or silt at the bottom of a navigable river, in such a manner as to interfere with vessels, which are accustomed to plow through the mud in their movements about the docks, thereby obstructs navigation, contrary to the provisions of Rev. St. U. S. § 5263, which authorizes any telegraph company to lay telegraph lines "over, under, or across the navigable streams and waters of the United States," provided they are "so constructed and maintained as not to obstruct the navigation of such streams or waters," and is answerable for damages thereby caused to vessels.

In Admiralty.

Action by the Western Union Telegraph Company to recover for damages to its submarine cables. Cross-action by the owner of the City of Richmond to recover for injury to the propeller of that steam-ship, damaged by contact with the submarine cables of the telegraph company.

Dillon & Swayne, for respondents.

Biddle & Ward, for libelants.

BROWN, J. The above cross-libels were filed to recover the damages sustained by the respective parties through the fouling of the propeller blades of the steamer City of Richmond with the submerged telegraph cables of the Western Union Telegraph Company a little outside of the end of the pier of the Dutch Steam-Ship Company at Jersey City, in the North river, on the 19th of August, 1887. The telegraph company had 21 cables running under the North river at Cortlandt street, New York, connecting with the wires at Jersey City. The cables were run under the stringers of the pier, and made fast to several spiles under the pier at about low-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

water mark, mostly about 50 feet inside of the exterior end of the pier. They were laid from the New York end, being reeled off from a drum carried by a boat crossing towards the Jersey side. When brought to the spiles under the pier, they were pulled in as tightly as five or six men could pull them, and then made fast.

The waters of the North river are constantly depositing more or less of a fine sediment. The deposits are most copious on the Jersey side, where a slight bank of mud is thereby formed in front of the piers in question, and at a little distance from them. The deposits are of every degree of consistency, from muddy water down to the solid bed of the river. It is the ordinary practice for vessels of deep draught, in going in and out of the slips in that vicinity, to plow more or less through this navigable mud. On the 19th of August, 1887, the City of Richmond, having just arrived from Liverpool, finding that her slip, which was immediately below the Dutch pier above referred to, was full, so that she could not then get a berth, rounded to in the flood-tide, and landed her cabin passengers at the end of the pier below, and then proceeded to back away from the end of the pier, in order to come to an anchorage for the purpose of transferring her steerage passengers bound for Castle Garden. While backing through this mud, her keel and propeller blades caught the cables running through the mud, and became badly entangled in them. Twelve of the twenty-one cables were broken. Some became so firmly wound around the propeller and shaft that it was necessary to dock the steamer in order to clear them, to her damage, as alleged, of $2,000. The cost of repairing the cables is alleged to be $10,789; and the telegraph company claims $50,000 in addition for the loss of the use of the same during 16 days.

The act of congress passed July 24, 1866, (Rev. St. U. S. § 5263,) authorizes any telegraph company to "construct, maintain, and operate lines of telegraph over, under, or across the navigable streams or waters of the United States," provided they are "so constructed and maintained as not to obstruct the navigation of such streams or waters." The libel of the telegraph company alleges that the cables were "laid and maintained upon the bed of said stream so as not to interfere with the navigation of said stream;" that the location and use of the cables thus laid were well known to the owners of the steamer, their agents and servants; and that their loss and damage were caused by the steamer's wrongful and negligent attempt to navigate in the vicinity of said cables when the tide was low, and when there was not water of sufficient depth to float her without coming in contact with the bed of the stream. The libel and answer of the steam-ship company allege that the place where the cables were laid is constantly used by steam-ships and other vessels engaged in carrying on commerce and navigation on the Hudson river; and that, although there is not much water there for vessels of large size and deep draught, the said cables were laid without any protection whatever, and with nothing to indicate the place where they lay; that the steamer was managed with all proper care, and that the loss was caused by the wrongful obstruction of navigation by said cables, and by the careless and im-

proper manner in which the cables were laid, rendering navigation dangerous and unsafe. The evidence shows that each cable was about 1½ inches in diameter, and, running a mile in length from pier to pier, weighed about 8 tons; that at the exterior end of the Dutch pier the cables were raised several feet above the muddy bottom, but struck the mud about 20 feet outside of the pier, and thence sank deeper in the mud as they extended outward in the stream, going, so far as the evidence shows, about a foot and a half deep. The master and the pilot in charge of the City of Richmond testify that they had no notice of the cables, or of their position, and that there was no sign at the pier indicating their presence. More or less of such cables had run to this pier since 1867. Trouble from anchors fouling was not uncommon, but there were few instances of difficulty from vessels.

The steamer at this time drew 24 feet of water. The tide was ebb, about half out. The steamer, after discharging her passengers, could not remain at the end of the dock, because she would have been strained by taking the uneven ground at low water. She could not move ahead, and was therefore obliged to back. For that purpose her stern was swung out into the river by two powerful tugs, until she made an angle of about five points with the line of the shore. In doing this her stern was brought into the mud of the bank outside, above referred to, and two hawsers were parted in bringing her stern round to that angle. This angle was thought sufficient by the pilot, and was probably as much as her stern could be swung to port. She was then backed, as above stated, reaching the middle of the river without her officers at the time knowing that the fouling had occurred. Large steamers had long been accustomed to come to the docks in that vicinity. To run through more or less of such mud in doing so was and is an ordinary occurrence.

The telegraph company contend that they had a right to the use of the bottom of the river as a bed for their cables; that when laid on the bottom, under the act of congress, the cables were lawfully there; that, if they are maintained there, the company discharges its full duty, and that other parties interfering with them do so at their own peril; that the bottom of the stream is, in all cases, the limit of the rights of navigation; that cables laid upon the bottom are no obstruction to navigation; and that the prohibition of any "obstruction" in the act of congress does not embrace mere inconveniences to which vessels may be subjected by the cables, but refers only to those permanent conditions which prevent navigation, and not merely incommode it. An elaborate brief has been filed, and numerous cases cited in support of these contentions. Most of the cases cited refer to highways and bridges, or other authorized structures, in which the acts authorizing such structures have been held not to regard the occasional or minor inconvenience that may incidentally arise. Only two cases have been referred to that deal with the fouling of cables by vessels, viz., that of *Stephens & C. Transp. Co.* v. *Western U. Tel. Co.*, 8 Ben. 502, and *Blanchard* v. *Telegraph Co.*, 60 N. Y. 510, in both of which the cables were found to be an obstruction to navigation, the evidence in both showing that they ran above the bed of the stream.

As applied to navigation, I cannot sustain the distinction contended for between an obstruction and an interference. The cables, whatever their exact position was, were in a permanent position. If they interfered at all with the rightful or necessary use of steamers in that locality, the interference was also permanent. And a permanent interference, which prevents a vessel from going where she ordinarily has a right to go, and where in her maneuvers she may find it necessary to go, whether that necessity be constant or frequent, or only occasional, as emergencies may compel her, seems to me to constitute an "obstruction." The libel alleges that the cables as laid did not "interfere" with navigation. ALLEN, J., in the *Case of Blanchard*, *supra*, citing *People* v. *Vanderbilt*, 26 N. Y. 287, says:

"The Hudson river, at the point of injury, is a public navigable stream, and those navigating it for commercial purposes, and using it as a highway for vessels, have the primary and paramount right to it, and every interference with or obstruction of the navigation, or hindrance to the free passage of vessels upon it, is *prima facie* a nuisance, and unlawful."

Continuing, he observes that, while minor obstructions and temporary inconveniences are made lawful and tolerated, the necessary obstruction should "in every case be reduced to its minimum," and that, "if there is an unnecessary interference with navigation, the act becomes unlawful by reason of the excess of the limits within which obstructions are allowed, in the interests of the public. * * * From the evidence in this case," he continues, "it is quite evident that the wires and cables, in making continuous telegraph lines, can be so placed in the bed of the stream * * * as not in the least, or under any circumstances, to interfere with the unobstructed use of such streams for the purposes of navigation. * * * It can only be when improperly laid, or they have become displaced, that vessels adapted to the navigation can come in contact with, and either cause injury to, or receive injury from, them. * * * Telegraph cables so laid * * * as to * * * come in contact with vessels navigating the stream with such draught as the depth of water will permit, and which, but for such cables, would pass without difficulty or interruption, are improperly placed, and do injuriously interrupt navigation."

These principles seem applicable to this case, and to be sufficient for its determination. The soft, yielding, navigable mud, in which these cables were more or less immersed, is not to be confounded with the solid bed of the stream referred to in the above cases. Such mud constitutes no sharply-defined bottom. It changes from time to time, and is dredged out as occasion requires. It admits of navigation by steamers through it, and forms a part of the available draught of water, and as such it is counted on and constantly used. The line of division between such navigable mud and the true bottom is distinguishable by no other test than the practical one of the ability of the ship to plow through it. So far as affects the rights of navigation, whatever depth of mud of this variable consistency steamers are accustomed to plow through, and do and must plow through, in the course of their maneuvers in and

about the docks, is to be treated as a part of the stream, and not as a part of the solid bottom.

No doubt complaint cannot be lawfully made of inconveniences that arise *necessarily* from the laying of cables pursuant to the act of congress; but there is no evidence, nor can it be inferred, that this obstruction or interference with the backing of steamers through the soft mud was necessary. Not only were no pains taken to sink the cables below the depth of silt that vessels might use, but the cables were not allowed to sink the distance that their whole weight would carry them, since at the end of the wharf they were raised up so as to be several feet above the mud.

The telegraph company's contention amounts to this: that it has a right to the exclusive use of the silt or mud for its cables, without interference from vessels. Such, however, is not the language of the act of congress. That act permits the cables to go "under water," but "not so as to obstruct navigation." Nothing in the act gives any absolute right to lay cables in all cases on the very top of even a solid bottom. A cable so laid would not perfectly meet even the language of the statute, for it would still be in the water, and not, as the statute says, "under the waters." Circumstances might exist where, if it were reasonably practicable, the cables would be required to be laid below the surface of even a solid bottom; or, as ALLEN, J., says, "in the bed of the stream," and not merely on the surface of the bed. The language of the act should, however, be construed in reference to the practical objects in view, viz., to facilitate communication by cable on the one hand, while not permitting the obstruction of navigation on the other. When cables can reasonably be laid so as not to interfere with navigation, plainly they must be so laid. In mud of such varying consistency as lines the shores of the North river, there can be no practical difficulty in sinking cables so deeply as not possibly to interfere with the movements of vessels in any and all emergencies of navigation. The use by steamers in this harbor of the undefined margin of silt between the solid ground and clear water is necessary. Every inch that can be utilized is needed, and should be scrupulously preserved for the uses of navigation, as against all unnecessary interference. Any unnecessary interference with the free movements of vessels is, in my judgment, an "obstruction to navigation," within the meaning and intent of the act of congress.

I must find that there was no necessity for these cables being where they were, and that the telegraph company, under the act of congress, was bound to lay them deep enough, as they easily could have done, not to interfere with steamers, to whatever depth of navigable mud and water they might plow through. On this ground, without considering the question of notice, or lack of notice, of the existence of the obstruction, by a proper sign upon the adjacent dock, the libel of the telegraph company is dismissed, and that of the steam-ship company sustained, with costs.

HAVERMEYERS & ELDER SUGAR REFINING CO. *v.* COMPANIA TRANSATLANTICA ESPANOLA.

(*District Court, S. D. New York.* March 28, 1890.)

ADMIRALTY—INTERROGATORIES—PRODUCTION OF LETTERS.

Under rule 23 in admiralty, interrogatories annexed to the libel are confined to issuable matter, and only the defendant's oath is required in response thereto. Inspection or copies of letters or documents not in issue cannot be obtained by that means. *Held*, therefore, in a libel for damage to cargo, that interrogatories calling for the production of letters between the defendants and their agents for the purpose of proving the fact of damage, and how it occurred, should be stricken out.

(*Syllabus by the Court.*)

In Admiralty. Exceptions to interrogatories.

Butler, Stillman & Hubbard and *Mr. Mynderse*, for libelant.

Wing, Shoudy & Putnam, for respondent.

BROWN, J. The libelant propounded interrogatories in the libel under rule 23, calling for the production of any letters, cablegrams, or correspondence between the respondents and their agents, or the master, relating to the damage to cargo, which forms the subject-matter of litigation. To these interrogatories the respondent objects as unauthorized. Rule 23 of the supreme court, in admiralty, provides that the libelant may require the defendant to answer all interrogatories "touching all and singular the allegations in the libel." The interrogatories must be confined, therefore, to the allegations of the libel; that is, to those matters or particulars that go to make up the item of damage, or that constitute alleged defects, or the particular acts of negligence, or specifications of negligence, that might properly be averred in the libel, and are covered by it in at least general terms. Contracts, bills of lading, or other documents, when directly forming the subject-matter in litigation, may be the subject of interrogatories, and perhaps be required to be produced. But letters passing between the defendants and their agents do not stand in any such relation to the subject-matter of this suit. If the fact that certain information was communicated to the defendants was material, that might authorize inquiry as to letters containing such information. But that is not the present case. No averment as respects such letters, or any information they contain, could here be properly pleaded. The libelant has the right to interrogate the defendant as to each and every material fact in issue; but the rule requires the defendant's oath, and his oath only, in response thereto. It does not require him to produce documents, much of which would be hearsay, as mere evidence in the libelant's favor, or as a substitute for his own oath as regards the material facts in issue. Ben. Adm. 670, form 220. That is not, I think, within the intent of the rule. The inspection of documents is a different matter, and is obtained, when allowed, by a different procedure, or under different rules. The English practice, which provides for the production of documents in actions at law, equity, or in admiralty, is founded

upon express statutory provisions and definite rules of court. See Judicature Act, order 31, and various rules under it; *Bustros* v. *White*, 1 Q. B. Div. 423; *English* v. *Tottie*, Id. 141; Williams & B. Adm. Pr. 406; *The Don Francisco*, 1 Lush. 474; *The Emma*, 3 Asp. (N. S.) 218. We have no such statute applicable to proceedings in admiralty. Section 724 of the United States Revised Statutes relates to suits at law only; and, considering that the answers made to interrogatories are not evidence for the party making them, (*Cushing* v. *Laird*, 6 Ben. 410; *Cushman* v. *Ryan*, 1 Story, 91; *Hutson* v. *Jordan*, 1 Ware, 389, 400; *The L. B. Goldsmith*, 1 Newb. Adm. 123; *The Serapis*, 37 Fed. Rep. 442,) I do not think the rule should be extended beyond its plain intention. The interrogatories as respects the letters, etc., must therefore be disallowed.

NOTE. Since the foregoing was written, I am informed of a similar decision made by Judge BENEDICT in the eastern district in April, 1885, in the case of *The Joseph Farwell*, which was also a suit for damage to cargo. No opinion was filed. The following is extracted from Mr. Mosher's brief in opposition to the interrogatories propounded:

"Perhaps the clearest and fullest exposition of the origin and object of these interrogatories is to be found in the learned note to *Hutson* v. *Jordan*, 1 Ware, 386, 395. It is shown in the opinion in that case that, with the other general rules of practice in admiralty, these interrogatories come to us directly from the Roman law. Id. 389. In the civil law the practice of putting interrogatories was substituted for interrogatory actions after the latter fell into disuse. Id. 398. But interrogatories were and are subject to the same rules, and governed by the same principles, as were the interrogatory actions. Id. 400. Now, it will be found by reference to the civilians quoted by the learned judge, that the interrogatory action, and the interrogatories which were substituted for it, were confined wholly to eliciting the oral answers of the adverse party, and could not be used to procure a discovery and copy of documents. For the latter purpose, there was a distinct action *ad exhibendum*. 2 Huberus, Prælectiones, p. 415, lib. 10, tit. 4. While the interrogatory action fell into disuse by the time of Justinian, the commentator says that Ulpian declares the *actio ad exhibendum* to be most necessary in practice, and that its value is proved by daily examples. Id. 1. This *actio ad exhibendum* is the origin of the bill to discover written instruments in chancery. 2 Story, Eq. Jur. § 1487. (2) While, in the simple proceedings of the American admiralty, these distinctions of form may be disregarded, and discovery of written instruments be compelled, in a proper case, by interrogatories, the substantial rights of the parties must be preserved, and the one interrogated should not be compelled to exhibit his business books, accounts, and correspondence before the trial, to be digested by his adversary at leisure, except on grounds strong enough to uphold an action *ad exhibendum* or a bill of discovery. Both the ancient action and the modern bill require that the actor or complainant shall show some especial right to the discovery sought beyond the ordinary interest of litigant to procure all attainable evidence in support of his case, and this special right must appear on the face of his pleadings. 2 Huberus, 415; 2 Story, Eq. Jur. §§ 1490, 1491. But whoever heard of a bill in equity seeking, under the circumstances of this case, the discovery here asked? If the libelants were the factors, trustees, or stewards of the claimants, and bound to account to them, more could not be demanded. If they were charged with misappropriating the claimant's property, a fuller discovery could not be required than that they exhibit

all their correspondence, accounts, and book entries relating to the merchandise for which they sue. Such practice is repugnant to the spirit of our jurisprudence, which has always jealously guarded the private affairs of litigants from the unnecessary prying of their adversaries. No precedent can be found for it either in equity or admiralty."

THE J. F. CARD.

(*District Court, E. D. Michigan.* May 26, 1890.)

ADMIRALTY—SEAMEN—LIABILITY OF SHIP TO SUPPORT AND CURE INJURED.

The obligation of a vessel navigating the lakes to support and cure seamen taken sick or receiving injuries in the service of the ship does not extend beyond the termination of the seaman's contract, and his return to his home or to a marine hospital.

(*Syllabus by the Court.*

In Admiralty.

This was a libel for wages, and money paid for medical attendance, board, and nursing, after libelant had been compelled to leave the vessel by reason of injuries received while in her service. The facts of the case were substantially as follows: Libelant shipped as mate on the schooner J. F. Card, August 24, 1889, at $60 per month wages. He stated his employment was for the remainder of the season, but admitted that he signed shipping articles for a voyage from Detroit to Toledo, thence to Gladstone, thence to Escanaba to load ore, and thence to Erie, the port of destination. The articles themselves were lost. While the vessel was proceeding down Lake Erie, about 10 o'clock in the evening of September 16th, with a fresh wind and considerable sea, libelant went on top of the cabin to reef the mainsail. The main boom was properly crotched to prevent its swaying, though it necessarily lifted a foot or two in the seaway. Libelant, and the seamen aiding him, had got the reef point tied as far as the forward end of the cabin, when he attempted to jump down upon the deck. He did not take hold of the boom, but turned around to step down, and while doing this the boom struck him on the elbow and hip, and threw him upon the deck. He was carried below at once, where he remained until the vessel arrived at Erie, the second day after the injury, when a physician was summoned to treat him. He told the master on the same day that he would have to leave the vessel, and at his request another mate was hired. As soon as possible, he was taken at his own request to the steamer Nyack, and returned to his home in Detroit. It was conceded that he received his wages at the agreed rate until he left the vessel at Erie. His injury appeared to be an intercapsular fracture or a bruise. He claimed in his libel wages to the end of the season, the expenses of his medical attendance, board and nursing for seven weeks.

Stewart O. Van der Marck, for libelant.

H. H. Swan, for respondent.

BROWN, J. The most important question of fact in this case relates to the contract of hiring. Upon the one hand, libelant swears that he was hired at Detroit on the 23d day of August "until the vessel laid up," or "for the balance of the season," and that the master "understood it so at the time." The wages were to be $60 per month. Upon the other hand, the master swears he hired him for "just as long as we agreed." "I hired him for the trip to go from here to Toledo" at $60 per month. He adds that he usually hires the men for as long as they can agree. About four days after he went on board, and before the vessel started on her voyage, the master instructed the libelant, who was the mate, to procure the signatures of the sailors to shipping articles for the voyage from Detroit to Toledo; thence to Gladstone; thence to Escanaba to load ore; and thence to Erie, the port of destination. These articles were lost, but it was admitted that they would show that libelant's name was signed about the third, instead of being the first, as they naturally would be, he being the mate. Owing to some dispute, either about the rate of wages or the length of the trip, the sailors declined to sign the articles until libelant had signed them; whereupon, in order to induce them to sign the articles, libelant put his own name down the third on the list.

Without undertaking to determine whether the articles were binding upon him when the agreement, as sworn to both by him and by the master, was a different one, it is clear that there is no preponderance of evidence in favor of the libelant that his shipment was for the season. My own impression is from the whole testimony that the agreement was indefinite as to time; that there was a mutual understanding that either party might declare the contract at an end if he chose to do so; but, as both parties are agreed that the rate of wages was to be $60 per month, I think that justice will be done by following the rule laid down by Judge LONGYEAR in the case of *The John Martin*, 2 Abb. (U. S.) 172, and treating this as an engagement for, at least, one month, with the option on either side of terminating the engagement at the end of the month.

What, then, were the legal obligations of the schooner to the libelant with respect to his injuries? It is too well settled to require a citation of authorities that a seaman taken sick or receiving injuries in the service of the ship is entitled to be treated at the expense of the ship, unless such injuries are received in consequence of his own gross carelessness. This is not only the law of England and America, but apparently of every civilized nation possessing a maritime code. The real question in this case is, how long does this obligation remain in force? Does it continue indefinitely, until the seaman is cured, or does it cease upon the completion of the voyage, or of his contract of hiring? If we are to accept the authority of *Reed* v. *Canfield*, 1 Sum. 195, as applicable to this case, we should be obliged to hold that the liability continued until the cure was complete, "at least so far as the ordinary medical means extend." In this case the injuries were received just as the ship Albion was returning from a whaling cruise, and after she had reached New

Bedford, the port of destination, but before the crew had been discharged. The court held that the acts of congress with respect to hospital money and the relief of sick and disabled seamen had not superseded the maritime law, but were rather to be deemed auxiliary to it, and that the obligation to cure the seaman at the expense of the ship extended beyond the termination of the voyage, although he did not undertake to fix a limit to it. This opinion, however, has not been received with the deference usually accorded to the utterances of Mr. Justice STORY. His well-known leaning toward the admiralty courts, and his belief in the beneficence of their jurisdiction and forms of relief, may have had a certain influence in inducing him to extend its aid to cases not properly within its purview. Subsequent cases have tended to limit the doctrine of *Reed* v. *Canfield*, and it is doubtful if it can any longer be accepted as law. In *Nevitt* v. *Clarke*, Olcott, 316, 322, Judge BETTS criticised this case, and held that the privilege of seamen to be cured at the expense of the ship continued no longer than the right to wages under their contract. "It is manifest," says he, "that a construction of this law, which should charge owners of vessels with the support of sick crews without limitation of time, would be most oppressive in its consequences, if it did not also tend to impair to a serious degree the maintenance and prosperity of a merchant marine, and thus become a public evil." The question was also considered by Judge MILLER, of the district court of Wisconsin, in *The Ben Flint*, 1 Biss. 562, in which he held the ancient maritime rule applicable to seamen upon the lakes as well as upon the high seas; but, after a full review of American cases, came to the conclusion "that, in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for disabled or sick seamen should only be co-extensive in duration to that of the seaman to the vessel." He denied the libelant relief for any expenses incurred after his arrival at the port of discharge. The question was again considered by Judge BETTS in the case of *The Atlantic*, Abb. Adm. 451, 476, and he adhered to the principle "that a seaman has no claim upon a ship or her owner for the cure of his sickness or disabilities after his contract has terminated, and he is returned to his port of shipment or discharge, or has been furnished with means to do so." The question was also considered by Judge BROWN with his usual care in *The City of Alexandria*, 17 Fed. Rep. 390, in which he came to the conclusion that "the maritime law affords no sanction for any claim to compensation beyond that already received by the libelant in due medical care and treatment, and wages to the end of the voyage." Of course, if there be any negligence or misconduct on the part of the officers of the vessel, this would furnish a separate ground for action, in which the seaman would recover, not only his expenses for medical attendance, etc., but compensation for his personal injuries, as in ordinary cases of negligence.

But, whether the case of *Reed* v. *Canfield* be considered as correctly decided or not, it is very evident that it has no application to the short voyages or trips upon the lakes. The rule was originally adopted for

the protection of seamen on long ocean voyages, where they were unable to obtain medical attendance, or, if obtainable, usually had no money to spend for that purpose. Upon such voyages sailors are shipped for many months, and even years, while upon the lakes they are rarely shipped for more than one or two trips, and the whole equipment may be changed a dozen times in the course of the season. To say that the obligation of the ship extends to the cure of every man of these crews who happens to be taken sick or receives an injury while upon the vessel, no matter how long the disability may continue, would be imposing a burden upon vessel owners far beyond that contemplated by the law, or required in the interests of humanity. The court will take judicial notice of the fact that marine hospitals are established at the principal lake ports for the nursing and cure of sailors, which are supported by deductions from their wages. In view of the fact that there is such a hospital here in Detroit, I think that the libelant cannot charge the owners of this vessel with the expenses of his medical attendance and board and nursing for the seven weeks following the accident, and before the filing of his libel. He should have resorted to the marine hospital, where he would have been treated free of expense to himself and to the owners of the ship.

I think that full justice will be done him by permitting him to recover his wages for the balance of the month, the amount paid his physician at Erie, and his return fare to Detroit; and for this amount he is entitled to a decree, with costs.

THE LOPEZ.[1]

PHIPPS *et al. v.* LOPEZ.

(*District Court, S. D. Alabama.* April 22, 1890.)

ADMIRALTY—DECREE PRO CONFESSO.

A decree *pro confesso* in admiralty is not final, and merely authorizes the court to hear the case *ex parte*, either directly, or by reference to a commissioner to ascertain and report the amount due.

In Admiralty. Libel for supplies on open account.

A decree *pro confesso* was rendered against the schooner, whereupon the libelant's proctor moved the court for a final decree for the sum sued for as set up in the libel, without further proof in support of the claim.

Hannis Taylor, for libelant.

TOULMIN, J., (*orally.*) When the court adjudges a libel to be taken *pro confesso*, and proceeds to hear the cause *ex parte*, as provided for in admiralty rule 29, the *ex parte* hearing may take place at the time of the default, or on a future day in court, as the court may direct. The more usual course is to refer the matter to a commissioner to hear the parties, and make report thereon to the court. Ben. Adm. §§ 449–452; 2 Conk.

[1] Reported by Peter J. Hamilton, Esq., of the Mobile bar.

Adm. 178, 191. The decree *pro confesso* is an interlocutory decree against the defendant or claimant, as the case may be. It is not a final decree, "such a decree as he can abide by," but the court is to "proceed to hear the cause *ex parte*, and judge therein as to law and justice shall appertain." The judge may himself determine the amount to be decreed, or, which is the usual practice, he may refer it to the clerk or to a commissioner to ascertain and report it. Id. 183–189. The case in 11 Wall. 268, (*Miller* v. *U. S.*,) cited by libelant's proctor, was a case of seizure on a proceeding for condemnation and forfeiture. In such cases, whether in revenue cases or admiralty suits *in rem* for condemnation and forfeiture of the property seized, (as, for instance, in prize cases,) the decree of condemnation is absolute, the only question being whether the property be forfeited or not. The rule in admiralty suits on claims *ex contractu* is different. In such cases the court must make some inquiry, and ascertain the sum which the plaintiff is entitled to recover, and for which a final decree shall be rendered. Authorities *supra*. The motion is denied, and it is ordered that it be referred to the clerk to ascertain from proof the sum which the libelant is entitled to recover, for which a final decree will be rendered.

THE BRITANNIA.

THE BEACONSFIELD.

CLEUGH *v.* THE BRITANNIA. COMPAGNIE FRANCAISE *v.* THE BEACONSFIELD. COTTON *et al. v.* THE BRITANNIA *et al.*

(*Circuit Court, S. D. New York.* June 10, 1890.)

In Admiralty. On appeal from district court. 34 Fed. Rep. 546.

For opinion in this case, together with the other findings of fact and the conclusions of law, see 42 Fed. Rep. 67.

Robert D. Benedict, for the Britannia and the Compagnie Francaise.

George A. Black, for the Beaconsfield and Cleugh.

Sidney Chubb, for Cotton *et al.*

LACOMBE, J. The findings of fact herein are hereby amended by adding thereto the following: *Thirtieth*. From the fact that they allowed their vessel to come into collision with the Beaconsfield under the circumstances specifically detailed in the foregoing findings, it must be inferred that there was negligent navigation on the part of those in charge of the Britanni : *Thirty-First*. The conduct of those in charge of the Beaconsfield, as specifically set forth in the foregoing findings, does not warrant the inference that there was on their part negligence contributing to produce the collision.

HENNING v. WESTERN UNION TEL. CO.

(*Circuit Court, D. South Carolina.* May 23, 1890.)

REMOVAL OF CAUSES—DOMICILE—CORPORATIONS.

A corporation chartered in another state is not a resident of a state, within the sense of the removal act of 1888, simply because it does business and has agents within such state. Following *Fales* v. *Railway Co.*, 32 Fed. Rep. 673.

(*Syllabus by the Court.*)

At Law. On motion to remand.

BOND, J. The petition to remand this cause is based on the ground that the defendant, although a corporation under the law of New York, has a place of business, agents, and property in South Carolina. Being so a resident of the state of South Carolina, it is argued the cause should not have been removed from the state court under the act of congress of 1888. We follow *Fales* v. *Railway Co.*, 32 Fed. Rep. 673, and the other cases taking the same view with it. The motion to remand is refused.

SIMONTON, J., concurring.

ROTHCHILD *et al.* v. HOGE *et al.*

(*Circuit Court, E. D. Virginia.* May 26, 1890.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—SPECIAL PARTNERSHIPS.

Under Code Va. § 2874, providing that no assignment made by an insolvent special partnership for the purpose of giving preferences shall be valid, creditors who have filed bills against a special partnership which has made such an assignment, under Code Va. § 2460, providing that suits may be brought by creditors to avoid assignments with intent to delay, hinder, and defraud creditors, prohibited by section 2458, and that the creditors filing such bills shall have a lien on the property of the partnership from the date the bills are filed, are not entitled to have their full claim paid out of the assets of the firm according to the dates of filing their bills, to the exclusion of other creditors. All creditors are entitled to share in the assets *pro rata*.

2. SPECIAL PARTNERSHIP—PAYMENT OF CAPITAL IN CASH.

A check given by a special partner, as his capital in the firm, which is received by a bank, and without verification placed as cash to the credit of the firm, and which on presentation is paid by the bank on which it is drawn, is a sufficient compliance with a statute requiring the capital of a special partner to be paid in cash.

3. SAME—RETROSPECTIVE LAWS.

Act Va. Feb. 29, 1888, (Acts Va. 1887-88, c. 268,) amending Code Va. 1887, § 2871, and requiring the names of special partners to be posted, together with the names of the general partners, conspicuously on the front of the firm's place of business, does not apply to special partnerships entered into before the act took effect.

In Equity.

Slater & Montague, *Robt. L. Montague*, and *Meredith & Cocke*, for complainants.

Guy & Gilliam and *Waller R. Staples*, for defendants.

HUGHES, J. Martin & Powers conducted a business in notions and white goods in Richmond, Va., as a special partnership, from the 6th February, 1886, till their failure, on the 5th December, 1889. The general partners were Saml. T. Martin and William A. Powers. The special partners were Edgar D. Taylor and Howard Swineford. The original input capital of the firm was $12,500. Of this Taylor put in $5,000 in a check on the Planters' National Bank, of Richmond; Swineford put in $5,000, partly in a check of $1,000 on the Planters' Bank, and the rest in a check of $4,000 on the National Bank of Virginia, at Richmond; and Martin put in the remaining $2,500. Before the certificate of special partnership was made and sworn to, on the 6th February, 1886, the Planters' National Bank had received all the checks making up the $12,500 of capital, (which except one were drawn on itself,) as cash; and had entered upon its own books, and credited in a pass-book given to the firm, a credit of $12,500 as "cash" to the new firm of Martin & Powers. Due publication was made on the day of this deposit, in the evening newspaper of Richmond, of the formation of the partnership, of the names of the respective partners, general and special, and of the amount of capital contributed each by the special partners. There is no complaint that any of the requirements of the laws of Virginia respecting special partnerships were not complied with, except as will be hereafter adverted to.

Among the provisions of the laws of Virginia in force on the 6th February, 1886, and still in force, are the following: What is now section 2873 of the present Code provides that, in case of the insolvency of a special partnership, no special partner shall be paid as a creditor of the firm until all its other creditors are satisfied; and what is now section 2874 of the Code provides that no assignment made by an insolvent special partnership, for the purpose of giving a preference over creditors of the firm to one or more creditors, shall be valid. In the original law of Virginia, relating to special partnerships, (section 22, c. 67, acts 1836-37,) it was provided that every special partner who shall violate the provision against deeds of preferences just named, or shall concur in or assent to such violation, shall be liable as a general partner. But this section became obsolete after the adoption of the Code of 1849, by having been intentionally omitted from that revision.

About two years after the formation of the special partnership of Martin & Powers, the legislature of Virginia passed a law[1] which it declared should be in force after May 1, 1888, amending the general law of special partnerships, by requiring that the names of the general and the special partners should appear conspicuously upon the front of the place of business of every special partnership; and making special liable as general partners in default of compliance with this requirement. The act does not refer in terms to pre-existing partnerships. The evidence taken in

[1] Act Va. Feb. 29, 1888, (Acts 1887-88, c. 268,) amending Code Va. 1887, § 2871.

this cause shows that the names of the special partners, Edgar D. Taylor and Howard Swineford, were not placed conspicuously upon the front of the place of business of Martin & Powers after the 1st of May, 1888.

The Code of Virginia, re-enacting the statutes of 13 & 29 Eliz. on the subject, in section 2458 provides that assignments of property made with intent to delay, hinder, and defraud creditors shall be void as to creditors, though remaining valid as between the parties to them. In section 2459 it provides similarly as to voluntary gifts or conveyances of property. And in section 2460 it authorizes suits to be brought by creditors to avoid such assignments and conveyances as are described in sections 2458 and 2459 before judgments obtained; and gives liens to creditors instituting such suits, from the times of commencing them, and to creditors filing petitions in such suits, from the times, respectively, of filing their petitions. But the supreme court of appeals of Virginia, in numerous decisions, has held that assignments for the benefit of creditors, which give preferences to one or more creditors or classes of creditors over others, if otherwise free from fraud, are not void merely on account of preferences being given.

The law and the facts of this case being as thus set forth, the two general partners of the firm of Martin & Powers executed to Howard D. Hoge, as trustee, on the 5th December, 1889, a deed of assignment, by which they conveyed all the stock in trade, choses in action, open accounts, office furniture, and all the property, social and individual, belonging to them, to their trustee, for the benefit of the creditors of the firm; and by which, distributing their obligations to creditors into five different classes, they provided that the assets of the firm should be sold, and payment of the proceeds made, to the creditors holding their obligations in the order named in the deed, paying those of the first class in full, and so on, each successive class to receive payment in full according as the fund would hold out. Except one or two banks, the names of the creditors of the firm do not appear upon the face of the deed; but it appears from the evidence taken in the cause that the two special partners, E. D. Taylor and H. Swineford, were indorsers for the firm to an aggregate amount of $15,000. It does not appear that either of the special partners had art or part, either direct or indirect, in the making of this assignment. The complainants' bill and supplemental bill assails the deed thus described, prays that it be set aside as void, and that the fund which has resulted from the sales and collections of the trustee shall be paid, first, to V. Henry Rothchild & Co., who filed the bills of complaint, and thereby brought the fund into this court; and afterwards, in the order of the respective dates of filing their petitions, to the numerous petitioners who have filed claims in this cause as prescribed by section 2460 of the code above cited. The supplemental bill, moreover, charges that the special partners of the firm are liable as general partners for the entire indebtedness of the firm, and prays the court to enforce that liability. I come, therefore, to pass upon these prayers of the bills.

The firm of Martin & Powers having been as to the public and its creditors a special partnership, it is clear, and indeed conceded, that the gen-

eral partners who executed the assignment of the 5th December, 1889, had no power to do so, and that the deed is invalid. Section 2874, which is the law of special partnerships, declares that no assignment can be made of the effects of such a firm that shall give preferences between its creditors.

But it is contended by counsel for complainants and petitioners that the making of the assignment in this case was a fraud upon this section 2874 of the code, and therefore that they are entitled to the benefit of section 2460, which gives preferences to vigilant creditors assailing the assignment according to the degree of their vigilance. Accordingly they pray the court to do what section 2874 forbids the partners to do. They call upon it to make a decree declaring a greater number of preferences between the creditors of this firm than the faulty instrument which they assail as fraudulent itself created. Logically, this would be condoning one fraud upon section 2874 with another,—a lesser fraud with a greater one. The *pro rata* payment of creditors is the fundamental law of special partnerships. All contracts made with special partnership firms, all credits given them, are, in contemplation of law, made and given on the faith of an equal distribution of the assets in the event of failure, on the faith of section 2874, which forbids preferences as between creditors. To violate this rule of distribution, by preferring any creditor or class of creditors over others, would be to break faith with all, and to repudiate the fundamental principle on which the business of this firm was transacted with the public. Such a proceeding cannot be thought of. The effects of this firm must be distributed *pro rata*. The statute law happily requires the court to follow the golden rule of chancery, "equality is equity," in the distribution of this fund.

Complainants and petitioners further pray the court to subject the special partners of this firm to liability as general partners to its creditors. The first ground on which this demand is based, is that Howard Swineford, one of the special partners, paid $4,000 of his in-put stipend of $5,000 with a check on the National Bank of Virginia, of this city. They cite decisions rendered by various courts to the effect that the cash required by statute to be paid as the capital of special partnerships must be money itself, and cannot be substituted with checks; this ruling being founded on the principle that nothing can be regarded as the capital of such a firm but money that is placed within its absolute control. Counsel for the special partners cite other cases in which other courts have held that checks, undoubtedly good, may be received as money.

It is easy to reconcile these decisions. When checks are used as substitutes for cash, or with the intention of avoiding the immediate payment of money, they are held to be an evasion of the law requiring the in-put quotas of special partners to be paid in cash, and to be an insufficient compliance with the requirements of law in that regard. The check under consideration was that of a man in the highest credit in Richmond, drawn upon a bank but a few doors distant from the bank which received it on the same street, and payable *instanter*. The only person competent at the time to question its value was the bank which

received it, and that bank was so confident of its value as cash that, without sending it for verification, it forthwith placed the amount of it to the credit as cash of Martin & Powers. It would offend the sentiment of the commercial and banking community to hold that such a check, so received, and so credited, which was duly paid, and the proceeds of it fully used by the bank receiving and the firm credited with it, was not cash; and it would inflict an injustice upon these special partners, which no court of conscience could be capable of perpetrating, to hold them responsible in thousands of dollars beyond their in-put for the general debts of this firm, on a pretence so narrow and so technical.

It is further insisted that, inasmuch as the provisions of the act of Assembly of February, 1888, which required the names of special partners to be posted conspicuously in front of the places of business of special partnerships after the 1st May, 1888, was not complied with by the firm of Martin & Powers after that date, Mr. Taylor and Mr. Swineford became afterwards liable as general partners. It is not worth while to inquire whether this act of 1888 was a remedial law, such as must have retrospective operation; or to enter into the discussion so elaborately conducted at the bar, whether general remedial laws operate more or less universally from and after the dates when they come into effect. The contract between the partners of this firm *inter se*, and between each of them and the public at large and the firm's creditors, as to the liability of its special partners, was determined and defined by the laws of Virginia regulating special partnerships, which were in force when the firm of Martin & Powers was formed,—the laws as they were on the 6th February, 1886. If the special partners complied then and throughout the existence of the firm with the requirements of the law which entered into and formed the basis of their contract with the general partners and the public when the partnership was formed, they performed their whole duty. No law on the general subject of such partnerships which, amending a previous one, imposes new and additional duties upon them, can justly be held by the courts to apply to pre-existing partnerships, unless the new law so declares in express terms. No one should be subject to heavy pecuniary liabilities by mere implication of law. Special partners are very often non-residents of the places or the states in which the business of their firms are conducted. It is not competent for them to engage in the personal management of such business. The law expects them to hold aloof. If, after complying with all the preliminary duties required by law, with a view to their protection as special partners, and after leaving the business of the firm to go on under the management of general partners, new laws are passed requiring additional duties to be performed, and subjecting them to liabilities in default of performance, never contemplated by them, the courts will not presume that the new legislation was intended to apply to their case. When the new law makes the non-compliance with new requirements the ground for imposing heavy pecuniary liabilities, it is of the nature of penal legislation, and must be express and specific in its terms. I do not think the special partners in this case became liable as general partners by the non-posting of their

names before their firm's place of business, after the 1st May, 1888. I will sign a decree drawn in accordance with the principles settled by the court of appeals of Virginia in the case of *McArthur* v. *Chase*, 13 Grat. 683, so far as it is applicable to the case at bar.

BRIGGS *et al.* *v.* SAMPLE *et al.*

(*Circuit Court, D. Kansas.* July 24, 1890.)

1. DEED—VALIDITY—INDIAN TITLE.
The treaty with the Kickapoo Indians (13 U. S. St. 624) provided that the land allotted to the Indians could not be sold to white men without permission of the president, which permission should be signified by his causing the land to be patented to the Indians "with power of alienation," and that before receiving patent the Indians must appear before the district court, make proof of their intelligence and ability, and take the oath of allegiance. An Indian conveyed his land by warranty deed on the day he made such proof, and after he had obtained his patent conveyed the land to another grantee. *Held*, that the second grantee took the land, since the first deed, being made before patent, was ineffectual to convey the land, either directly or by estoppel.
2. SAME—RECORDING—NOTICE.
The recording of the first deed before the patent was granted constituted no notice to the second grantee.

In Equity.
H. M. Jackson, for plaintiff.
A. F. Martin, for defendants.

FOSTER, J. The complainants file their bill in equity to quiet title to 40 acres of land in Atchison county, Kan., alleging title and possession in themselves, and further alleging that the action involves a construction of a treaty of the United States with the Kickapoo tribe of Indians, and that the defendants set up some claim to said property which constitutes a cloud upon complainants' title, and pray to have the title quieted, and for an injunction against defendants from interfering with complainants' possession. The facts are briefly these: The land was allotted to Meshem-a-wa, (Peter Cadue,) a Kickapoo Indian, under the treaty with such tribe proclaimed May 28, 1863. 13 U. S. St. 624. On October 20, 1886, said Indian appeared before the United States district court, and made proof as contemplated by the third article of said treaty, and took the oath of allegiance therein provided for. On the 24th day of December, 1887, the president of the United States directed a patent to issue to said allottee, and on the 19th day of January, 1888, said patent was issued, and delivered to the patentee; and on the 25th day of January, said patentee conveyed the land by warranty deed to these complainants. The source of the defendants' title is a warranty deed executed and delivered by said allottee to W. C. Cole and A. F. Martin on the 20th day of October, 1886, being the same day he made his proof before the United States court, but long before the patent was issued, and before the presi-

dent ordered it to be issued. This deed was recorded in the office of the register of deeds of Atchison county on the same day it was executed. All of these grantees are white men, and in no way connected with the Kickapoo tribe of Indians, and, it appears from the evidence, complainants are in possession. The question to be determined under this state of facts is this: Which of these grantees has the legal title to said land? Article 2 of said Kickapoo treaty has this provision relating to allotments in severalty:

"Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of, only to the United States, or to persons then being members of the Kickapoo tribe, and of Indian blood, with the permission of the president, and under such rules and regulations as the secretary of the interior shall provide, except as may be hereinafter provided."

Article 3 of said treaty is as follows:

"At any time hereafter, when the president of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the land severally held by them to be conveyed to them by patent, in fee-simple, with power of alienation, and may at the same time cause to be set apart, and placed to their credit severally, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty; and such patents being issued, and such payments ordered to be made by the president, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: provided that, before making any such application to the president, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof, and take the same oath of allegiance, as is provided by law for the naturalization of aliens, and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families."

It will be observed that, under the provisions of article 2 of said treaty, this land could not be sold to any person other than a member of the Kickapoo tribe without the permission of the president of the United States. Article 3 provides the mode by which the president shall act in giving his permission to the allottee to alienate his land. Being satisfied of the intelligence and prudence of the Indian to control his own affairs and interests, the president may cause the land to be conveyed to him "by patent in fee-simple, with power of alienation; * * * and such patents being issued, and such payments ordered to be made by the president, such persons shall cease to be members of said tribe, and shall become citizens of the United States, and thereafter the lands so patented to them shall be subject to levy, taxation, and sale in like manner with the property of other citizens." The article further provides that before making application to the president the Indian shall appear before

the United States district court, and make certain proofs establishing his intelligence, ability to support himself and family, etc., and take the oath of allegiance. This proof and oath of allegiance before the court does not of itself make the Indian a citizen, or sever his tribal relations, or procure him his patent, or make his land alienable. It is simply a preliminary proceeding to his making application to the president, and thereafter the president may act in the matter; and not until his patent is issued, and payments of his interest in the trust fund have been ordered, does he cease to be a member of the tribe, and become a citizen, and possess the power to alienate his land. It is clear that at the time this allottee made his deed to Cole and Martin, October 20, 1886, he was not a citizen, but still held his tribal relations, and was incompetent to contract, or to be contracted with, for the sale of his land; and his deed to said parties was illegal and void. Under the plain words of the treaty, it would seem no citation of cases is necessary; but, touching on this subject, see the following cases: *Pennock* v. *Monroe*, 5 Kan. 584; *Libby* v. *Clark*, 118 U. S. 250, 6 Sup. Ct. Rep. 1045; *Smith* v. *Stevens*, 10 Wall. 327; *Sheldon* v. *Donohoe*, 40 Kan. 346, 19 Pac. Rep. 901; *Maynes* v. *Veale*, 20 Kan. 374.

The defendants, however, insist that the title afterwards acquired by the allottee by the issuing of patent accrued by operation of law to his first grantees, under the covenants of warranty, and that he and his subsequent grantees are estopped to set up the subsequently acquired title. This position is not tenable. A void deed with covenants of warranty does not convey an after-acquired title. The grantor was incompetent, and under disability, to make the contract. The conveyance was in violation of law, and he may repudiate his act; but, if he invokes the aid of a court of equity, he must do equity. The question remains, can the patentee or his grantees, with knowledge of the former conveyance, invoke the aid of this court to quiet title against that conveyance, and at the same time hold the proceeds of that sale? On this question, either party may cite authorities within 20 days, and in the mean time no decree will be entered.

On further consideration of the complainants' liability to refund the purchase money paid by Cole and Martin, the complainants make the point that they are *bona fide* purchasers without notice, and therefore took the land free of such equity. On looking into the testimony, I find that both complainants testify that they had no actual notice of the prior sale by their grantor, and their testimony is not contradicted. The possession of Samuels appeared to be substantially the same both before and after the sale, and the record of the deed to Cole and Martin did not impute notice to the complainants; for they were not bound to look further back than the date of the patent, as their grantor's power to sell had its inception with the issue of the patent, and not before. The complainants are entitled to their decree.

CORNELL *v.* GREEN *et al.*

(Circuit Court, N. D. Illinois. July 14, 1890.)

1. JUDGMENT—EFFECT—PARTIES.
Where a bill for foreclosure makes a certain person defendant as executor and as guardian, and the return to the process shows that he was served as executor and guardian, and the bill states that he has an individual interest in the mortgaged land, a decree of foreclosure binds him as well in his individual as in his representative capacity.
2. EQUITY PLEADING—DEMURRER.
Where a bill to redeem from a mortgage which has been foreclosed alleges that the complainant was not a party to the foreclosure suit, and makes the pleadings and record in that suit a part of the bill, from which record it appears that said complainant was a party defendant to the foreclosure suit, the allegation that he was not a party, being an averment of a mere legal conclusion, is not admitted by a demurrer.

In Equity. On demurrer to bill.
Armstrong, Reed & Dyche, for complainant.
Bisbee, Ahrens & Decker, for defendants.

BLODGETT, J. The defendants have interposed a general demurrer to the bill filed in this case, which has been argued and submitted. The bill charges, in substance, that in 1871 George W. Gage was the owner of divers lots and parcels of land in the city of Chicago and vicinity, upon which he made a trust-deed to secure the payment of his notes to the amount of $50,000; and that in 1873 he made another trust-deed upon the same property, to secure the payment of notes to the amount $100,000, making a total incumbrance upon the property of $150,000 and accruing interest; that in December, 1874, after the making and recording of the aforementioned trust-deeds, Gage made a deed in fee-simple of the same lands to William F. Tucker, which was duly recorded in the office of the recorder of Cook county; that George W. Gage died in September, 1875, after the execution and recording of said deed to Tucker; and that Tucker died about September, 1887, leaving him surviving a widow and two children as his heirs at law, and that since the 25th day of January, 1890, those two children and heirs of Tucker have conveyed all their right, title, and interest in the said property to the complainant. The bill further charges that in November, 1875, the defendant Mrs. Green, having become the owner and holder of the notes secured by said two trust-deeds, filed in this court a bill to foreclose the same; that such proceedings were had in said case as that a decree of foreclosure was entered, finding that there was due to the complainant Mrs. Green the sum of $186,566; and that on the 2d day of January, 1877, all the said lots and parcels of land were sold under said decree, and Mrs. Green became the purchaser thereof, which sale was duly confirmed, and a deed made to the purchaser by the master in chancery of this court. The bill further alleges that William F. Tucker was the owner of record of all the said lots and parcels of land at the time of the foreclosure proceedings, and so remained up to the time of his death;

that he was not made a party defendant to the foreclosure proceedings, nor ever in court, nor subject to the orders, decrees, or judgment of this court, and avers that the foreclosure decree is not binding on him, nor on his heirs, nor on the complainant, as a grantee of his heirs. Complainant then asks that an accounting be had of the rents and profits of the property since the conveyance thereof to the defendant Mrs. Green and others, and offers to pay whatever shall be found to be due upon the said trust-deeds after deducting rents and profits received by Mrs. Green, and prays that he be allowed to redeem said premises on the payment of whatever is so found due. The bill refers to the orders, decrees, and files in the foreclosure proceedings for more specific statements and details in regard to what was done in that suit, and makes the same a part of the bill. An examination of the bill in the foreclosure case shows that the introductory clause of said bill was as follows:

"Your oratrix, Hetty H. R. Green, who is a resident of Bellows Falls, in the state of Vermont, and citizen of said last-named state, brings this her bill of complaint against Sarah H. Gage, a resident of the city of Chicago, Ill., a citizen of the state of Illinois, and the widow of the late George W. Gage of Chicago, deceased, and executrix of his last will and testament, Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of the said George W. Gage, deceased, each of said children being now residents of the city of Chicago, and citizens of the state of Illinois, the said two last-named children, George W. Gage, Jr., and David A. Gage, being minors, William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, state of Illinois, and citizens of said last-named state, and guardians of said minor children; the said William F. Tucker being also one of the executors of the last will and testament of said George W. Gage, deceased."

And in another part of the bill the complainant states as follows:

"Your oratrix further shows that the said George W. Gage, the maker of said notes, heretofore, to-wit, on the 24th day of September, 1875, at Chicago aforesaid, departed this life, leaving him surviving the said Sarah H. Gage, his widow, and the said Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., David A. Gage, his only children, the last two named being minors; and leaving a last will and testament, in and by which he appointed the said William F. Tucker, Lewis L. Coburn, and his said widow executors and executrix, and devised to them, upon certain conditions therein named, all his real estate, having before that time, as appears by the records in said recorder's office, by deed executed by himself and wife, dated December 18, 1874, and recorded in said recorder's office, December 19, 1874, for the consideration, as expressed in said deed, of $24,000, conveyed to said Tucker all said premises herein described, subject to said incumbrances. Your oratrix further shows that said above-named parties against whom this bill of complaint is brought have, or claim to have, some interest in said premises described in said trust-deeds by mortgage, judgment, conveyance, or otherwise; but your oratrix states those interests, whatever they are, are subject to the rights of your oratrix under her securities before mentioned, and cannot be set up against the same, nor in any way interfere therewith."

And the prayer for process was that the process of the court might issue, "directed to the said Sarah H. Gage and the other defendants hereinbefore named," etc. The summons was issued in the case, and ran

against Sarah H. Gage, widow, and the children of the said George W. Gage, (naming them,) William F. Tucker, Joseph K. Barry, John W. Clapp, guardians, etc., "William F. Tucker, executor," etc., and the return of the marshal was that he had served the writ by personally delivering a true and correct copy thereof to each of the defendants named, including the name of William F. Tucker, guardian, and William F. Tucker, executor, on the 8th day of December, 1875. This summons was returnable on the first Monday in January, 1876. On the 5th day of April, 1876, (the first Monday of April having been on the 3d day of said month,) a default was entered, in said cause, the record entry of which recited: *First*, service upon some of the defendants and appearances by them, and then proceeds:

"And it appearing that due and legal personal service has been had upon all the other remaining defendants in this cause, by service of subpœna in this cause upon them respectively, and that each and all the defendants in this cause are now legally before this court, and subject to its jurisdiction, and that neither of said defendants have pleaded, answered, or demurred therein, excepting the following named defendants, [naming them,] not including Tucker in any capacity."

The order was in the following words:

"On motion of complainant's solicitor it is ordered that each and all of said defendants who have not pleaded, answered, or demurred, as aforesaid, namely, [then naming the widow and children of George W. Gage, William F. Tucker, and others,] do plead, answer, or demur to the bill of complaint in this cause *instanter*; and said last-named defendants, having each been three times called so to do, come not, but make default; and it is hereby ordered, adjudged, and decreed that as to each of said defendants last named and so making default as aforesaid said bill of complaint and the matters and things therein contained be taken as and for confessed."

It will be seen from these quotations from the record that, while the bill in this case avers that Tucker was not made a party, and not brought before the court, it does appear that he was made a party distinctly in his representative capacity as executor and guardian, and that the bill also clearly and distinctly charged that the conveyance was made to him by Gage in December, 1874, whereby he became the owner of the premises in question, subject to the trust-deeds. The bill averring, therefore, a mere legal conclusion as to Tucker's not being a party, that averment is not admitted by the demurrer, unless facts and circumstances set forth are sufficient to sustain the allegation. *Gould* v. *Railroad Co.*, 91 U. S. 526. There can be no doubt that Tucker was before the court in his representative capacities, and that the bill also contained sufficient averments to put him upon answer as to his individual interest in the subject-matter of the controversy. In *Brasher* v. *Van Cortlandt*, 2 Johns. Ch. 242, the bill was against a committee of a lunatic. The subpœna was issued by the clerk of the court, but he omitted the addition of the plaintiffs as executors and of the defendants as a committee, believing those additions unnecessary in the process. A default was taken against the defendants as committee, and a decree entered against them as such. Upon an application to set aside the default and decree upon the ground

that they were not served as a committee, the court held that the defendants were too late for this objection, and that the process was sufficiently applicable to that bill. And in *Walton's Ex'r* v. *Herbert*, 4 N. J. Eq. 73, the bill was filed against James Herbert, surviving executor of James Herbert, deceased. The prayer was for process against said James Herbert. The subpœna issued against James Herbert generally, without stating his official character, or stating the character in which he was sued. On a demurrer to the bill the court said:

"It is by inspecting the bill that the defendant ascertains the nature of the charge against him. The subpœna only gives him notice that there is a bill filed against him, and, if he be properly charged in the bill as executor or devisee, or in any other capacity, it is not a good objection that the subpœna is issued against him generally."

Upon the principle asserted in this case it seems quite clear to me that Tucker, having been served with process in his representative capacity, was chargeable with notice of the entire contents of the bill so far as it affected him in his representative or his individual capacity, and that it does not lie in his mouth to say that he was not properly before the court. When Mr. Tucker was summoned into court as executor and guardian he was chargeable with notice of the entire contents and scope of the bill, both as it affected his representative and his individual capacity. He certainly must be conclusively presumed to have known that a bill was pending to foreclose those two trust-deeds upon the property, which he had acquired by the deed from Gage in December, 1874, and that he had himself individually acquired title to these lands by a deed from Gage, subsequent to the making of those trust-deeds. I am therefore clear that Tucker was sufficiently made a party before the court, to bind him in his individual as well as his representative capacity.

The record entry of the default also recites that all the parties defaulting, among whom were Tucker, had been duly served with process, and as there was ample time between the issue and return of the summons served on Tucker in his representative capacity and the time default was taken at the April term, 1876, for the issue of an *alias* or *plures* summons upon Tucker individually, the court will, I think, presume such service was obtained as is recited in the order of the court. *Robinson* v. *Fair*, 128 U. S. 53, (page 87,) 9 Sup. Ct. Rep. 30; *Sargeant* v. *Bank*, 12 How. 371; *Mulvey* v. *Gibbons*, 87 Ill. 367. It may also, I think, be urged with great force that this bill should not be sustained on the ground of the laches of the complainant. Tucker had acquired his title before the foreclosure proceedings. The foreclosure proceedings were completed on the 2d of January, 1877. Tucker lived until September, 1887,—nearly 10 years,—and there is no allegation or statement in the bill that he or his heirs at law were then laboring under any disability. This suit was not commenced until April, 1890, so that there has been a period of over 13 years since the commencement of the foreclosure proceedings, and the vesting of the absolute title to this property in the complainant, and yet no attempt is made to explain this long de-

lay, or to give any reason why the complainant, or those under whom the complainant claims, have not instituted proceedings at an earlier day, and it has been held by the supreme court of the United States that laches may be availed of as a defense on demurrer. *Landsdale* v. *Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350; *Speidel* v. *Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610; *Richards* v. *Mackall*, 124 U. S. 183, 8 Sup. Ct. Rep. 437. In the latter case, a bill to set aside a marshal's deed nearly 12 years after the sale was held to be too late, and the laches was held sufficient on demurrer. I choose, however, to place my decision in the case upon the ground that Tucker was sufficiently before the court in the foreclosure proceedings to be bound by the decree of sale there made, and that those claiming under him cannot now complain that he was not specifically served with process in his individual capacity. The demurrer is sustained, and the bill dismissed for want of equity.

DILLON *et al.* v. KANSAS CITY S. B. RY. CO.

(*Circuit Court, W. D. Missouri, W. D.* August 18, 1890.)

INJUNCTION—EMINENT DOMAIN—STATE AND FEDERAL COURTS.

Under Rev. St. U. S. § 720, which forbids federal courts from staying proceedings in state courts except in bankruptcy matters, a federal court will not, pending a condemnation suit in a state court, enjoin the petitioner from entering upon the land sought to be condemned.

In Equity.

This is an application for the writ of injunction, and grows out of the following state of facts in substance: The Kansas City Suburban Belt Railroad Company heretofore began proceedings in the circuit court of Jackson county, Mo., for the condemnation of the right of way over the Missouri Pacific Railway Company tracks within the corporate limits of Kansas City, in said county. Conformably to the state statute in such case, upon presenting the petition to the circuit court, stating that the two corporations were unable to agree upon the compensation, etc., the court appointed three commissioners to review the premises, and hear evidence, and make report. The commissioners proceeded, and made their report, fixing the compensation at one dollar, and determining the point and manner of making such crossing. To this the Missouri Pacific Railway Company filed exceptions in the state circuit court, the *gravamen* of which was as to the manner of the proposed crossing. On the hearing of the exceptions much evidence was submitted by the parties, and the matter taken under advisement by the state circuit judge. That court having adjourned until term in course, to-wit, October next, the controversy in that court is thus left pending and undetermined. The petitioners, John F. Dillon and Edward D. Adams, now come to this court, and present their petition, stating, in substance, that they

are citizens of the state of New York, and are the trustees of and for certain bondholders, owning and holding $30,000,000 in bonds, secured by a first mortgage on all the lines of railroad known as the Missouri Pacific Railroad, which mortgage bears date November 15, 1880, and is duly recorded in said county. By the terms and conditions of this mortgage these bonds are not yet due, and the right of possession, and the possession in fact, of said mortgaged property remains with the mortgagor, the conditions of the same not having been broken. The bill alleges that the said trustees and mortgagees were not made parties to said condemnation proceedings, nor notified thereof, and asserts, as a matter of law, that in contemplation of the state statute they are owners, or at least part owners, of the Missouri Pacific Railway Company, and entitled to notice, and to be made parties defendant in the condemnation proceeding; that by reason of the proposed appropriation of the right of way over the said Missouri Pacific Railway Company, and especially as to the proposed manner of effecting the crossing thereof by the Belt Railroad Company, as reported by the said commissioners, the property of the Missouri Pacific Railway Company will be greatly and irreparably damaged, materially interfering with the passage of its cars, carrying freights and passengers, so as to materially cripple its traffic and business, and impairing the said security; that, as provided by the state statute, on the coming in of said report by said commissioners, and filing the same, and paying in to the clerk of the state court the sum awarded as compensation by the commissioners, the said Belt Railroad Company threatens and is about to proceed to enter upon the right of way of the Missouri Pacific Railway Company, and effect said crossing, before the final hearing in said state court on said exceptions, and the right of the Missouri Pacific Railway Company to a trial *de novo* in said circuit court before a jury as to the issues therein involved. The petition alleges that the only safe and practical mode of effecting a crossing of the tracks of the Missouri Pacific Railway at the point in controversy is either by an overhead bridge or an underground way, to which both the corporation and said mortgagees give their consent, without compensation from the Belt Railroad Company. The prayer of the bill is that an injunction be granted restraining said Belt road, its agents, servants, etc., from going upon and making such crossing, as reported by said commissioners, at grade, and from operating said Belt road at a grade crossing, and for further proper relief upon the final hearing.

Adams & Buckner, for complainants.

J. McD. Trimble, for defendant.

PHILIPS, J. The discussion in this case has taken wide range, covering many questions, both as to the regularity of the proceedings had in the state court and the right of the mortgagees or trustees to be made parties to the condemnation proceedings, etc. On many of these questions I entertain decided opinions, but their expression here is rendered unnecessary in view of the conclusion reached upon a preliminary or jurisdictional question. Section 720, Rev. St. U. S., declares that—

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in a court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This restriction had its root in that doctrine of the law so aptly expressed by Mr. Justice GRIER in *Peck* v. *Jenness*, 7 How. 624:

"It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity; for, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* v. *Earl of Cassillis*, 2 Swanst. 313, Lord ELDON at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland, which, on more mature reflection, he dissolved, because it was admitted if the court of chancery could in that way restrain proceedings in a foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court."

In the adoption of the addition to the act establishing the judicial courts of the United States as early as March 2, 1793, this limitation on the jurisdiction of federal courts was placed upon the statutes to give the force of positive law to this rule of comity, in order to preserve the essential and necessary comity between the federal and state courts, and to maintain the independence of each. This rule was applied in *Diggs* v. *Wolcott*, 4 Cranch, 179, where an action was first begun in the state court upon a certain instrument of writing. Afterwards defendant began suit in chancery in the state court to cancel the instrument, and enjoin the plaintiff from proceeding in the law action. On removal of this chancery suit to the United States court, the action was dismissed for the reason that the federal court under the statute in question was forbidden to grant the injunction. This rule has been applied to a variety of actions. *U. S.* v. *Collins*, 4 Blatchf. 156; *Fisk* v. *Railway Co.*, 6 Blatchf. 399; *Riggs* v. *Johnson Co.*, 6 Wall. 195; *Orton* v. *Smith*, 18 How. 265; *Peck* v. *Jenness*, *supra*; *Haines* v. *Carpenter*, 91 U. S. 257; *In re Sawyer*, 124 U. S. 219, 220, 8 Sup. Ct. Rep. 482; *Yick Wo* v. *Crowley*, 26 Fed. Rep. 207.

It can make no difference, as claimed by some of the counsel in argument, that the order of restraint asked for would go against the corporation and its agents and servants, and not against the court as such, or any officer thereof. In *Peck* v. *Jenness*, *supra*, the court, meeting a like suggestion, says:

"The fact that an injunction goes only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise the power over a party who is a litigant in another and independent forum."

Whether the effect of the injunction is to stay or prevent the operation tion of litigation *in limine*, or a judgment rendered or to be rendered therein, in the state court first acquiring jurisdiction, it falls within the terms of the prohibition. *Haines* v. *Carpenter*, 91 U. S. 257; *Dial* v. *Reynolds*, 96 U. S. 340. In *Rensselaer & S. R. Co.* v. *Bennington & R. R. Co.*, 18 Fed. Rep. 617, the bill was brought to restrain the defendant road from entering upon the orator's railroad under a claim of authority of an act of the state legislature. The ground of relief claimed was that the legislative act was beyond the power of the legislature, and therefore gave no authority to the railroad company to proceed thereunder. The prayer of the bill was that the defendant, its officers, agents, and workmen, be restrained from running upon that part of the road, and for further relief. The court says:

"As no action or interference except such as may be authorized and had under the proceedings in the supreme court is threatened or apprehended, there is no relief to which the orator is here entitled, unless it is relief from those proceedings. The prosecution of those proceedings, or the carrying out of such order or decree as the supreme court may make upon them, must be restrained if anything effectual is to be done in this case. The restraint of the execution of complete fulfillment of proceedings of a judicial nature is in effect the same as the restraint of the proceedings themselves."

Mr. Justice BRADLEY, in *Haines* v. *Carpenter*, *supra*, said:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing."

So here, the Belt Railway Company, under the authority of the state statute, claims that in the condemnation proceeding in progress in the state court, after the coming in and filing of the report of the commissioners, and the payment into the clerk's office of the damages assessed, it has a right to enter upon the tracks of the Missouri Pacific Railway Company for the construction of the proposed crossing. The contention of counsel for the Missouri Pacific is that such asserted right is premature at said stage of the proceeding in the state court, and cannot be lawfully asserted until after disposition of the exceptions to the report, and after the exercise of the right of a trial *de novo* before a jury at its demand. But that is the very question in controversy, and pending in the state court, which it is competent to decide; and the unavoidable effect of a decree of injunction from this court restraining the Belt Railway Company, its agents and servants, from entering upon such work and completing the crossing, is to stay the right of entry claimed by the party seeking the condemnation in the proceeding in the state court, and to draw the litigation and determination of that very question into this court. And if the order and decree of this court is to effectuate and accomplish the manifest purpose of this application for a writ of

injunction, it must stop and foreclose any further proceeding in the state court. We cannot shut our eyes to obvious facts, and hear only the form and semblance of things.

In *Railroad Co.* v. *Scott*, 13 Fed. Rep. 793, suit was instituted in the state court of Texas under the state laws for the condemnation of certain lands for the right of way of the road. Preliminary proceedings had been conducted therein up to the report of the commissioners as to the amount of damages, and the filing of objections thereto by the defendant land-owner. Thereupon the railroad company filed its petition and bond for removal of said cause to the United States circuit court. The bill of complaint filed in the United States circuit court charged that the defendants were proceeding with said cause in said state court in defiance of the petition for removal, which would result in the annoyance and damage of complainant, compelling it to litigate in two different jurisdictions, and causing irreparable delays and injury to the railroad company in fulfilling and meeting certain contracts. An injunction was therein prayed to restrain the parties from any further proceeding in said pending action in the state court. PARDEE, circuit judge, held that the injunction came within the inhibition of section 720. He said:

"The case here is one where the state court undoubtedly had prior jurisdiction, and the question as to whether that jurisdiction has ended, is in dispute between the parties; the state court, undoubtedly, still claiming jurisdiction notwithstanding the petition and bond filed therein to remove the case to this court. The injunction asked for must be refused."

The same rule was followed by Judge DILLON in this circuit in *Chaffin* v. *St. Louis*, 4 Dill. 19. In that case there was a litigation in the state court between the city of St. Louis and the St. Louis Gas-Light Company, quite familiar to the profession and those acquainted with the judicial history of the state. Pending the action in the state court, Chaffin, a non-resident stockholder in the gas-light company, filed his bill in the United States circuit court against the city and the gas company and the Laclede Gas Company alleging that, owing to the manner in which that litigation was being conducted on certain concessions made and acts done therein by the gas company in which he was a stockholder, his rights as a stockholder were being greatly prejudiced, and injury was being done to his stock, and asking that the city be enjoined from further prosecuting said suit, and for certain other matters of relief. The prayer for injunction was amended by striking out so much as asked that the city be enjoined from further prosecuting said suit. Judge DILLON, of this, observed:

"But, notwithstanding this, it is evident that to grant the injunction sought would, if it were effectual for any purpose, be so only because it would in some way interfere with the progress of the litigation in that court. This the federal court is prohibited from doing directly, by section 720, Rev. St. U. S."

If the purpose of this application for injunction, and its effect, if granted, be not to prevent the Belt Railway from entering upon the right of way of the Missouri Pacific Railroad for the construction of a

crossing in the condemnation proceedings, what remedy or measure of protection would any decree this court might make afford the complainants? Under the action already had in the state court, or act upon the final judgment to be made therein at the end of the pending litigation, the Belt Railway Company would have the authority of the state court, and the state statute as construed by the court, to enter upon the construction of the cross-road. In so entering, it and its employes would claim that they had the mandate and process of the state court authorizing them thereto. To enforce the injunction granted by this court its marshal would be sent to arrest the parties for contempt. With equal authority and like judicial comity and courtesy the state court, on the recognized theory of having first acquired jurisdiction of the cause, might issue its injunction against the United States marshal, his deputies, and, perchance, *posse comitatus*, to restrain them from interfering with the rights of the Belt Railway Company under the judgment or proceedings of the state court. It was, as I conceive, the very purpose and policy of the federal statute under discussion to prevent such unseemly and hurtful conflicts between the respective courts and discreditable collisions between their ministerial officers. If, as contended for by the trustees of the mortgagees, they are necessary parties to the condemnation proceeding in the state court, and they are not made parties therein, any action taken or judgment rendered by the state court will not bind the mortgagees and leave their right of action for the protection of their interests intact. *Masterson* v. *Railroad Co.*, 72 Mo. 342; *McShane v. City of Moberly*, 79 Mo. 41–45. And if, as a matter of fact, the appropriation of the right of way for the mortgaged road and the manner of effecting the crossing threaten material injury to the security of the mortgage, the mortgagees are certainly not without remedy in the proper forum for the protection of their rights and interests. If it should become apparent after the case is finally ended in the state court, and the Belt road had entered and begun operating its road over that of the Missouri Pacific, that the use so damaged the mortaged premises as to materially impair the security, I am not prepared to say that the nonresident mortgagees could not come into this court for relief in an appropriate form of action. But under the present *status* of the case I am forbidden to grant the temporary writ of injunction, and the same is refused.

In re FLORIO.

(*Circuit Court, S. D. New York.* May 12, 1890.)

1. IMMIGRATION—CONTRACT LABOR—CONSTITUTIONAL LAW.
The act of congress prohibiting the importation of aliens under contract to perform labor is a constitutional exercise of the power to regulate commerce with foreign nations. Following *U. S.* v. *Craig*, 28 Fed. Rep. 795.

2. SAME—HABEAS CORPUS.
Under said act, which directs the secretary of the treasury not to permit such aliens to land, the fact that the refusal of a permit to land is to confine the immi-

grant to the ship on which he came while she remains in port, does not authorize him to be released under *habeas corpus* when it clearly appears that he is within the purview of the act.

At Law. Petition for *habeas corpus*.

Domenico di Florio, an alien immigrant, being barred from landing at New York by the collector of the port, applied for his release from the collector's custody.

Lorenzo Ullo, for petitioner.

Daniel O'Connell, Asst. U. S. Atty., for the collector.

LACOMBE, J. The question as to the power of congress to regulate the admission of alien passengers coming to this country was considered in *Henderson* v. *Mayor, etc.*, 92 U. S. 259, and *Edye* v. *Robertson*, 112 U. S. 580, 5 Sup. Ct. Rep. 247; and the views therein expressed seem conclusive as to the constitutional points raised in this case. This very act of 1885 has also been considered in *U. S.* v. *Craig*, 28 Fed. Rep. 795, by Judge BROWN, in the sixth circuit, and its constitutionality sustained.

It is a valid exercise of the power of congress "to regulate commerce with foreign nations." Any argument as to the merits of the act, which is no doubt to some extent a reversal of the judicial policy of the government of this country, is one to be addressed to congress, and not to the courts. The act, as amended in 1887, provides that any alien passenger arriving in this port in any ship or vessel, who comes under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien, to perform labor or services of any kind in the United States, shall not be permitted to land, and the secretary of the treasury is by the sixth section of the amendatory act charged with the duty of enforcing this provision. The secretary of the treasury, in this case, acting (as he necessarily must) through his subordinate officer, the collector of the port, refused to permit the relators to land, and may be said to restrain them of their liberty to that extent. By his refusal he necessarily confines them to the limits of the ship, and to review that restraint this writ of *habeas corpus* was granted. The collector returns that he refuses the permit, and confines them to the ship, because they have come to this country under such a contract or agreement as was referred to in the first section of the act; that is, to perform labor and services for some one else after they came here. The presumption is that as a public officer he performs his duty, and that he refuses the permit only because these alien passengers were in fact imported under such contract. That presumption may be overcome by proof, but it is not so overcome in this case. All that appears upon that branch of the case is the statement of the relators themselves, annexed to the return, by which it appears that they have come by this ship from Marseilles, are bound for Pittsburgh, Pa.; that their passage money from the point of sailing was furnished by Francesa Davesa, a man who is now working in Pittsburgh, Pa., and that they also have agreed to repay the cost of their passage to Francesa Davesa, for whom

they further agree that they will work at any kind of employment at wages stated by him. It appears, then, that they are within the prohibition of the statute, and the collector, or other representative of the secretary of the treasury, was therefore clearly authorized—in fact, it was his duty—to refuse a permit for their landing, although the effect of such refusal might be to confine them to the limits of the ship while she remains in this port. The writ, therefore, is dismissed, and the relators are remanded to the custody of the collector.

BULLER *v.* SIDELL *et al.*

(*Circuit Court, S. D. New York.* June 11, 1890.)

1. PLEADING—SHAM ANSWER—MOTION TO STRIKE OUT—ACTION ON JUDGMENT.
   In an action on a judgment, in which it appears by the answer that the defendant entered his appearance by attorney, a paragraph of the answer, denying knowledge or information regarding the judgment sufficient to form a belief, should be stricken out as sham.
2. SAME.
   A paragraph of the answer, which merely denies indebtedness, should also be stricken out.
3. SAME—EQUITABLE DEFENSE.
   A paragraph of the answer, seeking to impeach the judgment sued on for fraud, should be stricken out, since it attempts to set up an equitable defense to a legal action.

At Law.

Motion to strike out certain paragraphs of the answer as sham. The action was upon a judgment in favor of the plaintiff against the defendants, recovered in the United States circuit court for the district of Kansas. By the third paragraph the defendants, in substance, averred that they were induced to enter a general appearance in the Kansas action by certain stipulations of the plaintiff touching the judgment which he would enter therein, which stipulations the plaintiff failed to keep, whereby the amount of the judgment was, as defendants claim, improperly increased. The precise nature of this stipulation need not be stated. For the purpose of this motion it may be conceded that by their third defense the defendants seek to impeach the judgment for fraud or covin in obtaining it.

Frank Budd, for plaintiff.

Thomas N. Browne and *Olcott, Meatre & Gonzales*, for defendants.

LACOMBE, J., (*after stating the facts as above.*) The first paragraph of the answer denies knowledge or information sufficient to form a belief as to the recovery of the judgment sued upon. Inasmuch as it appears by the defendants' own papers that they entered a general appearance by attorney in the Kansas action, this paragraph must be stricken out as sham. *Roblin* v. *Long*, 60 How. Pr. 200; *Beebe* v. *Marvin*, 17 Abb. Pr. 194. The second paragraph of the answer merely denies indebted-

ness. It should also be stricken out. *Mills* v. *Duryee*, 7 Cranch, 481. Inasmuch as it is not disputed that the Kansas court had jurisdiction, and that the defendants had notice of the proceedings therein, the defense set up in the third paragraph of the answer is plainly an equitable one. *Christmas* v. *Russell*, 5 Wall. 290; *Allison* v. *Chapman*, 19 Fed. Rep. 488. Equitable defenses cannot, however, be set up in actions at law in the federal courts. *Bennett* v. *Butterworth*, 11 How. 669; *Montejo* v. *Owen*, 14 Blatchf. 324; *Parsons* v. *Denis*, 7 Fed. Rep. 317; *Doe* v. *Roe*, 31 Fed. Rep. 97. This paragraph must therefore be stricken out.

THE LUDVIG HOLBERG.

STAFFORD *v.* THE LUDVIG HOLBERG.

THE F. O. MATTHIESSEN & WIECHERS S. R. Co. *v.* THE LUDVIG HOLBERG.

(*Circuit Court, S. D. New York.* June 5, 1890.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The decision of the district court as to questions of fact will not be disturbed on appeal where the evidence is conflicting, and some of the witnesses were examined before the district judge.

In Admiralty. On appeal from district court.

FINDINGS OF FACT.

(1) The libelant Stafford was the owner of the bark Quickstep before and at the time of her loss on the 24th day of May, 1887. The libelant the F. O. Matthiessen & Wiechers Sugar Refining Company is a corporation, and was the owner of a cargo of sugar laden on board said bark.

(2) On the afternoon of the 24th day of May, 1887, the bark Quickstep, laden with a cargo of sugar, was being towed from sea into the port of New York by the tug-boat Leonard Richards, on a hawser 80 fathoms long. While proceeding up about in the middle of the main ship channel, and when a little to the southward and eastward of buoy No. 11, at about 4:26 P. M., she was run into by the steam-ship Ludvig Holberg; the latter vessel striking the bark on her port quarter, about the mizzen topmast backstay, cutting into her after companion door a distance of about nine feet, cutting her open so that the cargo rolled out. Immediately after the collision said bark began to sink, and, while sinking, was towed by the tug on to the west bank, where she grounded in 25 feet of water, about a quarter of a mile below buoy No. 11, and became a total loss, and her cargo was nearly all lost.

(3) The bark was 170 feet long, 37 feet beam, 23 feet depth of hold, and was laden with 1,024 tons of sugar, and drew 20 feet of water.

(4) The Ludvig Holberg, which hails from Bergen, Norway, was an iron screw steam-ship of 687 tons register, 200 feet long. The claimants

Christopher Kahrs and others were her owners. She was in ballast, drawing 13 feet aft and 9 feet forward, bound for Barracoa for fruit. She was tight, staunch, and strong, properly manned and officered, having a competent master and officers, and a full complement of men. At and prior to the time of collision her master and pilot were on the bridge. She steers by hand, and there was at her wheel one ordinary seaman steering the vessel as directed by the pilot. The first officer and second officer were on lookout, on the port and starboard sides, respectively, of the forestay, which is fastened to the stem. Back of them, by the windlass, was the carpenter, also on lookout.

(5) The steam-ship started from pier 15 E. R., some time between 3:05 and 3:15 P. M. She ran slow out of the East river, but soon increased to full speed, and continued to run at that rate until, fog having set in, she reduced to half speed, and later to dead slow. Her motion through the water, was, while at full speed, about 9 to 9½ knots; while at half speed about 6½ to 7 knots; while at dead slow about 3½ knots an hour. She had been running at the latter rate for a few minutes only, probably not more than four or five, before the collision. The pitch of her screw was 14 feet 2 inches, and at full speed she made from 69 to 71 revolutions per minute; at half speed from 40 to 45 to 50 revolutions per minute, and at slow speed from 20 to 25 to 26 revolutions per minute.

(6) She was off Bedloe's island between 3:27 and 3:32, and it was nearly 4 o'clock when she reached Fort Lafayette. The distance from that point to the place of collision is a little over 3½ knots. She carried the ebb tide with her from Bedloe's island to a little below the forts. After a brief period of slack water, and until the collision, there was a flood tide. Its set was about S. W., which helped a vessel coming in about one knot an hour, and a vessel going out about half a knot an hour. The wind was southerly, blowing a stiff breeze.

(7) At the time and place of collision there was so much fog as to prevent vessels from being visible to each other for more than a short distance, (estimated by the witnesses from the Holberg at between 200 and 300 feet,) and such as to require the sounding of fog-signals under the rules. Such signals were sounded by the Ludvig Holberg. This fog had prevailed between the Narrows and buoy No. 11 during a period of at least 15 minutes before the collision.

(8) The Ludvig Holberg ran into this fog about the time she passed the forts, and at that time began sounding fog-signals, but did not reduce her speed until she had run some distance below the forts. Then she reduced to half speed only, and did not further reduce her speed until about buoy No. 13.

(9) By the time she reached a point a little below buoy No. 13, she had slowed down to about four knots over the ground. From that point to the place of collision, a distance of about 4,500 feet, she did not increase her speed, proceeding down the channel, keeping upon the starboard side, as near the channel buoys as she could safely go, and sounding fog-signals from time to time.

(10) While she was thus proceeding she heard one blast right ahead, then another a little more on the starboard bow. Both these were blown by the tug, which was not at that time visible through the fog to those on board the Holberg.

(11) Almost immediately thereafter the tug came in sight, only a few hundred feet off, and a little on the steamer's starboard bow, and gave a signal of two blasts.

(12) Neither the bark nor the hawser were then visible, and no signals indicated to the Ludvig Holberg that the tug had a tow nearly 500 feet behind her.

(13) Upon receiving the whistle of two signals from the tug, the steamer starboarded, and passed the tug starboard to starboard clearing her about 30 feet.

(14) Then for the first time the Ludvig Holberg became aware of the presence of the Quickstep, which was not following directly after the tug, but to starboard of her, and whose pilot at that time, by putting her wheel hard a-port, threw her head somewhat more to starboard.

(15) Thereupon the steam-ship ported in order to go between the tug and the bark, at the same hailing the tug to cast off the hawser.

(16) If the hawser had been cast off promptly the steamer would probably have gone safely between the tug and the bark.

(17) The hawser was not cast off, and, the steamer, running against it with her starboard bow, parted it, and at the same time her bow was swung to port, resulting in collision with the bark's port quarter.

(18) The steamer stopped and reversed as soon as she saw that the tug had a vessel in tow, but not before, and was nearly stopped at the time of collision.

(19) Had the steamer been aware when she starboarded to pass the tug that the latter vessel had the Quickstep in tow on a hawser of 80 fathoms she could, and in all probability would, have avoided the collision.

CONCLUSIONS OF LAW.

(1) Said collision was not due to any fault or negligence of those in charge of the Ludvig Holberg.

(2) The libels herein should be dismissed, as already decreed by the district court, with costs to the claimants in both courts.

Owen, Gray & Sturges, for the Quickstep.

Sidney Chubb, for the owners of her cargo.

Wing, Shoudy & Putnam, for the Ludvig Holberg.

LACOMBE, J. As to the presence or absence of fog, and as to the speed of the Ludvig Holberg,—the two determinative questions of fact in this case,—there is great conflict of testimony. The witnesses from the Holberg testify most positively that during their run from the Narrows to below buoy No. 11 so dense a fog prevailed that vessels could be seen only at a short distance, and that the steamer sounded fog-signals, and reduced her speed. Those from the bark and the tug as positively assert the contrary. Of the witnesses other than those from these three vessels

some support the libelant's case, others that of claimants. Finally, in the testimony of nearly every witness there is much inconsistency, and it is impossible to frame such a theory of what occurred as will harmonize with all the proof. Some of the witnesses who testified on this branch of the case were examined before the district judge. His decision, therefore, is affirmed. In so doing the evidence of those on the Holberg must be in part accepted and in part discredited; either the fog prevailed for a time much less than they say it did, or she ran at full speed for some time after it shut in. It is, however, natural to expect that a witness who is testifying to the density of the fog, or the duration of a period of reduced speed, when the fog or reduction of speed is supposed by him to help his side of the case, will exaggerate his estimate in both particulars. That his narrative thereby becomes inconsistent is not by itself sufficient to require its entire rejection, especially where it is in part corroborated by other proof. In this case the disinterested witness who concededly was nearest to the collision both in time and place testified that he overtook and passed the Holberg going slow in a dense fog, with her fog-signals sounding; and that there was dense fog in the Narrows at about 4 P. M. is testified to by the light-house keeper at Fort Tompkins, (whose evidence is corroborated by his log-book,) and by the soldier at the same fort. The decree of the district court is affirmed, and the libels dismissed.

THE LUDVIG HOLBERG.

STAFFORD *v.* THE LUDVIG HOLBERG.

THE F. O. MATTHIESSEN & WIECHERS S. R. Co. *v.* THE LUDVIG HOLBERG.

(Circuit Court, S. D. New York. June 20, 1890.)

TRIAL—FINDINGS.

It is not necessary to set forth as a conclusion of law or finding of fact that the circumstance that some of the witnesses were examined before the district judge influenced the circuit court in deciding to affirm the judgment of the district court rendered upon conflicting evidence.

In Admiralty. Appeal from district court. On motion to amend the findings. For former opinion, giving the findings, see *ante*, 117.

SCHEDULE OF PROPOSED AMENDMENTS TO FINDINGS MADE BY THE COURT.

(1) That the second finding be amended, and made more definite and certain by stating how far to the southward and how far to the eastward of buoy 11 the collision occurred, or that said finding be made more specific than it now is by the use of the expression "a little."

(2) That the fourth finding be amended by stating that "the pitch of

the screw of the Ludvig Holberg was 14 feet 2 inches, and at full speed she made from 69 to 71 revolutions per minute, at half speed 40 to 45 to 50 revolutions per minute, and at slow speed she made 20 to 25 to 26 revolutions per minute;" and, if such amendment be refused, that an additional finding be made to that effect.

(3) That the fifth finding be amended, and made more definite and certain by striking out the words "between 3:05 and," and by stating more exactly the time at which the steamer started from pier 15, East river.

(4) That the fifth finding be amended by striking out the word "dead" before the word "slow," in the two places in which it occurs in said finding.

(5) That the sixth finding be amended and made more definite and certain by striking out the words "between 3:27 and," and inserting in place thereof the word "about," or otherwise specifying more exactly the time when the Holberg was off Bedloe's island.

(6) That the sixth finding be amended by striking out the words "a little over 3½," and inserting "3⅝ knots," or by indicating how much over 3½ knots is intended by the expression "a little over."

(7) That the sixth finding be amended by inserting after the words "thereafter and" the words "after a period of slack water."

(8) That the seventh finding be amended by inserting the word "dense" before the word "fog" in the sentence "there was so much fog as to prevent vessels," etc.

(9) That the seventh finding be amended and made more definite and certain by striking out the words "a short distance" and inserting the words "about 200 feet," or such other distance as the court shall find upon the evidence that the vessels could be seen in that fog.

(10) That the seventh finding be amended by inserting the word "dense" before the word "fog" in the sentence, "this fog had prevailed between the Narrows and buoy 11."

(11) That the seventh finding be amended by striking out the word "fifteen," and inserting the word "twenty."

(12) That the eighth finding be amended by striking out the words "about the time," and inserting in place thereof the word "before," in the sentence, "the Ludvig Holberg ran into this fog about the time she passed the forts."

(13) That the eighth finding be amended and made more definite and certain by specifying how much below the forts the Ludvig Holberg had got before she reduced her speed, in place of the expression "some distance."

(14) That the ninth finding be amended and made more definite and certain by indicating how much below, in place of the expression "a little below," the Holberg had got when she had slowed down to about four knots, and the time when she so slowed.

(15) That the eleventh finding be amended and made more definite and certain by specifying how many hundred feet off, or about how many feet off, the tug-boat was when she first came in sight.

(16) That the thirteenth finding be amended by stating that the steamer starboarded about one point, or as much as the court finds the fact to be that she did starboard.

(17) That the thirteenth finding be amended by adding thereto the words, "by reason of the tug at the same time taking a rank sheer to port."

(18) That the fourteenth finding be amended by inserting the words "in obedience to the tug's single whistle" after the words "to starboard of her."

(19) That the eighteenth finding be amended by inserting the words "but not before" after the words "vessel in tow."

(20) That an additional finding of fact and conclusion of law be made to the effect that some of the witnesses who testified as to fog in the district court were examined before the district judge, and that it is to be assumed as matter of law that the effect which the appearance of such witnesses produced on the district court is a fact proper to be considered by the circuit court in reaching a conclusion, or some similar conclusion, of law which would state the legal effect intended to be given by the court to the fact that some witnesses were so examined before the district judge.

Sidney Chubb, (*Geo. A. Black*, of counsel,) for libelants.

LACOMBE, J. 1. The proposed amendment to the second finding is refused; the evidence does not warrant a more specific statement.

2. The proposed amendment to the fourth finding is granted.

3. The proposed amendments to the fifth finding are refused; the evidence does not warrant a more specific statement.

4. The sixth finding is amended by inserting the words "after a brief period of slack water." The other proposed amendments to this finding are refused, the evidence not warranting more specific statements.

5. The proposed amendments to the seventh finding are refused for the same reason, but after the words "a short distance" there may be inserted "estimated by the witnesses from the Holberg at between 200 and 300 feet."

6. The proposed amendments to the eighth finding are refused for same reason.

7. The proposed amendments to the ninth finding are refused for the same reason.

8. The proposed amendments to the eleventh finding are refused for same reason.

9. The proposed amendments to the thirteenth finding are refused for the same reason.

10. The proposed amendment to the fourteenth finding is refused for the same reason.

11. The proposed finding to the eighteenth finding is granted.

12. The proposed additional finding of fact and conclusion of law is refused. It is not such a finding or conclusion as is contemplated by the act of 1875. That act does not require the circuit judge to set forth

among the findings and conclusions some small isolated fraction of the entire mental process by which as a trier of the facts he reached a conclusion touching the weight of conflicting evidence.

FARREL v. NATIONAL SHOE & LEATHER BANK.

(Circuit Court, D. Connecticut. July 18, 1890.)

1. DECEIT—MISTAKE OF LAW.
   Plaintiff, being about to enter into a contract with a corporation for loans and advances to it to a large amount, provided its debts had been accurately stated, for the purpose of verifying said statement, asked the defendant bank how much the corporation owed it. Defendant told him a certain amount, which did not include notes given to it by a third person for money actually loaned for the benefit of and received by said corporation, liability for which was denied by said corporation, and not understood, at the time, by the officer who gave the reply. The bank acted in good faith. Plaintiff, relying upon the correctness of the answer, entered into the contract. The bank afterwards claimed that the corporation was liable upon said notes, sued it thereon, the corporation went into insolvency, and great loss was suffered by plaintiff. In an action of deceit, *held*, that defendant was not liable, its representation having been made in good faith, the mistake which caused the misrepresentation being a mistake of law upon a state of facts which were imperfectly understood.
2. JUDGMENT—PRIVIES—ASSIGNMENT FOR BENEFIT OF CREDITORS.
   Though, under the insolvent laws of Connecticut, the trustees of an insolvent estate are the representatives of the creditors for the appropriation of the property of the insolvent towards the payment of their debts, they are not their privies in law so that a creditor is bound by all the findings of the court in a suit between the trustees and another creditor as to the validity of the latter's claim against the estate.

At Law.

J. P. Kellogg, *S. W. Kellogg*, and *Chas. R. Ingersoll*, for plaintiff.

Geo. C. Lay, *H. C. Robinson*, *J. Halsey*, and *John W. Webster*, for defendant.

SHIPMAN, J. This is an action at law, which was tried by the court, the parties having filed a written stipulation waiving a trial by jury, as will more fully appear by the stipulation which is a part of the record. Upon the trial by the court the following facts were proved, and are found to be true: In the year 1853, or 1854, a joint-stock corporation, under the name of Brown & Bros., was formed under the laws of this state for the manufacture of brass and copper goods in the town of Waterbury, which business was continuously prosecuted until the insolvency of said corporation in 1885. The corporation had for many years a store and branch office in New York city, of which William H. Brown had charge from about 1868 till 1884, and for a period of more than nine years before 1884 he acted as the New York agent and representative of the corporation, and during that time had exclusive charge of the loans and discounts obtained for it, or for its use, in New York. From 1875 till 1880, he was secretary of the corporation, and from 1880 to 1884 he was its president. In 1875 he opened two accounts with the defendant, one in the name of "William H. Brown, Agent," and

the other in the name of "Brown & Bros., William H. Brown, Secretary." Each of these accounts related solely to the business of the corporation. The "agent" account was the one used in the conduct of the New York business, and the other was used in connection with the business at Waterbury. Said Brown was in the habit of obtaining loans from said bank for the use of said corporation, upon accommodation paper made in the name of Brown & Bros., and secured by deposits of warehouse storage receipts of copper. On June 26, 1880, he gave such a note for $15,000, the proceeds of which were credited to the "agent" account. When it was renewed, he wanted to change the collateral, and offered, instead of the warehouse receipts, to give 600 shares of the Norwalk Lock Company stock, which he owned individually. The proposition was accepted, but the bank desired the form of the note to be changed so that said Brown should be the maker, because he was the owner of the collateral. This was done, and the new note was signed by William H. Brown, and was made payable to the order of the cashier of the bank. The note was also indorsed as follows: "WM. H. BROWN, Agt." Subsequently other notes for $2,400 and $12,500 were made in similar form, were payable to the order of the cashier, were signed by Brown individually, and were secured by stocks which he owned individually, and continuously thereafter, down to and at the time of the failure hereinafter mentioned, the renewals of said three notes, drawn and indorsed in the same form, and secured in the same way, amounting to $29,900, were due to and were owned by said bank. The second and third notes, and the renewals thereof, were each indorsed as follows: "Pay Nat. Shoe & Leather Bank. WM. H. BROWN, Agt." Said three loans were obtained from said bank for the benefit of said corporation, and, when made, were understood by said bank to be made to said corporation, and by the change in the form of the notes said bank did not intend to affect the liability of said corporation thereon. The proceeds of said three notes were used by said Brown for the benefit of said corporation. At the time of the transactions hereafter mentioned, said bank also owned the notes of said corporation, signed "BROWN & BROS.," to the amount of $17,300, which had been theretofore discounted by said bank for the benefit of said corporation. In the spring of 1884 said corporation became financially embarrassed, and on May 5, 1884, said Brown resigned all official connection with it, and the company substantially suspended business. Meetings of the stockholders were held, and efforts were made to secure some one to take the management of the company, and raise or provide money to carry on its business. A committee of the stockholders applied to the plaintiff, Franklin Farrel, who was a man of recognized financial credit and large means, to take the management of said company under his exclusive control, giving it the aid of his resources, credit, and business ability. The negotiations resulted in a contract between the stockholders of said company and said Farrell, whereby stock of said corporation of the par value of $100,000 was transferred to him in consideration of his written agreement, the important part of which is as follows:

"I further agree, for the consideration aforesaid, to loan and advance to said company, at 6 per cent. interest, such sum or sums of money as may be necessary to provide for the payment of the present existing indebtedness of said company, except such indebtedness as may be assumed by me or otherwise provided for in such manner as may be convenient for me, but in such way as shall relieve said company from claims thereon; and also to loan and advance such other sums of money as may be necessary to place said company upon a safe and reliable basis for the continuance of its business, and to provide stock, supplies, and means for carrying on the same, and to make necessary repairs and improvements in the mills and machinery of said company, and to provide for the continuance of its business, which sums of money so loaned and advanced to said company shall not be withdrawn or repaid to him until the existing indebtedness now being against said company shall be paid or provided for, or assumed by said Farrel, and said company relieved from liability thereon; but the interest on all sums so loaned or advanced by said Farrel shall be payable to him annually."

During the progress of the negotiations with Mr. Farrel, statements of the assets and a list of the liabilities of the company were made out at the meetings of the stockholders. The debt to the Shoe & Leather Bank was put in these lists at $17,300. The real estate and machinery were put in at $550,000 in these statements. With this valuation the statements showed an excess of about $223,000 of assets over liabilities, inclusive of the capital stock. The statements were shown Mr. Farrel. Before completing the arrangement, Mr. Farrel undertook to ascertain for himself the actual amount of the assets and liabilities, and through his agent verified the accuracy of such inventory, by actual count and weighing the manufactured stock on hand, except the stock of German silver goods, of which there was a considerable quantity, with which his agent was not familiar, and he took the statement of the officers or clerks of the company as to the value of that part of the assets. For the purpose of ascertaining the amount of the liabilities, and whether an extension could be obtained thereon with his indorsement, Mr. Farrel visited the different banks which held the bulk of the obligations of Brown & Bros. He went to the Shoe & Leather Bank, and asked Mr. Crane, the president of the bank, what the amount of the indebtedness of Brown & Bros. was to the bank, and whether the bank would extend them for one year upon his indorsement. Mr. Crane asked the discount clerk for the exact amount of Brown & Bros.' notes, and gave the amount of the notes to Mr. Farrel as $17,300, and agreed to give the extension requested. Mr. Farrel then visited all the other banks holding Brown & Bros.' paper, and found that the indebtedness of the company to those banks corresponded in amount with the list of the indebtedness given him by the company, and that he could procure a like extension from all the other banks. After he had ascertained these facts he decided to take the management of the company, and secure or indorse its liabilities, and to enter into the agreement hereinbefore mentioned. At the time of said Farrel's interview with the president of the Shoe & Leather Bank, said bank, in addition to the notes of Brown & Bros. for $17,300, which were unsecured, held the three notes hereinbefore mentioned, secured by 696 shares of Norwalk Lock Company stock, and 613 shares of Brown &

Bros. stock. Mr. Crane made no mention of these notes to Mr. Farrel. At the time of said interview Mr. Crane believed said notes to be fully secured by the personal collaterals of William H. Brown, and did not consider them to be obligations of Brown & Bros., and the liability of said corporation on said notes did not become apparent to him until afterwards. It was upon the understanding and belief by Mr. Farrel that the indebtedness of the company did not exceed the amount that had been so represented to him, and that the defendant's claim against the company did not exceed the amount that had been so represented to him, and that the defendant's claim against the company did not exceed the amount of $17,300, that Farrel was induced to and did enter into the arrangement with said company, and make said contract. The amount of the indebtedness was a material question with said Farrel in deciding upon and afterwards making the contract with the stockholders, and he would not have made said contract if he had known or been informed that the bank held another claim of $29,900 against the company by reason of the notes given by William H. Brown for that amount. The bank had full knowledge that said Farrel was inquiring into the amount of the indebtedness for the purpose of deciding whether he would take the management of the company, and that he decided to do so with the belief and understanding that the claims of the bank against the company did not exceed $17,300. Mr. Crane acted in good faith in his statement to Mr. Farrel. In carrying out the contract the bank transferred to Farrel its proportion of the stock of Brown & Bros. held by it. Farrel became president, and assumed control and management of the corporation, August 25, 1884, and indorsed the $17,300 notes held by the bank. The first extension was for one year; $15,000 of the same was then renewed for four months, the balance being paid. At the end of that time, when said Farrel sought a further extension, he was for the first time informed that a claim was made by the bank that the company was liable for said notes of $29,900. All the notes of $17,300 against the company, and also the notes for $29,900, had been protested, and were overdue, and lying in the bank as protested paper, at the time of Mr. Farrel's first interview with the bank officers in August, 1884. It was for the interest of the bank that said Farrel should take the management of the company, and indorse or secure the $17,300 held by the bank as protested paper of the company, as the debts of the company were in excess of their assets aside from their mortgaged real estate and machinery, and nothing could have been realized from the equity in said mortgaged property. After assuming control of the corporation, Farrel, in addition to indorsing the notes of the defendant bank, as above stated, indorsed the notes of the company held by all the other banks. He also borrowed $35,000 upon a note of the company, secured by his indorsement and collateral stocks of his own, which was presented to the commissioners, and allowed by them, but Farrel has paid the same in full. This money was used in paying current bills and starting work in the factory. He has also paid a large amount of other indebtedness of the company, and is held as indorser upon the remaining bank notes of the

company, so that what he has paid and what he is liable to pay will amount to $223,803.93, upon which dividends of 45 per cent. only have been or will be paid. The business continued under the management of Mr. Farrel for about a year and four months, when it was found that the company was insolvent, and that the capital stock could not be made of any value. Mr. Farrel undertook to settle up the business by paying or assuming all the claims against the company in full, whether secured or not, and disposing of the property to the best advantage. At this time the bank made the first claim to him that the company was liable for the three notes of $29,900, and soon after brought suit thereon against the company. In consequence of that claim and suit the company made their assignment in insolvency, under the statutes of Connecticut, for the joint and equal benefit of its creditors.

There had been large losses in the business after Farrel assumed the management, and there had been little or no profits. A considerable portion of this loss is accounted for by the disposition of the silver goods and business at a sum more than $30,000 less than they were inventoried for, and a fall in the price of copper. The losses to the company were not caused by the fault, neglect, or mismanagement of Farrel or his agents. Commissioners were appointed by the proper probate court to receive and allow or disallow claims against the estate of said corporation. The defendant presented its claim upon said three notes for $29,900, and upon the money represented thereby, which had been loaned to Brown & Bros., which claim was disallowed. The defendant appealed from said disallowance to the superior court for New Haven county, which court made a full finding of facts in the case, reversed the doings of the commissioners, and allowed the claim. Upon appeal, the supreme court of errors decided that there was no error in the judgment of the superior court, upon the ground that William H. Brown had authority to bind the corporation by procuring loans on its credit; that the entire proceeds of the loans went to pay the debts of the corporation, and that ignorance by the bank of such agency, if ignorance existed, was immaterial. It thereupon became the duty of the probate court to divide the fund resulting from the sale of the assets of said insolvent corporation among its creditors. The plaintiff and the trustees of the insolvent estate brought their petition to that court, setting up at length the facts which have been heretofore stated, and claiming "an equitable estoppel, which would prevent the bank from receiving any dividend upon its claim of $29,900 until Farrel had received upon his claim for moneys advanced to and liabilities assumed for Brown & Bros. the full dividend that he would have received if the bank's claim for $29,900 had not been presented." The court of probate dismissed the petition. Upon appeal of the petitioners to the superior court the facts were found in full by the court, and the questions of law arising thereon were reserved for the advice of the supreme court of errors, which court advised that the decree of the probate court should be reversed, and that court should be directed to pass a decree dividing the fund in its control in accordance with the prayer of said petition. This was ac-

cordingly done. Said Farrel's claims were $223,803.13. Said bank's claim was $29,900. The dividends then declared were 35 per cent., and the bank's share thereof was $10,465. Of this sum said Farrel received $7,385.53, and the bank received $3,079.47. Thereafter the present action at law, to recover the amount which the plaintiff lost in consequence of the defendant's untrue answer to his question, was brought. The plaintiff, to sustain the averments of his complaint, introduced the finding of facts by the superior court in the case of the appeal of the trustees of the estate of Brown & Bros. and Franklin Farrel against the defendant, which was admitted, and the facts hereinbefore found in regard to the transactions subsequent to the resignation of William H. Brown are stated in the language of said finding. The plaintiff also offered the finding of facts by the superior court in the case of the appeal of the present defendant against the trustees of said insolvent estate from the doings of the commissioners in the disallowance of said claim for $29,900. The admission of this evidence was objected to by the defendant. This record was offered upon the ground that the trustees represented in all their acts the creditors of the estate of the insolvent corporation, and that Mr. Farrel, as one of said creditors, was therefore a privy in law with the trustees. Although it is true that, under the principles of the insolvent laws of Connecticut, the trustees of an insolvent estate become the representatives of the creditors for the appropriation of the property of the insolvent towards the payment of their debts, and can avoid conveyances which are fraudulent and void as against attaching creditors, I do not think that there is such a mutual or successive relationship to the same rights of property between each creditor and the trustees as to make them privies in law, and to compel any creditor, as to rights or liabilities between himself and another creditor growing out of or incidental to their respective claims against the insolvent, to be bound by all the findings of a court in a suit between the trustees and such other creditor, wherein the validity of the latter's claim against the estate was the only matter properly in issue. I do not, therefore, admit the finding of facts in the defendant's appeal upon the ground that Farrel is a privy in law with the trustees, but the finding so far forth as it relates to the origin and history of said three notes, of the liability of said corporation thereon, the knowledge of the bank that the avails were for the benefit of the corporation, and to the intent of the bank in regard to said liability, is admissible, and was admitted, because the action was by the bank to enforce said liability, and the statements in regard to the origin of the claims, the use of the avails of the notes by the corporation, and the knowledge and intent of the bank in regard to the liability of the corporation were the bank's case, and are deliberate declarations or admissions on its part of the truth of these facts, which are also important in this case. 1 Greenl. Ev. § 527*a;* Steph. Dig. Ev. 100. The facts hereinbefore stated, which took place up to and including the resignation of said W. H. Brown, were admitted. Said two records were the only testimony which was offered by either party in regard to the alleged fraud by the bank. The plaintiff's direct loss in

consequence of entering into said contract, which he would not have entered into if the bank had answered his question correctly, was and is $115,706.63, without interest.

Upon the foregoing facts, the principal question is as to the liability of the defendant for the direct and injurious consequences which resulted to the plaintiff from the untrue, and in that sense, false, representation which was made by its president to the plaintiff concerning a material fact, the knowledge of which especially belonged to the bank. The oral argument was directed more particularly to the question whether the finding that Mr. Crane acted in good faith in making the representation was a finding which determined the result in favor of the defendant. The plaintiff contended that the facts brought the case within the principle announced in some of the modern cases, especially by the courts of Massachusetts, which is in favor of holding the person who makes positive material misrepresentations, not as to matters of opinion, and not by way of commendation of the seller's wares, but as of his own knowledge, professing to have knowledge that the representations are true, liable for the damages which are directly caused to a person to whom the representations are made, and who relies, to his harm, upon his confidence in their truth. Mere belief in the existence of a thing "will not warrant or excuse a statement of actual knowledge," in the view of the courts of Massachusetts. *Furnace Co.* v. *Moffatt*, 147 Mass. 404, 18 N. E. Rep. 168. The defendant insisted that the case was an ordinary action of deceit in which proof of fraud is requisite, and that to constitute fraud the false representation must be made either knowingly, or without belief in its truth, or recklessly, *i. e.*, careless whether it is true or false; and that a false statement, honestly believed, though on insufficient grounds, falls short of, and is a different thing from, fraud. In support of this position much reliance was placed upon the recent case of *Derry* v. *Peek*, L. R. 14 App. Cas. 337, overruling the judgment of the court of appeals, reported in 59 Law T. (N. S.) 78. The real difference between the courts is in regard to the latitude which shall be given to the word "recklessly," the house of lords, in *Derry* v. *Peek*, holding that the person who makes the misrepresentation must be actually reckless or careless whether he tells the truth or not, while the tendency of other judges is to hold that when a person has no reasonable cause to believe a thing to be true, and makes positive statements upon very insufficient cause, he is reckless. There is, however, a class of cases which comes under the general head of cases of deceit, in which, as it is generally held, the intent to deceive may not be a controlling circumstance. This class is described by Lord HERSCHELL, who gave the leading opinion in *Derry* v. *Peek*, *supra*, as follows:

"There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock*, 10

Ves. 470*a*, may be cited as an example where a trustee had been asked by an intended lender upon the security of a trust fund whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defense to the action. Lord SELBORNE pointed out, in *Brownlie* v. *Campbell*, L. R. 5 App. Cas. 925, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with." *Slim* v. *Croucher*, 1 De Gex, F. & J. 518; *Bower* v. *Fenn*, 90 Pa. St. 359.

This case is, in many of its leading features, very similar to those which are stated in the paragraph which I have quoted, and, if the facts are within the principle of those cases, the defendant is liable, notwithstanding his good faith. In this case, for the purpose of determining his course, Farrel was desirous of ascertaining from the bank a fact which it might be expected to know. The bank knew that Farrel's inquiry was for the purpose of deciding whether he would enter into the obligations which were specified in the proposed contract with the stockholders of Brown & Bros. If the three notes for $29,900 had been of the same character as the notes for $17,300,—that is, if the liability of Brown & Bros. had been known and manifest thereon,—Mr. Crane's forgetfulness of their existence, or opinion that they were fully secured, and his consequent good faith in answering Farrel's inquiry, would have been immaterial. The liability of Brown & Bros. was not one which was manifest upon the notes, but was a legal question, dependent upon the existence of a state of facts outside the notes, and this liability was not then apparent to Crane. The notes were made by Brown individually to the order of the cashier of the bank. They were then indorsed: "WM. H. BROWN, Agent," and from the instruments themselves and alone, the name of the corporation nowhere appearing upon the paper, it could not be clearly ascertained who was, in law, the indorser. *Falk* v. *Moebs*, 127 U. S. 597, 8 Sup. Ct. Rep. 1319; *Hitchcock* v. *Buchanan*, 105 U. S. 416. The liability of the corporation was not placed by the supreme court of errors upon the notes, but upon the fact that the loan was actually for the benefit of the corporation which used the money. The court say:

"Had the claim been so restricted, * * * [to the question whether Brown & Bros. could be held liable as makers, indorsers, or guarantors,] there would be obvious difficulties in the way of sustaining the judgment of the superior court, for one must be a party to a note to be made liable as maker or indorser, and the face of the notes in question does not indicate that they had any relation to Brown & Bros.; and, if the indorsement, 'WM. H. BROWN, Agent,' could be regarded as the indorsement of Brown & Bros., it would still be a mere contingent liability, without any foundation being laid to make that liability absolute." *National Shoe & Leather Bank's Appeal*, 55 Conn. 490, 12 Atl. Rep. 646.

When the form of the notes was changed, the bank intended that the corporation should be still liable, but it was plain that this liability was denied by the directors, and apparently Crane believed or had become satisfied that their opinion was well founded. The finding is that, at the time of the interview with Farrel, "Crane did not consider them [the notes] to be obligations of Brown & Bros., and the liability of said cor-

poration on said notes did not become apparent to him until afterwards." The corporation also did not consider itself to be liable thereon, and contested its liability through three courts, and it was not until an exhaustive examination of the facts that its liability became apparent. The existence of the facts upon which the validity of the claim depended subsequently became clear, and the disastrous attempt was made to enforce this liability by suit, but when the conversation took place Crane thought that he must rely upon Brown and his collaterals. The mistake or error which caused the misrepresentation was a mistake of law upon a state of facts which, when known, are apt to be puzzling. He did not forget, and did not conceal; but he was mistaken in his legal conclusions. If the misrepresentation had been, in terms, that of a conclusion of law as to the legal consequences of facts truly stated, the bank would have been undoubtedly not liable, (*Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. Div. 693;) and it is true that Crane did not tell Farrel the history of the $29,900 note, but simply stated the result, viz., that the bank's claims against Brown & Bros. were $17,300. The misrepresentation was not, therefore, a mere misrepresentation of law, because he did not tell Farrel his opinion or conclusion upon facts which were also communicated. But the finding leads to the conclusion that these facts did not become clear and the consequent liability did not become apparent to him till afterwards, and in that respect the case is peculiar. A misrepresentation was made, resulting from imperfectly understood and blurred facts, and a consequent erroneous conclusion of law, and it is, in my view, unjust to hold that the person who honestly comes to such an erroneous conclusion must be visited with the unfortunate pecuniary consequences of his error. It was a mistake by reason of which Farrel has suffered terribly, and one which might have been avoided had Crane been more talkative, and told Farrel of all the bank's transactions with Brown, but yet a mistake which ought not to be visited upon the bank in this suit. The conclusion is that, upon the facts as found, the defendant is not liable in this suit.

HENNING *v.* WESTERN UNION TEL. CO.

(*Circuit Court, D. South Carolina.* May 13, 1890.)

TELEGRAPH COMPANIES—NEGLIGENCE—EVIDENCE.

In an action against a telegraph company for an accident caused by a hanging wire, one witness testified that six or eight days before the accident four or five men cut down a telegraph pole near the place where the accident occurred, and left the wire hanging. There was no competent evidence that these men were in defendant's service. Another witness testified that two men employed by defendant cut down a pole in the same neighborhood 15 days before the accident, but left no wires hanging. There was no proof that the witnesses referred to the same transaction. *Held*, that the evidence did not connect defendant with the accident so as to justify a verdict for plaintiff.

At Law. On motion for new trial.

Buist & Buist and *John Wingate*, for plaintiff.

Barker, Gilliland & Fitzsimons, for defendant.

SIMONTON, J. This case has been exhaustively discussed, both in citation of authorities and in arguments upon them. The right of the court, after verdict, to look into and test the evidence upon which the jury came to their conclusion cannot be doubted. Whenever there is no evidence to sustain the verdict, or when there is evidence and it is insufficient, or when the preponderance of testimony is so great against the verdict as to raise the presumption that it was rendered through inadvertence, or bias or prejudice in favor of or against one of the parties, or through some corruption, misconduct, or objectionable behavior on the part of the jury, the court will and should set it aside. But when there has been competent evidence submitted on both sides, and the result depends upon the credibility which the jury attaches to testimony of the witnesses, without regard to the number of these witnesses, and the jury reach their conclusion, it is not competent for the court to interfere with it. It is not the opinion of the judge as to the credibility of the witnesses which governs such a case, nor his conclusion as to the preponderance of the evidence, based upon his opinion as to their relative credibility, nor what verdict he would find were he a juror. The jury alone can determine this. It is their exclusive province; and, were judges to interfere with it, the value of a trial by jury would be destroyed. Such is the result of the authorities quoted upon both sides. The names of the cases appear in a note to this opinion. Let us examine this case in the light of these principles. The plaintiff brought his action for damages resulting to him from this accident, caused, as he charges, by the negligence of the agents of the Western Union Telegraph Company. The burden of proof was on him. He and another witness testified that at the time of the accident he was going along the footpath quietly, and that he accidentally struck a hanging wire, which caused the accident. A witness was put up by defendant to contradict him in his statement that he accidentally touched the wire. The jury has solved this question. He did not contribute to the injury. There is no dispute upon the fact that a wire depended from the electric wire, causing the accident; and the only question remaining is, was this wire left hanging there by agents of the defendant? This plaintiff must prove, and, if there be any contradiction in the proof, the solution of the jury ends the question. The proof must be by competent evidence, that is, by evidence which the nature of the thing requires, (1 Greenl. Ev. § 2;) and in examining his proof the court is not only at liberty, it is its duty, to go into the whole case, and examine into the testimony offered by the defense, in order to see if all the testimony together may not sustain the verdict. See *Thomas* v. *Jeter*, 1 Hill, (S. C.) 382; *Railway Co.* v. *Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493. The witness for plaintiff who connects the defendant with the hanging wire is Augustus Pulfrich. He was called, and in his testimony in chief he swore that in the early part of September, some six, seven, or eight days before the accident, a time fixed by his illness the next day, he remembered the cutting of a pole in Hayne street at the place of this accident; that there were four or five men where the pole was cut, some assisting in it with pronged sticks in

their hands; that he was near the man who did the cutting, and saw the pole cut; that this was done by Stephen Rumph, who was in the employ of the Western Union Telegraph Company, and who told him that he got orders from that company to cut it down; that when the pole was cut down the line dropped on the electric wire, and he told the man to remove the wire away from the electric wire, and he told him that he (Pulfrich) had nothing to do with it. If the case of the plaintiff had ended here there could be no question of disturbing the verdict. But he was recalled in reply, and in his testimony, and in that of Mr. Buist, it appeared that he did not know the man Rumph at the time the pole was cut down, nor his connection with the Western Union Telegraph Company; that his only knowledge of these facts was derived in a conversation with Rumph, whom he saw and recognized at Branchville some months after the accident. The sufficiency of this evidence depends upon two questions: *First*, can it be used to show that Rumph was an agent of the defendant? and, *second*, can his declaration made at the time and under the circumstances stated be accepted? There is no evidence that the man Rumph was the agent of the defendant in cutting down the wire in question, except his own statement, made to Pulfrich at Branchville. Even were his other declarations admissible, his agency must be proved in some other way. His declarations *in pais* are not competent to prove it. Whart. Ev. § 1183, and cases quoted; *Jordan* v. *Stewart*, 23 Pa. St. 244. But were we to suppose that his agency has been shown by competent evidence, in this action of tort his statements made in Branchville, months after the accident, are not competent evidence. Whart. Ev. § 1174, and notes, and quoting cases. It is clear, therefore, that there was not sufficient evidence on the part of the plaintiff connecting the defendant with the accident. Was he aided by the evidence of the defendant? Is there in the testimony of the defense proof of facts supplementing the evidence of Pulfrich so as to fix the cause of the accident on the defendant. I assume from the action of the jury that Pulfrich's testimony was true in every respect. He saw on a day, six, seven, or eight days before the accident, which occurred on 15th September, 1889, four or five men taking down a pole on which were wires. One of these men was a man whom he afterwards identified as Rumph. None of them ascended the pole. They cut it down, sustaining it with pronged sticks, and, in the act of cutting, the wires fell and lodged on the electric wires. The man identified as Rumph cut down the pole, and Pulfrich warned him as to the consequences of his act, which warning was disregarded. The defendant's witnesses say that, acting for the Western Union Telegraph Company, they cut down a pole in the same locality on 1st September, 15 days before the accident; that two men only were engaged in that work,—Malone and Howell; that Howell climbed the pole, and cut away the wire; that Malone then cut down the pole as one would fell a tree, and that it came to the ground without any assistance of any kind; that Rumph was not in the party; that none of the wire fell on the electric wires, and that none of it was left behind; all of it was rolled up and carried away. Is there a conflict in this tes-

timony; which the jury must and could decide? Their province is to weigh the testimony *pro et con* and pass upon the preponderance. To do this, the testimony must be contrary,—the one inconsistent with the other. If the testimony on one side is true, that on the other must be false. As has been seen, the jury has believed Pulfrich, and for the purposes of this case his testimony is true. But, notwithstanding this, the two witnesses for the defense, Malone and Howell, whose evidence has been abstracted above, may also be true. They do not contradict Pulfrich, nor is their testimony inconsistent with his. On one occasion four or five men may have taken down a pole in the way he stated, and may have let fall a wire as he swears, and Rumph may have been —undoubtedly in the opinion of the jury was—one of them. Yet on another occasion Malone and Howell may have taken down a pole as they have stated, leaving no wire. And this is the more probable, as the only circumstance in which their testimony coincides with that of Pulfrich is in the locality. He speaks of circumstances, time, persons, and conversation wholly different from those spoken of by them. This being so, their testimony cannot supply the material fact in which the testimony of Pulfrich was insufficient. The verdict of the jury settled no conflict and decided no issue of veracity between him and them. Taking the whole testimony of all the witnesses, there is no legal evidence bringing home to the defendant's agents the cause or causes of the accident. Says Mr. Justice MILLER in *Pleasants* v. *Fant*, 22 Wall. 116:

"It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury. But, conceding to all the evidence offered the greatest probative force to which according to the law of evidence it is fairly entitled, is it sufficient to justify the verdict? If it does not, then it is the duty of the court after a verdict to set aside and grant a new trial."

After careful review and consideration of the whole record in the case, I am satisfied that the verdict was not sustained in a material point by the evidence. The charge of the judge induced the error on the part of the jury, in that it assumed that there was competent evidence before them, which, if they believed, would justify a verdict for the plaintiff. This assumption was clearly an error on his part, and prejudiced the defendant. Undoubtedly it is the province of the jury to find all matters of fact, and of the court to decide all questions of law; but a jury has no right to assume the truth of a material fact without some evidence legally sufficient to establish it. It is therefore error in the court to instruct the jury that they may find a material fact where there is no evidence from which it may be inferred. *Parks* v. *Ross*, 11 How. 373. The verdict of the jury is set aside, and a new trial is granted.

NOTE OF CASES CITED. *U. S.* v. *Tillotson*, 12 Wheat. 180; *Ewing* v. *Burnet*, 11 Pet. 41; *Hickman* v. *Jones*, 9 Wall. 197; *Klein* v. *Russell*, 19 Wall. 463; *Insurance Co.* v. *Snyder*, 93 U. S. 393; *Moulor* v. *Insurance Co.*, 101 U. S. 708; *Wilkinson* v. *Greely*, 1 Curt. 63; *Blanchard's, etc., Factory* v. *Ja-*

cobs, 2 Blatchf. 69; *Hathaway* v. *Railroad Co.*, 29 Fed. Rep. 489; *Nonce* v. *Railroad Co.*, 33 Fed. Rep. 429; *Sargent* v. *Association*, 35 Fed. Rep. 711; *Wakeman* v. *Hungerford*, 16 Fed. Rep. 741; *Fearing* v. *De Wolf*, 3 Woodb. & M. 185; *Aiken* v. *Bemis*, Id. 348.

UNITED STATES v. BROWN.

(Circuit Court, D. Vermont. August 8, 1890.)

OFFENSES AGAINST POSTAL LAWS.

Mailing a letter inclosed in an envelope, on which the words "Excelsior Collection Agency" are printed in very large full-faced capital letters, which occupy more than half the envelope, and are so placed as to be entirely separate from the direction to return to the sender, is a violation of 25 St. at Large, U. S. 496, c. 1039, which forbids mailing any envelope on which appears any delineation, epithet, or language calculated and intended by its terms, manner, or style of display to reflect injuriously on the character or conduct of another.

At Law. On demurrer to indictment.

Frank Plumley, Dist. Atty.

William P. Dillingham, for respondent.

WHEELER, J. By chapter 1039 of the Laws of the First Session of the Fiftieth Congress, 1888, (25 St. at Large, 496,) all matter otherwise mailable upon the envelope or outside cover or wrapper of which any delineations, epithets, terms, or language calculated by the terms, or manner, or style of display, and obviously intended to reflect injuriously upon the character or conduct of another, may be written, or printed, or otherwise impressed or apparent, is declared to be non-mailable; and depositing such matter for mailing or delivery is made punishable by fine of not more than $5,000, or imprisonment at hard labor not more than five years, or both, at the discretion of the court. The respondent is indicted for depositing for mailing and delivery matter upon the envelope of which the words "Excelsior Collection Agency" were printed in large letters, and calculated, by the terms, manner, and style of display, and obviously intended, to reflect injuriously upon the character and conduct of the person addressed. He has demurred to the indictment, and raised the question whether those words are capable of being so displayed upon an envelope or wrapper of mail matter as to be calculated, and obviously intended, to reflect injuriously upon the character or conduct of another person. If they can be, they are well charged in the indictment to have been so displayed as to be so calculated and obviously intended. To make the matter non-mailable, and constitute the offense that the delineation is calculated and obviously intended to so reflect, must be apparent from an inspection of the envelope. The design and intention must appear from that, and not from extrinsic facts averred or shown. The reflection upon character or conduct must come from seeing the envelope. The question here is whether it would come

from seeing this envelope addressed to a person as mail matter. The sending of letters with those words on the outside to a person would lead to the inference that the character, or conduct, or both, of the person sent to, in respect to the fulfillment of pecuniary obligations, was such as to make the sending necessary or justifiable, unless they should be so restricted by connection with other words as to show that they were used for directions to return if not called for, or other legitimate purpose, not referring to the person addressed. The manner of display might indicate clearly whether the words were placed there for injurious reflection upon that person, or for legitimate transmission of the contents of the envelope through the mails. The indictment shows that the manner of this display indicated intended reflection. The indictment, therefore, appears to be sufficient. Whether the display of the words upon the envelope would support the averments of the indictment would be a question of fact for a jury.

The respondent's counsel and the district attorney have submitted a sample envelope printed like the one in question, upon a suggestion that if, in the opinion of the court, it would warrant a verdict of guilty, the respondent would plead guilty in answering over upon the overruling of the demurrer, although he was ignorant of the statute, and innocent of all intention to violate any law. Upon this sample the words "Excelsior Collection Agency" are printed in very large full-faced capital letters, which occupy more than the upper half of the envelope; are separate from directions to return to the respondent if not called for, in the lower left-hand corner; and were obviously placed there to attract attention, and reflect delinquency in making payments upon the person sent to. The object probably was to make the person pay up to avoid repetition of the reflection. The depositing of mail matter for delivery with such words so displayed upon the envelope would seem clearly to constitute an offense within the act of 1888, which appears to be aimed at all use injurious to the feelings of others of the outside of mail matter. Demurrer overruled, the respondent to answer over.

BORTREE *et al. v.* JACKSON.

(*Circuit Court, N. D. Ohio.* July 18, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.
The claim in letters patent No. 369,979, issued to Lewis S. Bortree September 13, 1887, for "a bustle having coil springs arranged longitudinally thereof, coil springs arranged centrally and at right angles thereto, and means for holding the same to any desired adjustment," having for its object to provide for giving a greater or less amount of fullness in the direction of its length, by contracting or letting out the upper or lower central coil, so arranged at right angles, by means of a cord and loop, is not infringed by a bustle having similar longitudinal and central coils, but incapable of, and not designed to give, such adjustability.

2. SAME.
Such device does not infringe the third claim in such letters for "a bustle comprising a series of coil springs extending in the direction of its length, coil

springs at right angles thereto, with means for holding the same to any desired expansion or contraction, the whole covered with a suitable fabric, as and for the purpose set forth," since under the last clause the claim will be construed with reference to the purpose previously set forth.

This is a bill in equity to recover damages for the infringement of letters patent No. 369,979, issued September 13, 1887, to the plaintiff Lewis S. Bortree for a bustle.

In his specifications the patentee states that "his invention relates to an adjustable bustle, having for its object to provide for giving a greater or less amount of fullness to any portion of the same *in the direction of its length.*"

This object was attained by the use of a series of longitudinal coil springs laid parallel to each other, with three in front, and one on each side thereof, bearing upon the two outer front coils; thus leaving an intermediate space in the center of the inner side of the bustle occupied by a single coil. In this central inner space are arranged two or more horizontal coil springs at right angles to the others, and of a length, when in normal condition, to protrude for some distance beyond the outer periphery of the coils at each side, and are adapted to be contracted to the diameter of the longitudinal coils. Strings were attached to the bustle parallel with the horizontal coils, and threaded through eyelets or loops formed at the outer ends of the springs, and adapted to hold the same in their contracted condition. By contracting or pressing upon the upper horizontal spring, allowing the lower spring to be extended, the skirt of the dress is thrown out some distance below the waist, while if the lower spring be contracted, and the upper one relaxed, the skirt is thrown out immediately below the waist. This feature of adjustability is what the patentee intended by his words, "to provide for giving greater or less amount of fullness to any portion of the same in the direction of its length."

The claims alleged to be infringed were the second and third, which read as follows:

"(2) A bustle having coil springs arranged longitudinally thereof, coil springs arranged centrally and at right angles thereto, and means for holding the same to any desired adjustment, as set forth.

"(3) As an article of manufacture, a bustle comprising a series of coil springs extending in the direction of its length, coil springs at right angles thereto, with means for holding the same to any desired expansion or contraction, the whole covered with any suitable fabric, as and for the purpose set forth."

The defenses were want of novelty and non-infringement.

It is conceded that claim 1 is not infringed.

L. L. Leggett, for plaintiffs.

Almon Hall, for defendant.

BROWN, J. The invention in this case is a very narrow one; and, in view of the state of the art, we think the patent should receive a strict construction. We are clear in our opinion that there is no infringement of the second claim, which is for a bustle having coil springs arranged longitudinally, coil springs arranged centrally, and at right angles thereto,

with means for holding the same to any desired adjustment. While the defendant uses coil springs arranged longitudinally, and also coil springs at right angles to these, they are not arranged centrally, at right angles to the central longitudinal coil; but there are three such springs arranged at right angles to the three longitudinal springs, which latter are curved at the top, and at that point are practically parallel with the horizontal springs. They, therefore, do not accomplish the object sought to be obtained by the patent, of giving greater or less amount of fullness to the bustle in the direction of its length. Defendant's horizontal springs are evidently intended to be contracted or relaxed together. If one or two were contracted, and the third were relaxed, the skirt would be extended, not in the direction of its length, but in that of its breadth, and would inevitably have a one-sided appearance.

If the third claim were construed according to its exact language, and without reference to the specifications, the defendant's bustle would infringe, since he has a series of coil springs at right angles thereto, with means for holding the same to any desired expansion or contraction, and substantially the whole covered with a suitable fabric. We were at first inclined to give it this construction; but, upon reflection, we are satisfied that, having reference to the words "as and for the purpose set forth," at the end of this claim, we are bound to construe it in connection with the specifications, and in view of the object declared by the patentee, "to provide for giving greater or less amount of fullness to the bustle in the direction of its length." In discussing the effect of the words "substantially as described," or "substantially as set forth," it is said in *Seymour* v. *Osborne*, 11 Wall. 516, 547:

"Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specifications; and, where it contains the words referring back to the specifications, it cannot properly be construed in any other way."

So, in *The Corn-Planter Patent*, 23 Wall. 181, 218, it is said that the words "'substantially as and for the purpose set forth' throw us back to the specifications for a qualification of the claim, and the several elements of which the combination is composed." See, also, *Matthews* v. *Shoneberger*, 4 Fed. Rep. 635; *Westinghouse* v. *Air-Brake Co.* 2 Ban. & A. 55, 57. In the light of these authorities, we think the third claim should be construed in connection with the declared object of the patentee, and that it should receive substantially the same construction as the second claim, with the addition of the covering of a suitable fabric. This seems, also, to have been the views of the learned counsel for the plaintiffs, as stated in his brief.

Now, as the defendant's bustle is not designed to secure adjustability in the direction of its length, and as he has not arranged his horizontal springs against the central longitudinal coil in such a way as to make it possible to accomplish this result, we think that he cannot be held to infringe. Upon mature consideration of this case, we have come to the conclusion that the bill ought to be dismissed.

McEvilla v. Hall & Shelvin Lumber Co.

(Circuit Court, D. Minnesota. August 27, 1890.)

PATENTS FOR INVENTIONS—ANTICIPATION—SAW-MILLS.

Letters patent No. 377,630, issued February 7, 1888, to Henry McEvilla, for improvement in reciprocating saw-mills, consisting in the combination with the feed mechanism and dividing shaft, of upper and lower slides carrying the saw-gate, such lower slides having the pins on which they oscillate located below the top of the slides, were anticipated by letters patent No. 156,193, issued October 20, 1874, for an invention exactly the same except as to the location of said pins.

In Equity.

P. H. Gunckel, for complainant.

Paul & Merwin, for defendant.

NELSON, J. A suit is brought in equity for an infringement of letters patent No. 377,630, granted February 7, 1888, to Henry McEvilla, for improvement in reciprocating saw-mills. The alleged infringement is confined to the first claim of the patent. The defenses are anticipation and non-infringement. The first claim is as follows:

"In combination with the feed mechanism and the dividing shaft of the saw-mill gang, upper and lower slides carrying the saw gate or frame and mechanism substantially such as shown for oscillating the lower slides connected with and driven by the main driving shaft, said lower slides having the pins on which they oscillate located below the top of the slides and above the pin on the lower girder of the gate when the latter is at the upper limit of its stroke, whereby the saws are made to recede from the log at the start, and thus the cut at the first quarter of the stroke equalized with the cut during the rest of the stroke, as specified."

In the specification, it is said:

"The invention may therefore be said to consist in so arranging the lower slides, upon which the saw or saws reciprocate in a gang or other reciprocating saw-mill, that the pins upon which they oscillate shall be in such a position relatively to the pins carrying the lower end of the gate or saw as to equalize the cut during the first quarter of the down stroke with the other three parts of the same, and free the saw or saws completely during the up stroke; and, further, to the devices employed for changing the position of the upper slides to give the rake corresponding with the rake of feed given to the log or cant," etc.

The purpose of the invention is to overcome the continually changing speed of a saw driven by a crank having a uniform rate of revolution by means which will so regulate the movements of the saw as to fully equalize the cut in the down stroke, and give effective clearance upon the up stroke, so that the teeth shall each perform its proper part of the work in the down stroke, and be kept away from the front of the cut during the up stroke. The changing speed of a saw increasing and decreasing is due to the pitman or such other device used to connect the crank with the reciprocating body. The location of the pins on which the lower slide oscillates below the top of the slide and above the pins on the lower girder of the gate when it is at its extreme upper travel equalizes the cut,

it is claimed, in the down stroke, and gives effective clearance upon the stroke, so that a uniform and unchanging speed is secured. If the location of this pin on which the lower slides oscillate below the top of the slide, instead of being above the top, makes any difference in the result, then perhaps the defendant's improvements involve a patentable invention, but if the location of the pin above or below the top is a change in form, and not in substance, and the difference in result, if there is any, is one of degree, then McEvilla has no patentable invention.

A patent was granted to I. B. Wayne (No. 156,193) on October 20, 1874, in which the only substantial difference of construction in the mechanism employed is the location of the pins on which the lower slides oscillate just above the top of the slide; and the complainant's expert Redfield, in describing the McEvilla invention, admits that the location of the pin does not change the results obtained, and although he says the feature in the McEvilla patent of having the pivot of the slide at all times above the pivot in the lower end of the sash-frame is peculiar, and not general in saw-mills, he thinks the change in location would make no material difference in the operation of the machine, except a difference of quality, rather than of kind. The patents of Wayne and McEvilla are substantially identical in the results obtained. In both the pins which oscillate the lower slides are above the pins on the lower guides of the gate when the latter is at the upper limit of its stroke, but the pins on which the slides oscillate in the McEvilla patent are below the top of the slides, which location of the pins is not in the Wayne patent. There is no patentable invention in this.

The Ehlers patent, No. 78,443, granted June 2, 1868, reissued as No. 6,185, December 22, 1874, locates the pins on which the slides oscillate below the top of the slide, so that McEvilla was not the first even to do that. Without considering, therefore, the case further, I am of opinion that the defendant is entitled to a decree dismissing the bill, and it is so ordered.

SUGAR APPARATUS MANUF'G CO. *v.* YARYAN MANUF'G CO. *et al.*[1]

(*Circuit Court, E. D. Pennsylvania.* July 8, 1890.)

1. PATENTS FOR INVENTIONS—EVAPORTING APPARATUS—NOVELTY.
The combination in an evaporating apparatus of parallel evaporating tubes, discharging both liquid and vapors directly into a common separating chamber, with a provision for an equal and regulated supply of the liquid to be evaporated to each of the tubes, *held* to be a patentable novelty.

2. SAME—EVIDENCE—AMENDMENT OF APPLICATION TO AVOID PRIOR PATENT—ADMISSION.
Yaryan, one of the defendants, and president of defendant company, who was conversant with the art, had applied for a patent for evaporating apparatus, which was rejected on the first patent in suit. He amended his application to avoid this patent. *Held*, that Yaryan's admissions in the patent-office should be regarded as the expressions of a competent expert, and as evidence in support of the validity of the patent in suit.

[1]Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

3. SAME—EXTENT OF CLAIM.
The original application for the first patent in suit included the device afterwards patented in the second; in erasing a description of this, there was also erased a description of a modification of the first, in which a "dome" placed above the evaporating tubes was dispensed with. The claims in issue do not include the dome as an element of the combination. *Held:* the claims should be construed to cover the combination set out therein, and the "dome" should not be read into the claims.

4. SAME—EXTENT OF CLAIM—DRAWINGS.
A claim containing as elements certain tubes, without specifying vertical or horizontal tubes, is not confined to vertical tubes, though the drawings show them only in this position, and their ends are designated as "upper" and "lower," where the invention clearly includes horizontal tubes, especially where, in other claims, the patentee intends to confine himself to vertical tubes, and he so expresses himself in plain language.

5. SAME—LETTER IN REPLY TO REJECTION—NOT LIMIT OTHER CLAIMS.
A letter from applicant for patent replying to a rejection by the patent-office, distinguishing a claim from the references cited against it by calling attention to the fact that the surfaces made an element therein were vertical, not horizontal as in the alleged anticipation, affects no claim but the one rejected.

6. SAME—LETTERS TO OFFICE BEFORE GRANT OF PATENT—CLAIMS NOT AMBIGUOUS.
A correspondence between the inventor and the patent-office prior to the grant of the patent cannot control the import of claims the terms of which are not ambiguous.

7. SAME—INFRINGEMENT—EXPERT TESTIMONY NOT NECESSARY.
Where expert testimony does not seem necessary to the court, it can proceed to determine the question of infringement without its aid.

8. SAME—LETTERS PATENT NO. 341,669.
Claims of letters patent No. 341,669 sued upon, *held* to be valid claims and infringed by defendant.

9. SAME—ABANDONMENT—ERASURE FROM PRIOR APPLICATION.
The specification of a patent originally embraced matter which was erased before issue, and was after the issue presented in another application and patent issued thereon. *Held*, not an abandonment of the parts erased from the first specification.

10. SAME—NOVELTY.
Claims which cover merely placing several apparatus side by side, and connecting them in substantially the same manner as had previously been done with analogous apparatus, a pump to cause a flow of liquid from one to another being the only new element, do not, even though the individual apparatus had a special fitness for such connection, cover patentable novelty.

11. SAME—LETTERS PATENT NO. 378,843.
The novel portion of claims of letters patent No. 378,843 sued upon, is fully claimed in prior patent to same inventor, No. 341,669, also sued upon. The question of infringement and novelty of other claims in patent No. 378,843 not being in issue, not passed upon.

12. SAME—NOVELTY.
The claims sued upon in letters patent No. 378,843, claim merely duplications of the apparatus claimed in letters patent No. 341,669, and the addition of a pump cannot make the subject-matter of said claims, a patentable invention in view of said letters patent.

In Equity.

Bill for injunction and account against the Yaryan Manufacturing Company, Homer T. Yaryan, and Frederick B. Dodge. The apparatus described in complainant's patent 341,669, consisted essentially of a chamber, E, in which were a number of parallel tubes, *b*, *b*, *b*, called a "battery," along the interiors of which the liquid to be evaporated was made to pass in thin films. The exterior of the tubes were exposed to the action of hot steam. At the top of the tubes was a chamber, G, which received the liquid, and had devices distributing it over the interior surfaces of the tubes. At the bottom of the tubes was a well or separating chamber, P, that received both the vapors and the unevaporated liquid from the ends of the tubes, and was kept, as were the tubes, in a comparative

vacuum. Outside the apparatus was a condenser which was connected by a conduit, Y, with the chamber, P, to draw off the vapor, and to maintain a vacuum in the chamber and evaporating tubes, and in the drawings was shown a "dome" into which the tubes communicated at the top, which also was connected with the condenser. The claims alleged to be infringed were:—

"(4) In an apparatus for evaporating liquids, the combination of a heating chamber containing the battery of tubes, *b*, chamber, G, communicating with the interiors of the tubes, as described, chamber, P, and conduit, Y, connecting the chamber or well, P, with a suitable vacuum-inducing apparatus, substantially as described. (5) In an apparatus for evaporating liquids, the combination of a battery of tubes contained in a heating chamber, means for delivering a liquid upon the interior surfaces of the tubes near their upper ends, well, P, for receiving the vapors and unevaporated liquid from the lower ends of the tubes, and means for maintaining a more or less perfect vacuum in the well, P, substantially as specified. (6) In an evaporating apparatus constructed and operating as set forth, the combination of a battery of tubes, *b*, contained in a suitable heating chamber, well, P, with which the lower ends of the tubes communicate, and into which the unevaporated liquid from the same flows, and a pump or equivalent means for returning liquid from the well, P, into the interior surfaces of the tubes, substantially as specified." "(11) In an evaporating apparatus, constructed substantially as described, the combination, with the chamber, G, and well, P, of a pump, M, or other suitable means for returning liquid from the well, P, into the chamber, G, substantially as described."

In claim 1, the patentee has used the words "approximately vertical" in reference to the "evaporating surfaces;" and in the second claim the word "vertical" in reference to "tubes" in certain combinations.

Edward N. Dickerson, *Randall Morgan*, and *George Harding*, for complainant.

Elmer P. Howe and *Chauncey Smith*, for defendants.

BUTLER, J. The suit is for infringement of two patents, No. 341,669, dated May 11, 1886, and No. 378,843, dated, February 28, 1888,—granted to S. M. Lillie,—the first for "improved apparatus for evaporating sugar solutions," and the second for "vacuum apparatus for evaporating liquids." The defense assails the validity of each patent; and also denies infringement. The specifications of No. 341,669 carefully describe the apparatus covered by that patent,—too elaborately, however, for insertion here. This patent, and the alleged infringement of it, will first be considered.

The process, which the apparatus is designed to carry out is described in the specifications as follows:

"The process consists in causing the sugar solution for evaporation, to flow in thin films over surfaces heated by steam or otherwise, and in maintaining in the space or spaces in which the surfaces are exposed, and in which the evaporation takes place, a more or less perfect vacuum, to facilitate the evaporation of the solution flowing over the heated surfaces."

The application for this patent was filed on the 25th day of April, 1884. The charge of infringement is confined to the fourth, fifth, sixth,

and eleventh claims. The history of the art, to which the patent belongs, shows that prior to Lillie's invention the most advanced apparatus for vacuum distillation was one patented by Mr. Yaryan in 1884. It is well described in the accompanying specifications, from which the following is copied:

"In the ordinary operations of vacuum distillation a 'vacuum pan' is employed, consisting, substantially, of a large copper or iron vessel for holding the liquid to be evaporated, and provided with steam coils at the bottom of said vessel for heating the liquid. Among the difficulties attending the process as ordinarily followed are, that by reason of the necessity of dealing with only the immediate contents of the vessel at one operation the process is not continuous, and time and labor are lost in the frequent replenishing required. Moreover, owing to the length of time during which the liquid is necessarily exposed to heat, in many cases the color is injured and the value of the ultimate product impaired, while in the case of saccharine solutions this prolonged exposure to heat tends to convert crystallizable into uncrystallizable sugar. Further, in order to deal with a sufficient quantity for commercial practicability at each replenishing, a vessel of large dimensions is required, thereby entailing large original outlay, besides increased cost in maintaining a vacuum and a large waste of heat by radiation from so large an exposed surface. In such pans a large inner space must be allowed for frothing, to prevent loss in boiling over, and the entire operation thus necessitates constant and highly-skilled attention to prevent turbulent boiling."

Mr. Yaryan's previous patent, of 1878, is also worthy of attention in this connection, and has not been overlooked. It is not necessary, however, to enlarge on this branch of the case. The state of the art, the deficiencies of former apparatus, and the object of inventors in this line, are readily seen and understood by an examination of the patents just referred to. Mr. Yaryan's apparatus of 1884 was intended for a more effectual means of applying the process of vacuum distillation. The process itself was old. The apparatus was not successful when applied to sugar distillation. The reasons are stated by Mr. Yaryan in his applications for other patents in 1886. In one of them he says:

"In an apparatus patented by me June 10, 1884, No. 300,185, the advantages of continuous and rapid evaporation *in vacuo*, are fully and correctly stated. In operating the apparatus therein described, where large quantities of liquids are to be operated upon, it becomes necessary to multiply the number of coils in order to obtain the requisite amount of heating surface. To a certain limit this is practicable, beyond which, and especially when used for multiple effects, there are serious objections, among which are cost, space occupied, and the large number of joints exposed to the atmosphere to be kept tight. In the apparatus, and by the methods constituting the subject of my invention, these difficulties are largely overcome; and to this end I employ a cylinder containing a large number of tubes, each tube being the equivalent of a coil, and so arranged as to receive an equal feed and to discharge into a common separating chamber."

In the other of said applications of 1886, he says:

"In the apparatus described in said original patent, numbered 300,185, the fluid to be evaporated is fed to a coiled pipe connected with a vacuum pump and surrounded by steam or other heating medium. In its course through said pipe the fluid gives off in vapor its volatile constituents, and the vapor and fluid are discharged into a separating chamber, from whence the vapor

passes over either to a condenser or to the outer air, while the evaporated substance is withdrawn from the separating chamber by a tail pipe or pump, making the evaporating process continuous. In the specification of said letters patent I point out that as the equivalent of the arrangement shown, the coil of pipe conducting the liquid to be evaporated may be inclosed in a larger pipe instead of a drum, and the steam or other heating medium introduced in the space between the two pipes. In practice I find this arrangement to be preferable, as the simpler and cheaper form, and my improvement relates more particularly to a device employing coils so arranged. When it is desired to increase the capacity of my device so as to treat fluids in large quantities, I find that it is not practicable to do so by increasing to any considerable extent either the diameter or length of the pipe constituting my evaporating coils, for the following reasons: *First.* The coils being usually of copper, the increase of thickness and weight of metal requisite as the diameter of the pipe is increased, renders the cost, as well as the bulk and weight of the enlarged coil, entirely disproportionate to the increase of capacity. *Second.* Unless the diameter or area of the pipe is restricted, a sufficient current of vapor will not be formed to throw the liquid being evaporated into commotion, so as to constantly bathe the whole inner surface of the coil, which is absolutely necessary to insure the greatest efficiency of heating surface and to prevent coating and clogging of the coil. *Third.* In coils composed of pipe of uniform diameter a uniform degree of vacuum and heat cannot be maintained throughout the coil, owing to the constantly increasing volume, pressure, and friction of the vapor as it progresses towards the separating chamber. *Fourth.* When the coil is of too great length, the friction of the contained fluid and vapor amounts to several inches of mercury, or, in other words, a vacuum gauge connected with the outlet will mark some inches higher than one connected with the inlet, which results in unduly heating the substance contained in the inferior vacuum, and in consequent injury to the product."

To overcome the defects of Mr. Yaryan's apparatus of 1884, and of all others then in use, was, as we have seen, the object of his later inventions. Mr. Lillie's efforts had also been directed to this end, and, as before stated, he applied for the patent under consideration, April 25, 1884. A comparison of the specifications and claims of Mr. Yaryan's application of 1886 (for No. 355,259) with Lillie's shows that the invention described in each (as respects the matters here involved) is substantially the same. Differences in form and construction of some parts of the apparatus, described in the two applications, appear; but they seem to be immaterial as respects the subject of invention now under consideration. In principle, operation, and effect the apparatus are, I think, the same, to the extent involved. Mr. Yaryan, on being referred to Lillie's patent, amended and obtained letters. The apparatus, however, subsequently underwent other changes, which appear in his subsequent patent of 1888. This reference to the state of the art and acts of the parties brings us to the questions raised by the defense.

First.—Is the patent valid—does the improvement show patentable novelty? It would not be profitable to devote much space to this question. Starting with the usual presumption in favor of the patent, considering the state of the art, and the admissions of Mr. Yaryan, shown in his application for the patent just referred to, covering similar invention, the conclusion that this question should be answered affirmatively seems unavoidable. I do not attribute to these admissions the

force of an estoppel, but treat them as the expressions of a competent expert. Without them, indeed, it would seem reasonably clear that Lillie was the first to perfect an apparatus adapted to the successful application of this process of vacuum evaporation to sugar liquids. How he accomplished it—the peculiarities of his apparatus—fully appears by his specifications. The substitution of comparatively short parallel tubes for the old coils of pipe, the addition of a separating chamber into which they discharge directly, both the liquid and vapor, with provision for an equal, regulated supply to each of the tubes, constitute the most important new features. These changes from the old devices are of great value; and with others of less consequence, combined as he describes, constitute substantially a new apparatus. The improvement over all former devices, intended for the same use, is such an advance in the art as seems to put the question of invention beyond doubt.

Second.—Has the respondent infringed? As we have seen, the claims involved are the fourth, fifth, sixth, and eleventh. They are for combinations of various elements of the apparatus, and are readily understood. Were they intended to express what their terms (considered in connection with the specifications alone) import; or should they be construed to mean something else? On this question much time and labor were expended. The respondent has subjected the claims to careful analysis, in the light not only of the specification, but also of attending circumstances, in an effort to show that they include by implication the "dome, D," and also a *vertical* arrangement of the tubes.

As respects the first—the implication of the dome—I cannot accept the respondent's view. The point is, however, not free from embarrassment. The difficulty arises, apparently, from carelessness of the patentee in erasing from the specifications (as originally filed) what relates to the "multiple effect" combination. In doing this he included in the erasure a description of modifications of the "single effect" apparatus, dispensing with the dome. This description has no special relation to the combination referred to; it relates particularly to a modification of the previously-described "single effect" apparatus. The claims under consideration were drawn in conformity with it—dispensing with the dome, before the erasure was made, and were subsequently allowed without change. The erasure seems, therefore, to be the result of inadvertence. The embarrassment arises from the insertion of the clause and its erasure combined. If the clause had been omitted originally, I think it would be reasonably clear that the claims should be construed to cover the combinations stated, without the dome, as their terms import. Under the circumstances, I still think they should be so construed. Both the office and the patentee must, I think, have understood them to cover the modification stated. They were drawn, as before observed, prior to the erasure, when it is clear such modification was intended, and were allowed, subsequently, without amendment. I attach no importance to the fact that the patentee included the dome when describing the operations of his device. From this description the operation without the dome is readily understood; and it would have

been unusual to describe the operation with reference to the various modifications contemplated. Besides, this description was also written before the erasure, when, it is clear, the modification was contemplated. I cannot seriously doubt that the claims were understood and intended to cover only what they express—a modified combination, dispensing with the dome.

As respects the second—the implication of *vertical* tubes—more should be said. That the claims were originally intended to cover the combinations with tubes differently arranged (varying from vertical) I cannot doubt. It must be supposed that Lillie intended to cover his entire invention. If he confined himself to vertical tubes he did not cover it; for the invention embraces tubes in any other practicable position, as clearly as it does those vertically arranged. There is nothing more to distinguish the latter from what was old than the former. If tubes in horizontal position, or varying at all from vertical, had been old, a change to vertical would not have been patentable. The specifications show that Lillie so understood the scope of his invention, and the claims show his intention to cover the whole of it. The specifications refer to other than vertical tubes, and the claims are drawn in terms, not only broad enough, but most appropriate to include such other tubes. Where he intends to confine himself to a vertical arrangement he so expresses himself in plain language, as appears by other claims. Where he intends to confine himself to a *slight variation* from vertical, he says so, as in the first claim. While he attaches most importance, as he states, to the vertical arrangement, for reasons given in the specifications, he attaches importance also to any other which is practicable. His statement of preference for the former is not an exclusion of the latter, but rather an implied reiteration of his claim to it. The respondent's inference, from what he says on this subject, would seem to limit him to *strictly* vertical tubes. If varied even slightly from this position the tubes might nearly as well be horizontal; for in such case the equal distribution to their surfaces, from which the especial benefit of the vertical position arises, could not be maintained. The respondent further points, in this connection, to the words "upper and lower ends" of the tubes, found in the claims. I do not think importance should be attached to this language. It is strictly appropriate if the tubes vary ever so little from horizontal; and it is not entirely inappropriate, I think, when applied to the receiving ends of horizontal tubes through which a stream flows. We associate the idea of upper and lower with such streams, and I think the source from which they flow may be termed the upper end, without actual misuse of language, even though the course is level and the flow forced. So the expression may be understood in the claims. Slightly more important is the fact that some of these claims call for the "battery of tubes, *b*," and that the specifications refer to this battery as one of vertical tubes. The drawings exhibit tubes in this position only. The purpose of the drawings is to illustrate the parts and combinations of the apparatus, nothing more. The tubes and their relations can as well be illustrated in one of the positions specified as an-

other. It would have been waste of labor, as well as unusual, to draw them in the various positions contemplated. Placed vertically in the battery shown, the specifications properly describe this battery as one of vertical tubes; but it does not follow that the other arrangements, described in the specifications are excluded, and that the claims are to be limited accordingly.

The correspondence between Lillie and the office, is also invoked, as evidence that the claims were intended to embrace vertical tubes only; and also as a reason why Lillie should be so confined in a court of equity, regardless probably of intention. This correspondence is as follows:

"April 25, 1884. 129,291.

"Claims 1, 2 are met by patent of Percy, 52,197, Jan. 23, 1866. See also patent of Southmayd, 34,651, Mar. 11, 1862. And Matthiessen, 147,149, Feb. 3, '74, and are rejected. B. S. HEDRICK, Ex."

"1910 LOCUST STREET, PHILADELPHIA, PA., December 14, 1885.

"*To the Honorable Commissioners of Patents:* In reference to my application 129,291, filed Apr. 25, 1884, for improvements in evaporating apparatus, and to your letter of the 7th inst., rejecting the first and second claim of said application. The first claim I hereby abandon as met by the references cited. The second claim I ask a re-examination for on the ground that in no case, in the references, are the evaporating surfaces vertical, or approximately so. In Matthiessen's arrangement (patent No. 147,149, 2, 3, '74) the evaporating trays, B, are nearly horizontal. In Percy's (52,197, 1, 23, '66) the evaporating coils are nearly horizontal, and in Southmayd's (No. 34,651, 4, 11, '62) the wire netting of the plunger is not a continuous vertical surface at all, nor is it an evaporating surface or wall in the sense of one to one side of which heat is applied for the evaporating of liquids in contact with the other side; the plunger and nettings simply act as an agitator and not as a conveyor of heat for evaporating purposes, as stated on p. 2 of the specification of my application. The object in having the evaporating surfaces vertical is that it permits evaporation being carried on on all of the surface inclosing (or exposed) in the evaporating spaces; thus in the tubes of my arrangement are utilized the entire surfaces of interiors of the tubes in evaporating their films of liquid, while in the case of Matthiessen's trays, for example, only the upper surfaces of the hollow bottoms, *c*, of the trays, B, are evaporating surfaces. If the trays, B, were vertical, then the liquid could be made to flow down both surfaces of the hollow bottom, *c*, and the arrangement would meet my claim.

"Yours respectfully, S. MORRIS LILLIE."

Mr. Lillie's letter is assumed to be an admission that the claims are for vertical tubes. This point was urged with impressive force. I am not satisfied, however, after careful examination of the letter and the circumstances under which it was written, that this assumption is justifiable. The only claim under consideration was the second—first in the patent. This is for the combination therein stated, with *vertical surfaces*. To apply the admission to other claims, for different elements and combinations, is, I think, inadmissible. That he did not intend it to be so applied, and that the office so understood, seems manifest, from the fact that he did not amend, and that the office granted the claims as drawn. Indeed, the office never objected to them. If Lillie contem-

plated such an admission, we would expect him to amend, and if he did not, and the office so understood his letter, we would expect it to reject his application. Yet he did not amend, and the office allowed the claims. Granting, however, that the assumption is justifiable, what is the result? We have seen that notwithstanding the assumed admission, the claims were allowed as drawn, covering, (as we have found,) horizontal tubes, and the patent issued accordingly. This act of the office is not only inconsistent with the belief that the claims were intended to be limited to vertical tubes, but is conclusive, I think, that they were not. If the correspondence evinces an intention, at the time of its date, to restrict the claims, the subsequent act of the office shows that it was abandoned. This was the final act in the transaction, and is entitled to controlling weight. The patent was intended to express and define the patentee's rights. If the claims granted are inconsistent with former expressions of the office, and admissions of the patentee, the logical inference is that further examination led to a change of views. The case is not analogous to one in which the terms of a claim are ambiguous, and susceptible of different constructions, and the acts and declarations of the patentee are appealed to. Here the terms are not ambiguous; and their import cannot be set aside or controlled by the previous correspondence—even if it be interpreted as the respondent desires. In *Vulcanite Co.* v. *Davis*, 102 U. S. 222, the court said:

"We do not mean to be understood as asserting that any correspondence between the applicant for a patent and the commissioner of patents can be allowed to enlarge, diminish, or vary the language of a patent afterwards issued. Undoubtedly a patent, like any other written instrument, is to be interpreted by its own terms."

The doctrine of estoppel, which is also invoked, is inapplicable to the facts. Neither Yaryan nor the respondent was misled. If aware of the correspondence, the subsequent grant of the claims would guard them against misunderstanding. There is no reason, therefore, why equity should not construe the claims as their terms import.

With this construction, are the claims infringed? It is urged, as matter of law, that the court cannot pass on this question, without expert testimony. I do not so understand. Expert testimony is often necessary, in disposing of such questions; and there the court will not proceed without it. Here, however, it does not seem necessary. Mr. Yaryan, as we have seen, amended to escape the objections of the office—founded partly on Lillie's patent. From time to time he made other changes, until the apparatus became what is shown in the alleged infringing devices. The changes, however, seem to be formal and unimportant, so far as respects the claims involved. Looking at Lillie's specifications and claims, and observing the variety in form and combination contemplated, it is, I think, reasonably clear that the devices used by the respondent infringe the claims under consideration. While there are mechanical differences, the apparatus of the complainant and respondent, so far as respects these claims, seem to be the same in manner of combination, the elements embraced, mode of operation and ef-

fect. It would be a waste of time to enter upon an analysis of the apparatus and point out the infringement more particularly. I think the substance of each claim involved is almost as readily seen in the respondent's as in the complainant's.

The other patent sued upon, No. 378,843, is, in the language of the specifications, for the "combination of a series of evaporating pans, each having a construction substantially as shown in patent No. 341,669, to form a multiple effect evaporating apparatus, and consists further in a series of surface heaters arranged in connection with the pans, and operating to use a portion of the vapor from the several pans for heating either a single liquid passed in succession through the several heaters, in the direction from the coolest to the hottest, or for heating different liquids in the several heaters respectively."

The claims involved are as follows:

"(3) The combination of the battery of evaporating tubes, their surrounding heating chamber, E, and collecting chamber, P, common to the said tubes of an evaporating pan operated substantially as described, the heating chamber and its contained evaporating tubes of a second similarly operating pan, a vapor conduit leading from the collecting chamber, P, of the first pan to the heating chamber, E, of the second pan, and a liquid conducting pipe and connections leading from the chamber, P, of the former to the feed ends of the evaporating tubes of the latter, substantially as and for the purpose described. (4) The combination of the battery of evaporating tubes, *b*, their surrounding heating chamber, E, and collecting chamber, P, common to the said tubes of an evaporating pan operating substantially as described, the heating chamber, E, and the tubes, *b*, of a second similarly operating pan, and a vapor conduit leading from the collecting chamber, P, of the first pan to the heating chamber, E, of the second pan, substantially as and for the purpose specified." "(6) The combination, with two consecutive pans of a multiple effect evaporating apparatus, each pan being provided with the evaporating tubes, *b*, and collecting chamber, P, of a pump, C, having its suction pipe connected with the chamber, P, of the first of the two pans, and its eduction pipe, *v'*, with the feed ends of the evaporating tubes of the second pan, the pump and its connections operating to draw liquid from the chamber, P, of the first pan, and to deliver it to the evaporating tubes of the second pan, substantially as specified."

The question of validity applies, of course, to these claims only. Whether the patent may be sustained for other claims embraced, is not involved. I attach no importance to the fact that the specifications of the prior patent originally embraced this subject. Mr. Lillie had a right to withdraw that part, as he did, and present it subsequently. I see nothing to justify the allegation of abandonment.

Do the claims, or does either of them, embrace invention? The "multiple effect" process was old, and had long been practiced, when this patent was applied for. Rillieux described, and applied it, in 1843, as appears by his patent of that date. His method of applying it was to place several "single effect" apparatus side by side, and unite them in such manner that the liquor and vapor, after passing through the first would pass into the second, and so on to and through as many such apparatus as were united, receiving an additional effect from each. To

place several of Lillie's apparatus, covered by the first patent, side by side, and unite them in the same manner and by the same character of appliances that Rillieux employed in uniting the old single effect apparatus, certainly would not require invention. If it be admitted that Lillie's apparatus, so united, constitutes a new combination, a new device, (and in one sense it does,) this admission would not support the claim to patentable novelty. The combination would be new only to the extent of the single effect apparatus combined in it; and this apparatus is covered by the former patent. Nor does it tend to support the claim to such novelty to say that Lillie was the first to make a successful application of the multiple effect process to film evaporation. Here, again, so far as respects the claims involved, the statement is correct only to the extent that his single effect apparatus is embraced. The manner of combining the single effect apparatus is the only thing covered by the claims, and in my judgment, it embraces nothing new. The third is for the liquor and vapor conduits, in the connection stated; the fourth is for the vapor conduit alone, in this connection; while the sixth is for a pump combined with a liquor conduit. I am unable, after patient examination, to find any material distinction between this means of uniting several single effect apparatus, with a view to multiple effect, and that employed by Rillieux. In construction, character, operation, and effect, the means or devices employed, seem to be essentially the same.

Rillieux did not use the pump to accelerate the flow of liquor, when sluggish, as Lillie does; but the addition of this old means of accomplishing such a purpose did not require invention. Any mechanic directed to increase the flow would presumably have added the pump. It is the most common appliance for such a purpose.—It would have made no difference, as respects this question, if the original application, of 1886, had not been amended by the withdrawal referred to, and these claims had been inserted in the first patent. The objection to them, there would have been the same, that is to say, that all patentable novelty is covered by the other claims.

I have not overlooked the usual presumption in favor of the patent, nor the fact that Yaryan's conduct may probably again be appealed to in its support. But with these considerations fully in mind I am nevertheless forced to the conclusion that the claims cover nothing new. The first patent to Lillie embraces everything mentioned in them to which he is entitled. For the introduction of any of the matters covered by that patent into the respondent's combined devices, it must answer in damages, as we have already determined. It cannot use them, in any connection or combination whatever, without the complainant's assent.

Nor have I overlooked the fact that one of the advantages of Lillie's single effect apparatus is its especial fitness for further combination and use in the multiple effect process. This advantage inheres in that apparatus and is covered by the patent for it. It is one of the features that renders that invention valuable. Lillie, and others obtaining his assent, may utilize it by making such combinations. If in making

them something new and patentable is introduced protection for it may be obtained. If the other claims of Lillie's 1888 patent cover such new things they will of course be sustained. That question is not involved. The decision here is simply that the claims under consideration embrace nothing new and are invalid.

THE NORMANDIE.[1]

THE CHARLOTTE WEBB.

O'SULLIVAN *et al. v.* COMPAGNIE GENERALE TRANSATLANTIQUE.

O'SULLIVAN *et al. v.* THE NORMANDIE.

(*District Court, S. D. New York.* May 20, 1890.)

1. COLLISION—STEAM AND SAIL—FOG—EXCESSIVE SPEED—DUTY TO REVERSE.
Collision occurred towards midnight of May 28, 1889, from five to eight miles east by south of Sandy Hook light-ship, in a dense fog, between the steam-ship Normandie and the pilot-boat Charlotte Webb, by reason of which the pilot-boat was sunk. The steam-ship, having left New York on one of her regular trips, had been put upon a course of east by south, on which course she continued until within a few moments of collision. The pilot-boat was cruising for vessels. She was sailing slowly on a course of about E. N. E., and crossing the steamer's course. When the steamer's whistles were first heard, which was from 15 to 30 minutes before the collision, the pilot-boat continued to sound her fog-horn, which was blown by mechanical means, at regular intervals, and as the Normandie's whistles continued to approach, bearing in the same direction, two bombs were fired by the pilot-boat, and a flash light was twice shown over the port side. She did not alter her course at any time. She was struck by the steamer on her port side, half cut through, carried along with the steamer for a short period, until she dropped off and sank. The steamer's speed had been from 11 to 12 knots, her maximum speed being 16 knots. Soon after hearing the pilot-boat's horn ahead her engines were slowed. She continued on at this speed for about a minute, when the light of the sailing vessel came in sight, only a short distance ahead. By reversal before the collision her speed was reduced to four or five knots. The above facts being found on very conflicting evidence, *held*, that there was no fault in the pilot-boat, either in her signals or maneuvers; that the speed of the steam-ship was in excess of the moderate speed required in a fog by article 13 of the collision rules; that she was also to blame for not reversing, instead of slowing, when the horn was heard ahead and near; and that she alone was responsible for the collision.

2. SAME—TWO SUITS—COSTS—MANEUVERING AND STOPPING POWER.
Upon two suits *in personam* and *in rem*, successively brought for the same demand, no security being obtained in the former, *held*, decree should be given in the suit *in rem* with one bill of costs only, but not until after the lookout, a co-libelant and an available witness, had been produced and called therein.

In Admiralty. Actions for damages by collision.

Carter & Ledyard, for libelant.

Coudert Bros., for defendants.

BROWN, J. The above libels were filed to recover damages for the loss of the pilot-boat Charlotte Webb, with the personal effects of those on

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

board, through collision with the French steam-ship La Normandie, in a dense fog at sea, from five to eight miles east by south from Sandy Hook light-ship, towards midnight of May 28, 1889. The first-named libel is against the owners of La Normandie *in personam;* the second, brought by the same libelant with one other libelant, who was a passenger on the pilot-boat, is against the ship *in rem.* The Normandie is a steam-ship of the first class, plying regularly between Havre and New York, about 464 feet long, 50 feet beam, 25 feet draft when loaded, displacement at 21½ feet draft, 8,392 tons, and between 7,000 and 8,000 tons burden. She has triple expansion engines, of 6,600 horse-power; a single right-hand propeller, about 22 feet in diameter, with a pitch of 9 meters and 80 centimeters, (about 32 feet,) giving under her ordinary full speed about 56 or 57 revolutions per minute, and a speed of 16 knots per hour. The Charlotte Webb was a two-masted schooner, 85 feet long, 23½ feet beam, and was in the service of licensed pilots. The Normandie left her dock at New York at 7 A. M. of the 28th of May. Encountering a dense fog at Sandy Hook, she came to anchor. A little before 10 P. M., the weather being still foggy, she resumed her voyage, passed a little to the northward of the Scotland light-ship and the Sandy Hook light-ship, both of which she made, the latter at 20 minutes past 11 P. M., and was then put upon a course of east by south, and so continued until her wheel was ported a few moments before collision. The Charlotte Webb left Stapleton, Staten island, between 11 and 12 o'clock of the same morning, on a cruise at sea in search of pilot service. She had on board four pilots, six seamen, and Green, who was a passenger or volunteer. The wind was light, about south-east by east, and she was sailing upon the starboard tack, with her booms to port, and her jib, foresail, and one reefed mainsail, all close-hauled, and a stay-sail hauled to the mast, with the sheet to starboard, making not over one or two knots per hour, upon a course E. N. E., or N. E. by E. and crossing, therefore, the steamer's course at an angle of from three to four points to port. The fog continued dense up to the moment of collision. The pilot-boat was struck near her fore rigging on the port side, by the stem of the steamer, at an angle variously estimated to be from 60 to 90 degrees. She was a little more than half cut through by the blow, carried along in the jaws of the steamer for a short period, until, as the steamer stopped by the backing of her engines, she dropped from the stem of the steamer and sank in 13 fathoms of water. Several of her men jumped overboard, or went down with the schooner; two of whom (Malcolm, the wheelsman, and Fitzgerald, the boat-keeper) were drowned; the rest had got into the yawl, which had been hove overboard before the collision, and, after being upset, they were rescued by the steamer. The libelants contend that the collision arose in consequence of the immoderate speed of the steamer, of her failure to heed the signals given by the pilot-boat, and her neglect to stop and back in time. The respondents claim that the steamer was in no fault in these respects, and that the collision arose through the failure of the pilot-boat to give proper signals, or to veer, as it is claimed she might and ought to have done,

out of the line of the steamer's course when it was perceived that the steamer was coming directly upon her, and could not avoid her.

Damages for collision are given under our law only upon proof of fault, actual or presumptive. As between a steamer and a sail-vessel, upon proof that the latter has observed all the rules of navigation, fault in the steamer in case of collision is presumed, except on an issue of inevitable accident, (*The Florence P. Hall*, 14 Fed. Rep. 408–416, 418, and cases cited;) and the burden is upon her, if she would avoid liability, to satisfy the court that she has observed all the rules of navigation, and of careful seamanship. If this be proved to the satisfaction of the court, she is entitled to acquittal. The loss is ascribed to inevitable accident, or perils of the sea, and remains where it fell. *The Morning Light*, 2 Wall. 550–556; *The Marpesia*, L. R. 4 P. C. 212–219.

The Pilot-Boat's Signals. On careful consideration of the testimony, and of all that has been urged in behalf of the claimant, I must find that fog signals, as required by law, were duly given by the pilot-boat, and that she is without fault in this respect. When the Normandie's whistles were first heard two persons only were on deck, Capt. Scott, who was at the wheel, and in charge of the watch after 10:40 P. M., and Olsen, who was the lookout, and blowing the fog-horn. The horn was blown by a mechanical appliance of approved form, giving blasts audible, as the testimony states, at three or four times the distance at which a horn blown from the mouth would be heard. Olsen went on the lookout at 10 P. M. He and Capt. Scott testify that the horn was sounded regularly at intervals of about a minute from that time to the collision; the signal being one blast, in conformity with the rules of navigation, the pilot-boat being on her starboard tack. The fog signals of the Normandie, as they testify, were heard a considerable time before collision, estimated at from 15 to 30 minutes. These signals, according to the claimant's testimony, were given at intervals of about one minute. Capt. Scott testifies that he located these signals as bearing by compass W. by N., or W. N. W., and that they continued on the same bearing until the collision; that, after hearing six or eight of those signals, he called up Pilot Hammer, who thereupon came up and remained some time standing in the companion way, and watching for the steamer. Both used glasses. Soon afterwards Hammer called up Pilot Hines. Hammer and Freeman testify to hearing the signals from the Normandie upon the same bearing, and that the pilot-boat replied thereto regularly for some time before the collision, and that they heard the pilot-boat's previous signals before they came on deck. Four other witnesses testify to hearing the horn blown while they were below. After Hammer came up Capt. Scott ordered a bomb to be fired, which was done, giving a report, it is said, louder than a cannon. To get, to fix, and to fire the bomb took "about a minute." After the bomb, a flash light was shown over the port side for about a minute. After that, another bomb was fired, and then the flash light was again shown on the port side. Meantime the boat-keeper and all hands had been called from below. The steamer's lights were first seen about the time, or soon after, the second bomb was fired. She

was then probably not over a quarter of a mile distant. It was then, or very soon afterwards, that the yawl was hove over, before all the men below had got on deck. Scott and Hammer jumped into the yawl at once. Two others below, roused by the calls and the noise above, came up, saw the steamer's lights, and got into the yawl; they did not pull away before they were upset by the collision. Larsen estimated that the yawl was launched eight minutes before collision; Anderson, three or four minutes. Freeman thinks the second bomb fired was a half hour before collision. These estimates carry no weight. Capt. Scott, the other pilots, and Olsen say the boat was thrown over just before the collision, and of that I have no doubt. The whole testimony on both sides bristles with discrepancies as regards the estimates of time and distance. Little weight is to be attached to such estimates, unsubstantiated or uncorrected by other facts. The acts done, and all the circumstances of time, place, and navigation, afford a better means of judging of such particulars. *Kennedy* v. *The Sarmatian*, 2 Fed. Rep. 914. Several blasts of the Normandie's siren were heard between the two bombs; Scott thinks, two or three blasts; Hammer, three or four. Taking all the evidence and the circumstances into account, I think it most probable that the Normandie's whistles were first heard about 15 minutes before collision; that the interval between the bombs was probably from one to three minutes; that the last bomb was fired about two minutes before collision, and the steamer's lights first seen a few moments after the last bomb was fired; and that the yawl was hove over about that time. The steamer's witnesses testify that only one bomb was heard by them, and, before the bomb, only one blast of the horn, which was immediately before the bomb; that, after the bomb, the pilot's horn was heard often, and was soon blown almost continuously. For the defense it is urged that Olsen's testimony that he assisted in exhibiting the torch-lights, and also in heaving the lead once after the steamer's whistles were first heard, as well as in launching the yawl, proves that other duties were imposed upon him incompatible with his duty to keep a proper lookout, and to give the proper signals. Capt. Scott, however, testifies that he himself threw the lead, and took the observation of 13 fathoms; and that Olsen merely hauled in the line, a matter of a few seconds only. Both Scott and Hammer testify that the torch-lights were shown by them, and not by Olsen, and the latter so stated on his original examination. The fact, also, testified to by five of the claimant's witnesses, that the horn was heard just before the bomb, confirms the testimony of Scott and Hammer that Olsen was not called off from his duty to fire the bomb. The other circumstances on which Olsen's alleged neglect to sound the horn regularly is based are too slight to have any weight against the mass of direct evidence, as well as the probabilities of the case, that the proper signals were given. The event shows that Capt. Scott had accurately located the bearing of the steamer by her whistles as west by north. The whistles continued, he says, to bear in the same direction; showing, therefore, that the steamer was coming directly for the pilot-boat; and he was fully alive to that fact. It is extremely

improbable that, under such circumstances, the use of the ordinary fog signals, which had been given all along, should be neglected then. Many witnesses testify that these signals were given, and given oftener than is required by the rules; and the firing of the two bombs was an additional precaution that was employed because they knew the steamer was coming towards them. It is not credible that such added precaution should have been adopted, and the simple and usual precaution of blowing the horn neglected. That it was not neglected is proved by all the direct testimony that the case makes possible; and it is confirmed, as I have said, to some extent, by the steamer's evidence that the fog-horn was heard before the bomb. Such a mass of testimony I cannot discredit, merely because the horn was not heard earlier on board of the Normandie. Her witnesses say that only one bomb was heard, yet two were certainly fired. The first bomb was probably within a few minutes of the second; at all events, it was some time after the first signal from the Normandie was heard on the pilot-boat; and the first bomb should ordinarily have been heard on the Normandie. If not heard, the failure to hear the first bomb, as well as earlier fog-horns, should be set down to abnormal conditions of the atmosphere, or to inattention. *Bradley* v. *The John Pridgeon*, 38 Fed. Rep. 261, 267; *McCabe* v. *Steam-Ship Co.*, 31 Fed. Rep. 238; *The Lepanto*, 21 Fed. Rep. 651, 656–658; *The Zadok*, 9 Prob. Div. 114. The theory that the yawl was launched some eight minutes before collision, for the purpose of sending a pilot to the steamer, and that the crew were occupied about that business, encounters too many opposing circumstances and too much opposing testimony to be adopted. Nor could the pilot-boat safely depart from her course before the steamer could be distinguished. No rule required that; and, had she done so, it would have been at her own risk. There was nothing by which she could determine whether to turn to the right or the left; and, after the steamer was seen, there was nothing, I think, which she could have safely done. She could not tell what change the steamer might be making. It requires a very clear case to condemn a sailing vessel for observing the general rule to hold her course, instead of departing from it. This is not such a case.

The Normandie's Speed. The Normandie's speed before slowing is estimated by her officers at from 10 to 11 knots, but no reason appears for estimating it at much less than 12 knots. For more than half an hour she had been making 42 revolutions per minute. The general conditions for speed were favorable. Her loading was not deeper than usual. Fifty-six or 57 revolutions give her 16 knots, and 42 revolutions should therefore give 12. Computed from the pitch of the propeller of over 31 feet, with 10 per cent. slip, 42 revolutions should give nearly 12 knots. It is not very material, however, whether her speed was 12 knots or 11. Either is considerably in excess of what has been adjudged in many cases in the courts of this country an excessive rate of speed in a dense fog, and therefore a violation of the thirteenth article of navigation. I am not at liberty to depart from these adjudications, notwithstanding the opinions of witnesses and the argument of

counsel that her speed was moderate, and was the safest for herself and for other vessels.

No doubt the question of what is "moderate speed" is largely a question of circumstances, having reference to the density of the fog; the place of navigation; the probable presence of other vessels likely to be met; the state of the weather as affecting the ability to hear the fog signals of other vessels at a reasonable distance; the full speed of the ship herself, her appliances for rapid maneuvering, and the amount of her steam-power kept in reserve, as affecting her ability to stop quickly after hearing fog signals. No doubt, also, that, in the absence of circumstances of special danger, navigation is not required to be suspended on the high seas on account of dense fog. Neither the rules nor the ordinary practice of seamen require that. The rules intend that signals shall be given which are expected to be heard in time to enable vessels to avoid each other; and no speed is sufficiently "moderate," under given conditions of wind, sea, and weather, unless it is so reduced as to enable the vessel to perform her duty to keep out of the way from the time when she has a right to expect that the other vessel's signals, under the existing conditions, will be heard. For the Normandie it is contended that her speed in this case, considering all the circumstances, was moderate speed, because her speed was reduced, and was such as, considering the utility and necessity of rapid evolutions, was most effective to enable her successfully to avoid collision with other vessels that observe the rules of navigation. The recent case of *The Champagne* and *The City of Rio Janeiro* in the French courts has been cited in support of this contention. There the Champagne was running in foggy weather at a speed of 14½ knots an hour. She heard the whistle of the Rio Janeiro ahead, or a little on her port bow, and thereupon ported, and reduced her speed to 10 knots. The Rio Janeiro heard and erroneously located the whistles of the Champagne on her starboard bow, and accordingly veered to port, which brought the two vessels into collision. The vessels had in fact been approaching very nearly head and head. The erroneous location of the Champagne's whistle by the City of Rio Janeiro was ascribed to inexplicable fatality, or the reverberations of the sound of the whistles from *strata* of fog of different density. The court of appeal at Rouen adopted the finding of the tribunal of Havre, that the reduction of speed from 14½ to 10 knots was in keeping with the circumstances, and proper for making the necessary evolutions that are required to execute maneuvers as quickly as possible in order to avoid collisions. Both courts, however, found the further fact that the speed of the Champagne did not contribute to the collision in that case, nor have any direct relation to it, and therefore released the Champagne. International Mar. Rev. 1887–88, pp. 500–543. The court of cassation, in affirming the judgment, did not consider the question whether her speed was moderate within the rule, but affirmed the judgment on the finding of fact below that the rate of speed was in that instance immaterial, having no direct connection with the collision. Id. 1889–90, p. 7. In a still later case the court of appeals at Montpelier held the steamer Tonkin in fault for

going in fog at a speed of 10 knots instead of 5. Id. 1889–90, pp. 204–207. Very similar arguments in favor of higher speed were addressed to the supreme court in the case of *The Pennsylvania*, 19 Wall. 125, and overruled; and I am not at liberty to treat the question as an open one in this court. The maximum speed of the steamer in that case was 13½ knots; and, under circumstances very similar to the present, a speed of 7 knots was held excessive. With improvements in steam-engines, and increased facilities for handling, it is not impossible that one-half the maximum speed, when full power is held in reserve for immediate use in emergencies, may come to be held a moderate speed, even in dense fog, in those parts of the high seas where other vessels are not specially liable to be met. But the speed of the Normandie in this case was more than half of her maximum speed. There is no case in the courts of this country where a speed of two-thirds of the maximum speed, under such circumstances as the present, has been held to be moderate speed within article 13. No doubt certain evolutions could be effected more rapidly with a speed of 10 to 12 knots than with a speed of 6. But a speed of 10 or 12 knots was not more necessary to the Normandie's safe navigation in this case than was 7 knots in the case of *The Pennsylvania*. Besides, the question is not whether certain evolutions can be executed in less time, but whether the Normandie, when meeting a vessel suddenly in a fog, could, as a rule, more effectively avoid her under a speed of 10 or 12 knots than when under a speed of only 6 or 7 knots. The experiments with the Normandie, testified to by Lieut. Chambers, do not favor the higher rate of speed, because they show that the ship stops in less space, and turns more within a given area, under a speed of 8 knots than under a speed of 12 knots. See White, Nav. Arch. 631–635.[1]

There was nothing to prevent the Normandie from proceeding at a much slower rate. The evidence shows that soon after the fog-horn was heard, her revolutions were brought down to 16 or 17 per minute, equal to about 5 knots speed. The testimony of the engineer in charge and of the first officer shows that this continued about a minute, whereupon her engines were reversed; and the commander testifies that this reversal was ordered at the time when the pilot-boat's light first came in sight, distant less than half the steamer's length. Upon other adjudged cases I also think the Normandie is to blame for not reversing at the time she slowed, because at that time the signals were heard nearly ahead, and must have been perceived to be near; and, considering that she was then at a speed of from 10 to 12 knots, on hearing such a signal near and ahead, she was bound to check her speed as soon as possible by instant reversal. *Leonard* v. *Whitwill*, 10 Ben. 638, 647; *The Frankland*, L. R. 4 P. C. 529; *The Martello*, 34 Fed. Rep. 71, 74; *The City of Atlanta*, 26 Fed. Rep. 456, 462; *The Britannic*, 39 Fed. Rep. 395, 399, and cases there cited; *The Wyanoke*, 40 Fed. Rep. 702, 704. From the fact that the pilot-boat was not cut through, it is not probable that at the moment of

[1] See note I, *post*, 159.

collision the steamer was going at the rate of more than 4 or 5 knots, and such is the master's estimate. The testimony of Pilot Hines tends to confirm this. He says he went down with the pilot-boat, and that on rising to the surface he saw the lights of the steamer, and kept them in view all the time until he was picked up. Had not her speed been reduced very much below 10 or 12 knots, the pilot-boat would have been cut through, and the Normandie would have gone out of sight before stopping. Mr. De Forrest, a passenger on the Normandie, testifies also that through the port-hole of his state-room on the saloon-deck on the starboard side he saw men struggling in the water very near the ship; that he threw life-preservers to them, and afterwards saw them hauled aboard; and that when he first looked out the ship was then running only very slowly ahead. This confirms the conclusion that at collision the steamer's speed had been reduced to 4 or 5 knots.

It is not possible to reconcile the testimony of the master and the men on the lookout as to the shortness of time between the hearing of the first signal and the collision with the testimony of the first lieutenant and the engineer. The master thinks that the reversal of the engine took place within 5 or 6 seconds after the pilot-boat's signals were first heard, and within 20 seconds of the collision; and the order to reverse he says was given 2 or 3 seconds after the order to slow. It is not perhaps necessary to determine which is correct on this point. But the master must be mistaken if at the collision the Normandie's speed was reduced to 4 or 5 knots, as he estimates; for she could not retard from 11 knots to 5 in less than a minute and a half, even on instant reversal of the engines at full speed; and if during a minute of the interval she ran at the rate of 16 or 17 revolutions ahead before reversing, she could not retard to 5 knots in less than 2 minutes; and the distance run, I am confident, would, on the last supposition, be as much as a quarter of a mile. Such, or nearly such, are, I think, most probably the facts of the case. The master's testimony, also, that he did not reverse until a second blast of the pilot-boat's horn was heard nearer, agrees with the engineer's testimony that there was about a minute's slowing before reversal. Upon this view, had the engine been reversed full speed when the horn and bomb were first heard, whether that bomb was the first that was fired or the second, the steamer would have passed astern of the pilot-boat, and the collision would have been avoided. I do not say that she would have been fully stopped before reaching the line of the pilot-boat's course, for there is uncertainty both as to her actual distance from the pilot-boat at that time and as to the distance within which she could have been stopped by reversing; but I am confident that the estimates as to the distances required for stopping given in the testimony are much too small.[1] By reversing when the bomb was first heard the Normandie would have passed astern, both from the delay consequent on her reversal and from her greater change of heading to starboard. This change would have been from two to three points. As it was, the testimony shows that she

[1] See note II, *post*, 160.

changed but one point. The difference from both causes would have been sufficient to allow the pilot-boat, going from 150 to 200 feet a minute, to escape. If some uncertainty, however, remains on this last point, I cannot doubt that, had the Normandie been going at such moderate speed as the adjudications of this country require, she would have been stopped before reaching the pilot-boat, had she reversed when the first signals were heard so near, and the collision would have been thereby avoided. A decree must therefore be given for the libelants in the suit *in personam*, with costs. In the suit *in rem*, the testimony not being complete, and the omission to call the lookout not being satisfactory, no decree should be given until some necessity for that suit shall appear and the omission be supplied.

The defect in the testimony in the suit *in rem* being subsequently supplied, and it appearing that that suit had been brought because no security had been obtained in the prior suit *in personam*, and that the stipulation given in the suit *in rem* was sufficient to cover the libelants' demands, a decree was directed to be entered in the suit *in rem* only, with one bill of costs. See *The Normandie*, 40 Fed. Rep. 590.

NOTE I. The following is a summary of the observations of Lieut. Chambers, U. S. N., in his experiments with the Normandie. The experiments were made in the English channel, off Bar Fleur light, under the lea of the land, in 27 fathoms of water, in a light wind and smooth sea. The ship was light, drawing only 21½ feet, 3 feet less than when loaded.

(1) *Turning.* The helm is worked by steam. The propeller is right-handed. After the order to port or to starboard is given, it takes 23 seconds to get the helm hard over if the ship is going at her maximum speed of 16 knots, 20 seconds if she is going at 12 knots speed, and 18 seconds if she is going at 8 knots. In turning to starboard, the ship begins to change almost as soon as the helm is moved; but in going to port, and at 12 knots speed, not until she has traveled nearly a length. Going 16 knots, she makes a circle to starboard in 13 minutes and 5 seconds; going to port, in 15 minutes. Going at 12 knots speed, she makes a circle to starboard in 14' 30"; to port, in 15'. Going at 8 knots, she makes a circle to starboard in 20' 25". Though the steam-power is kept the same, the speed is diminished nearly 25 per cent. in turning the first quadrant, through the drag of the rudder, the increased friction of the ship in swinging, and the indirect thrust of the propeller. The ship's path is not an exact circle, but a spiral, ending inside the point of departure, and in advance of it, viz., when beginning under full speed, 30 feet inside the point of departure; when beginning at 12 knots speed, 155 feet, and when starting at 8 knots, 320 feet inside.

(2) *Rate of Change.* Going at full speed, (16 knots,) it takes 50" after the order is given to change 2 points to starboard; to change 4 points, 1' 33"; 8 points, 3' 14"; 16 points, 6' 33"; 24 points, 9' 50"; 32 points, 13' 5"; average speed for first 8 points, 131 knots; for the whole 32 points, 12 knots; diameter of circle, 5,130 feet; average change of one point in a little over a length. Turning to port, and going 12 knots, it takes 1' 16" after giving the order to change 2 points; to change 4 points, 2' 4"; 6 points, 2' 56"; 8 points, 3' 48"; 16 points, 7' 25"; 32 points, 15'; circle, 4,430 feet diameter; average speed of first 8 points, 10.6 knots; of the whole 32 points, 9 knots. Turning to starboard, going at 12 knots speed, it takes 58" to change 2 points; to change 4 points, 1' 50"; 8 points, 3' 40"; 16 points, 7' 19"; 24 points, 10' 55"; 32 points, 14' 30"; diameter of circle, 4,050 feet; average speed of first 8 points, 9.3 knots; of whole 32 points, average, 8.2 knots; average change of 1 point in about 5-6 of a length. Going at a speed of 8 knots, to change 2 points takes 1' 29"; 4 points, 2' 38"; 6 points, 3' 48"; 8 points, 5' 2"; 16 points, 9' 59"; 24 points, 15'; 32 points, 20' 25"; diameter of circle, 3,835 feet; average speed of first 8 points, 6.5 knots; of whole 32 points, 5.4 knots. According to these experiments the Normandie turns faster to starboard than to port. Under a speed of 16 knots she turns 4 points to starboard in 93" after the order to port is given, going about 2,200 feet; at 12 knots speed, she makes the same change in 110," in going about 2,025 feet; at 8 knots speed, the same change in 158," going about 1,750 feet.

(3) *Backing.* On reversing full speed the rudder is said to have no perceptible effect, and was therefore put amid ships. No observation was made, however, as to the possible effect of a port or starboard helm during the first minute after reversal. See The Aurania, 29 Fed. Rep. 122, note. In the first experiment, reversing from full

speed ahead, 16 knots, to full speed astern, the Normandie ran 1⅛ lengths without change of heading; she then fell off rapidly to starboard, and stopped with a change of 4 points, in 245 seconds. In the second experiment, reversing full speed from a previous speed of 12 knots, (?) she changed 8½ points to starboard, and stopped in 165 seconds. (?) In the third experiment, reversing full speed from a previous speed of 8 knots, (?) she turned 2½ points to starboard and stopped in 121 seconds. (?) When loaded, as at the time of collision, 3 feet deeper, causing an increased displacement of at least 1,400 tons, (one-sixth,) the times of stopping and distances advanced would be increased probably about one-tenth. See note 2, sub. 6, infra. The observations as to the actual speeds at which the above experiments were begun were lost. They are given as estimated, presenting, doubtless, some errors, ut infra.

(4) *Distances Run in Stopping.* These distances were not measured, but were estimated as follows: In the first experiment, stopping from 16 knots, 1,771 feet; in the second, stopping from 12 knots, (?) 818 feet; in the third, stopping from 8 knots, 645 feet. These estimates are inconsistent and irreconcilable. Comparing the second with the third, they would make the ship, while retarding from 12 knots to 8, run only 173 feet in 44"; whereas the distance run in that time, going at the mean rate of nearly 10 knots, must have been about 700 feet. So a comparison of the estimated distances run in the first and second experiments shows only 953 feet traversed in 1' 20", while retarding from 16 knots to 12; but if that retard took 80," the distance run must have been about 1,800 feet. These inconsistencies are probably due to errors in the second and third experiments, because there is no probability that in the first experiment the time noted was too much, either by delay in reversing at the beginning, or by counting time after the ship stopped; nor could the speed of the ship at the start have been more than full speed; whereas, in the second and third experiments, the initial speed might easily have been below the estimate, and the time of stopping might also have been noted too soon. In the absence of ranges, and considering the very slow movement of the ship during the last half minute, (see table, infra,) and especially if the quick-water is already running ahead of the observer, the exact time of stopping must be difficult to observe. In a paper by Lieut. F. F. Fletcher in the volume on Naval Mobilization, published in June, 1889, by the office of naval intelligence, it is stated at page 456 that the estimates of the distances advanced before coming to a dead stop after reversing the engine are much less than in similar cases where the distances have been measured. The appendix states the time required to stop in the cases of some 50 vessels, but no distances. In several cases the different times are also given for stopping when light and when loaded; the former being about two-thirds of the latter, a much greater difference than computation would indicate for the Normandie. On the basis of Lieut. Chambers' first experiment, the least distances in which the Normandie could stop from 16 knots, 12 knots, and 8 knots would probably be about 2,750, 1,850, and 970 feet, respectively. See note II, infra.

NOTE II. In the absence of any tables showing the rate at which steamers retard knot by knot on reversing, the subjoined tables, computed by approximation, without the use of the calculus, and based on Lieut. Chambers' first observation of stopping in 245", will be generally intelligible, and found capable of many useful applications. A few explanations are prefixed. By Newton's first law, the amount of retard under a constant force is proportionate to the time the force acts. The time required to retard a given mass a given amount, under different forces, is inversely proportional to the acting forces. To obtain the times occupied in stopping, and the distances traversed during each interval, knot by knot, it is therefore only necessary to know the comparative amount of the retarding forces at work during each of these intervals, and the whole time it takes to stop; in this case, 245". The retarding forces are (1) that of the reversed engine and propeller, which may be assumed to be constant, or nearly so; (2) the resistance of air and water, which is variable, diminishing mostly as the square of the ship's velocity. At high speeds, the ratio of the water resistance approaches the cube of the velocity; but as the square gives the least distance traversed, and applies for the most part, and the object being to find the least possible theoretical distance, the rule of the square is applied throughout. The cube rule applied between 16 knots and 12 would result in a net increase of less than 40 feet. At the full speed of any vessel the resistance of air and water just equals the effective propelling power of her engine. If the full-speed propelling power of the Normandie (16 knots) be represented by 16, the resistance of air and water at her full speed will be 16 also. If, then, on reversing full speed, the engine and propeller worked as effectively astern as ahead, the combined retarding forces would at first be represented by 32. But neither the engine nor the propeller blades are so constructed as to work astern as effectively as ahead; the loss in different vessels has been estimated to be from 20 per cent. to 60 per cent. Supposing the Normandie's backing power to be 60 per cent. of her propelling power, the combined retarding forces on reversing full speed would then be, at first, 9.60+16 —25.60. As will appear below, the precise amount of the assumed loss of power in backing is not very material when the time is fixed. In the first computation, the retarding force of the engine and propeller is taken as —9.6, and as constant throughout; in the second computation, (columns 7, 8, and 9,) as equal to the propelling force —16. As

regards the variable resistance of air and water, it is sufficiently accurate to take the force and speed at the mean between the successive knots for those intervals, where the intervals are so small. The error is less than one-fourth of 1 per cent. This resistance at a speed of 16 knots, being represented by 16, will, for the interval between 16 and 15 knots, therefore be to 16 as $(15\frac{1}{2})^2$: $(16)^2$, or 15.016. The second column of the table gives the proportionate amount of air and water resistance, computed in the same way for the mean of each interval down to stopping. Adding 9.6 for the constant retarding force of the Normandie's engine, gives (column 3) the total amount of the retarding forces for each interval. Let T represent the time it would take for the engine alone, exerting a constant force —9.60, to retard the ship one knot, then the time required to retard from 16 knots to 15, by the combined retarding forces, will be to T, by the inverse proportion of the forces, as 9.6 : 24.616—.390 T. The time required to retard during all the other intervals being found in the same way in multiples of T, (column 4,) their sum, 11.300 T, equals by observation 245". T therefore —21".6808; and this value, applied to column 4, gives (column 5) the time in seconds for retarding each knot. Multiplying this time by the mean speed per second for each interval, gives (column 6) the advance of the ship during each knot's retard, aggregating 2,757 feet. The computations in the seventh, eighth, and ninth columns are made in the same way, but on the assumption that the retarding and propulsive forces of the engine are the same; and 16, as the engine constant, instead of 9.60, is therefore added to column 2 to obtain the whole retarding force.

Speed.	Resist. A. & W.	Total Resist. Force.	Seconds.		Feet.	Seconds.		Feet.
16—15	15.016	24.616	T. 390	8.455	221	T. 516	10.06	262.3
15—14	13.140	22.740	T. 422	9.153	224	T. 549	10.70	262.
14—13	11.390	20.990	T. 457	9.916	226	T. 584	11.39	259.7
13—12	9.766	19.366	T. 496	10.742	227	T. 621	12.11	255.5
12—11	8.266	17.866	T. 537	11.650	226	T. 659	12.85	249.4
11—10	6.891	16.491	T. 582	12.621	224	T. 699	13.63	241.6
10— 9	5.641	15.241	T. 630	13.656	219	T. 739	14.41	231.6
9— 8	4.516	14.116	T. 680	14.745	212	T. 780	15.20	218.2
8— 7	3.516	13.116	T. 732	15.869	201	T. 820	15.98	202.4
7— 6	2.641	12.241	T. 784	17.00	186	T. 858	16.73	183.6
6— 5	1.890	11.490	T. 836	18.11	168	T. 894	17.43	162.1
5— 4	1.266	10.866	T. 883	19.154	145	T. 927	18.07	137.3
4— 3	.766	10.366	T. 926	20.077	118	T. 954	18.60	110.
3— 2	.391	9.991	T. 961	20.832	88	T. 976	19.03	80.3
2— 1	.141	9.741	T. 986	21.369	54	T. 991	19.34	49.
1— 0	.016	9.616	T. 998	21.642	18	T. 999	19.47	16.4
			T 11.300=245"		2757	T 12.5676=245"		2921.4
		C. E.=208.1	T=21."6808			T=19."49457		C. E.=311.9

By columns 5 and 6 in the above table the Normandie, in stopping from 16 knots in 245", would advance 2,757 feet, or about 6 lengths; from 12 knots speed she would stop in 212", advancing 1859 feet, or about 4 lengths; and from 8 knots speed, in 154", in 978 feet, a little over 2 lengths. If she could stop from 12 knots speed in 165", she would stop from 16 knots in 199", instead of 245".

(1) Columns 6 and 9 show that, when the time of stopping is given, but little difference results in the distance advanced, though a large decrease be assumed in the backing efficiency of the engine. A greater proportion of the work is thereby assigned to the water resistance. A decrease of 40 per cent. in the assumed backing efficiency, the time being fixed, is shown to make the distance advanced only about 6 per cent. less; the distance is less because the less the proportion of work done by the engine, and the greater that done by the water resistance, the greater must be the effect of the variable water resistance in diminishing the distance run below what would be run (3,310 feet) if the engine alone could stop the ship in the same time.

(2) Saving this small percentage of variation through differences in backing efficiency, the above table is applicable to all propellers that stop in the same time on reversing full speed from the same maximum speed of 16 knots, without regard to the model or mass of the ship.

(3) The proportion of work done by the engine in retarding each knot is expressed by the decimals in column 4. Multiplying the different times in column 5 into the constant engine force (here 9.6) and into the variable water resistance, column 2, the sum of the products of each gives the relative proportions of the work done by each during the whole or any part of the interval. From 16 knots to 12, the engine does 44 per cent. of the work; from 12 to 8, 61 per cent.; from 8 to 4, 81 per cent.; from 4 to 0, 96¾ per cent.; from 16 to 8, 53 per cent.; from 8 to 0, 88¾ per cent. If the engine's backing power equaled three-fourths its propelling power, its proportion of the work done in stopping from 16 knots to 8 would be 57 per cent.; from 8 knots to 0, 92 per cent. The power of the engine is therefore a very important factor in determining the time and distance required to come to a stop. But see, *contra*, White, Nav. Arch. 604.

(4) The items of total retarding force and time, as given in columns 3 and 5, multiplied together, produce a constant throughout. This product, 208.1, represents the constant of energy (C. E.) requisite to retard the Normandie 1 knot, on her supposed backing efficiency of 6-10. If this efficiency equaled 75 per cent. of her propelling power, and the time required to stop remained the same, the constant would be 248; if it equaled 100 per cent., it would be 311.9. Dividing the constant of energy by the total retarding force for any knot, gives the time required to retard that knot.

(5) The gain in time and distance from any increased backing efficiency of the engine is thus easily deduced. If the Normandie's actual backing power were increased from 9.60 to 12, each item of total retarding force in column 3 would be increased by 2.40, and the times and distances in columns 5 and 6 reduced in proportion, making a saving of 37" in time, and of 370 feet in distance advanced. If her backing power were increased from 9.60 to 16, so as to equal her propelling power, as in the case of ferry-boats, the stop would be made in 163", and in 1,945 feet, a gain of 82" in time, and of 807 feet in space. From 8 knots speed, as in fog, the stop would be made in 97", and in 789 feet. The importance of keeping a full head of steam in reserve when going at moderate speed in a fog is thus apparent.

(6) Other things being equal, the times and distances for stopping vary directly as the *mass*, and inversely as the combined forces of engine and water resistance. The greater the water resistance at the same speed, in the case of different vessels, owing to differences of model, or of the same vessel when more deeply loaded, the greater must be the engine force necessary to attain that speed; and hence the greater the combined retarding forces on reversing. If the water resistance increased precisely as the mass, or weight, or draft of the ship, these opposite effects would neutralize each other, and the stop from the same speed would be made in the same time and distance. But the rate of increase of the water resistance, depending chiefly on the amount of the submerged surface of the ship, (White, Naval Arch. 460,) does not usually much exceed one-half that of the draft; and an increase of cargo therefore increases the stopping distance.

In stopping from the same speed, however, the proportional values given in columns 2, 3, and 4 are independent of mass or any particular engine power, or water resistance; and hence the distances advanced, (column 6,) by different vessels in stopping from the same speed, are in proportion to the observed times they occupy in stopping.

The following table shows computations for (1) the Willamette, (length 335 feet; gross tonnage, 2,561,) stopping from 10 knots in 120"; (2) the Pennsylvania, (343 feet; tons, 3,104,) stopping from 12 knots in 140"; and (3) the Wyoming, (366 feet; tons, 3,288,) stopping from 14 knots in 160",—as stated in the appendix to Lieut. Fletcher's paper, *ut supra;* also for the Normandie, (4,) and for an 18-knot steamer, (5):

Max. Speed,	Stops in.	Engine Const.	Engine. Per Cent.	Stops. Feet.	Pr. Ct. of Adv.	C. E.	Stops from half of full speed in.
(1) 10. kn.	120"	5.	80	874	43.	79.8	73." 300 ft.=14.8 per cent.
(2) 12. "	140"	6.75	75	1215	42.8	106.8	85."5 413 " =14.6 "
(3) 14. "	160"	8.	66	1588	42.	126.9	99." 555 " =14.7 "
(4) 16. "	245"	9.60	60	2757	41.6	208.1	154" 976 " =14.9 "
(5) 18. "	270"	12.	59	3420	41.6	255.6	170" 1217 " =14.8 "

(7) From the lost table the distance advanced by any other steamer in stopping from either of the full speeds above given, or from half that speed on reversing full speed, when her time of stopping is known, may be approximately ascertained; the distances being in the proportion of the respective times of stopping. The distance traversed for any particular knot or knots may be ascertained by first obtaining the *time* required to retard that knot by dividing the tabular Constant of Energy (C. E.) for similar speed by the whole retarding forces at that knot, as per above tables, and then increasing or diminishing the *time* so obtained in the proportion of the whole observed times of the two vessels' stopping. From this the distance is readily obtained.

(8) From the above tables it will be seen, as previously deduced, through the shorter method of the calculus, by Lieut. Fletcher, to whom I am indebted for various facts and suggestions in the above calculations, that the whole advance which may be expected to be made by screw propellers in stopping from full speed is from 41 per cent. to 43 per cent. of the full speed advance for the same time; and that the stopping distance from half of full speed, on reversing at full speed, is about 14.7 of that advance. The tables show that the rule should be general, subject only to the small variation above noted, (sub. 1,) and that the rule would apply on reversing from any given speed with the same power used in going ahead. These conclusions nearly accord with the few results best reported.

THE ADDIE B.[1]

THE J. J. DRISCOLL.

ABRAMS *v.* THE J. J. DRISCOLL.

(*District Court, E. D. New York.* July 16, 1890.)

SALVAGE—NEGLIGENCE.

A yacht was lying at anchor, when a gale arose, and the yacht became in danger of going ashore. To render her a salvage service, a tug took hold of the yacht to tow her off shore. The anchor of the yacht remained down, which fact was known to the master of the tug, but no effort was made to have the line taken in, the anchor being allowed to drag, until it caught in the anchor of libelant's yacht, which was thereby torn from her moorings, and subsequently went ashore. *Held*, that it was the fault of the tug.

In Admiralty.

Suit for damages caused by stranding.

A. Van De Water, for libelant.

Hyland & Zabriskie, for claimant.

BENEDICT, J. This action was commenced by Henry B. Abrams, then the owner of a small vessel called the "Addie B.," to recover of the steam-tug J. J. Driscoll for damages done to the Addie B. by stranding, under the circumstances hereafter stated. Abrams having died subsequent to the commencement of this action, it is now prosecuted by his daughter as executrix.

In September, 1889, at 10 A. M., the Addie B. was lying off Whitestone, made fast to a mooring-stone, when a dangerous wind blew up from the north-east. Her owner, to make her secure, put out two more lines to anchors, and then left her, thus safely moored in a proper place. The yacht Amaranth lay near the Addie B., and, being in danger of being driven on shore, the tug J. J. Driscoll, for the purpose of rendering a salvage service to the Amaranth, went to her assistance, took hold of her by a line from her bow, and commenced to tow her off the shore. At the time the Driscoll began to tow the Amaranth the Amaranth had an anchor down, and this the captain of the Driscoll knew, as he himself says. This anchor was being allowed to drag when the Amaranth passed the Addie B. in tow of the Driscoll. The dragging anchor of the Amaranth caught the anchor of the Addie B., and in this way the Addie B. was torn from her mooring, and she was towed by the tug for some distance by her anchor lines, when, the anchor lines parting, the Addie B., being thus freed from the Driscoll, brought up on her line, that was still fast to the mooring-stone. The storm was heavy, and, the mooring-stone proving insufficient to hold the Addie B., she was driven ashore, sustaining the injuries for which this action is brought.

The first point made in defense of the tug is that it was no negligence of hers that the Amaranth's anchor was down, and so caught the Addie

[1]Reported by Edward G. Benedict, Esq., of the New York bar.

B., but negligence of the Amaranth; and that the action should have been brought against the Amaranth instead of against the tug. The case of *The Jack Jewett*, 23 Fed. Rep. 927, is cited as authority for this position. But the present case differs from *The Jack Jewett* in that the J. J. Driscoll was engaged in performing a salvage service to the Amaranth. She had no contract with the Amaranth, but took charge of her in the capacity of salvor, for the sake of the salvage reward to which she would be entitled. She is accordingly responsible for any damage done by the Amaranth while so in her charge. It was in her power to get up the Amaranth's anchor. She knew it was down, and, having undertaken to tow her with the anchor down, is responsible for the damage that ensued.

The next position taken is that there was no fault in the navigation of the J. J. Driscoll, because she was ignorant of the position of the anchors of the Addie B., and, under the circumstances, was unable to pass further from the Addie B. than she did. The evidence shows that the anchors of the Addie B. were not out any unusual distance. The position of the Addie B. was notice to the tug that she had anchors out. It was her duty to avoid the anchors of the Addie B. Upon the evidence she could have taken the Amaranth further away from the Addie B., and so have avoided all danger of fouling.

The third and principal defense is that the Addie B. remained where she brought up after being dropped by the Driscoll for a space of three hours, during which time the Driscoll, according to some witnesses, on three, and, according to others, on four, occasions offered to her owner, Abrams, then on board of her, to take her to a place of safety, which offers were declined. The making of these offers is denied by the libelant. Abrams is dead, and three or four witnesses are called at the trial to prove this defense. These witnesses swear positively to the making of these offers, but in my opinion their testimony, positive as it is, must be held to be overthrown by the testimony of the witness Webster, called by the libelant. This witness, who has no interest whatever in the controversy, was asked by Abrams, of the Addie B., after she had been dragged from her mooring by the Driscoll, to take him out to her, and he did so. He was then requested to take a line from the Addie B. to another vessel near by, and he left the Addie B. for this purpose in his boat, but the vessel refused to take the line, and then Webster was blown off by the storm, and unable to regain the Addie B. Thus Abrams was left on the Addie B. alone, without a boat, in a dangerous storm. He was an old man, in poor health, and of feeble voice. That, under such circumstances, the old man should have refused any offers of the tug to put him in safety seems to me to be highly improbable. The facts proved show conclusively that he knew his vessel was in danger of dragging ashore, and no reason can be assigned why he should refuse to accept from the Driscoll an offer to repair the injury that had been done him by tearing his vessel from her moorings. In the next place it is difficult to believe that this feeble old man could have made himself heard on board the tug in such a storm as the witnesses say he did when

he refused their offers. Furthermore, the offers of assistance are said to have been made to the old man at intervals of about an hour and a half, and to have continued up to about 3 o'clock in the afternoon, when she went ashore. But Webster's evidence shows plainly that the Addie B. did not hold on for any considerable time after she was dropped from the tug, but went ashore in a short time. This witness watched her after he had been driven away from her, and says that he saw no approach to her by the Driscoll, as the witnesses from the Driscoll describe, and his evidence proves to my satisfaction that the Addie B. went ashore a considerable time before 3 o'clock. The witness saw the Addie B. go ashore, and himself rendered assistance to the old man at the time she came ashore, and before he went to his dinner. After that he went to his dinner, and at about 1 o'clock. The testimony of this witness is therefore entirely inconsistent with the testimony from the tug that on three or four occasions, extending up to 3 o'clock, they offered assistance to the old man. In this state of the evidence I am not convinced that proffers were made to Abrams to remove him to a place of safety. Furthermore, such offers, if made, in order to constitute a defense must appear to have been offers to take the Addie B. from the place of danger where she was left by the tug free of charge. There is no evidence to show that offers of that character were made. The offers, described by the witnesses for the tug, were simply to tow the Addie B. to a place of safety, presumably for salvage compensation, as in the cases of the other vessels which the tug did take out that morning. An offer by the tug to become a salvor to the Addie B. after she had been placed in a position of danger by the tug constitutes no defense to this action. But, as has been already said, the evidence has failed to satisfy me that any offers of any kind were made to the Addie B. by the tug.

Let a decree be entered in favor of the libelant, with an order of reference.

The Jersey City.[1]

Cornell Steam-Boat Co. v. The Jersey City.

(*District Court, E. D. New York.* July 21, 1890.)

Collision—Subrogation.

Libelants, a towing line, held a contract to tow all the boats of the Delaware & Hudson Canal Company. While towing one of their boats, it was run into and sunk by a ferry-boat. The canal company claimed that the libelant was liable to them for the damage. Libelants denied this, notwithstanding which the canal company deducted the amount of the damages from their next payment to libelants. Libelants refused to recognize their right to make this deduction, but the money was withheld until the statute of limitations was about to run in favor of the colliding ferry-boat, when the libelants assented to the deduction, and brought this action in their own name against the ferry-boat. On exception to the libel on the ground that it showed no cause of action in favor of the libelants, *held* that, under the circumstances, libelants were subrogated to the rights of the canal company, and the exception should be overruled.

In Admiralty. On exception to libel.

Robert D. Benedict, for libelants.

Robinson, Bright, Biddle & Ward, for claimants.

Benedict, J. This action is brought by the owners of the tug-boat Genl. Sheridan, to recover of the ferry-boat Jersey City the damages done to the coal-boat No. 3,059, and her cargo of coal, while being towed by the Genl. Sheridan, in a collision between that boat and the ferry-boat Jersey City. The libel avers that the collision was caused by the sole negligence of the ferry-boat; that the libelants have paid to the Delaware & Hudson Canal Company, the owners of the coal-boat No. 3,059, the damages so caused; and that by reason thereof they have been subrogated to the rights of the Delaware & Hudson Canal Company to recover said damages of the ferry-boat. Wherefore they pray to recover of the said ferry-boat the sum they have so paid the Delaware & Hudson Canal Company. To this libel the exception is taken that it sets forth no cause of action, because the libelants' payment of the Delaware & Hudson Canal Company's claim, as owners of boat No. 3,059, and cargo, for damages sustained while in charge of the libelants' tug, Genl. Sheridan, confers no right of subrogation upon the libelants.

It appears by the evidence that the libelants had a contract with the Delaware & Hudson Canal Company to tow all their boats at certain prices, for which they were to be paid on the 10th day of each month. This towing they agreed to do in a skillful, judicious, careful, and effective manner, and they also agreed to pay all damages and losses that the Delaware & Hudson Canal Company might sustain by reason of the omission of the libelants so to do such towing. Upon the happening of the collision in question, the Delaware & Hudson Canal Company set up the claim that the libelants were liable to them for the damages done the coal-boat. This the libelants denied, notwithstanding which

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

the Delaware & Hudson Canal Company deducted the amount of the damages from the next payment due the Cornell Steam-Boat Company under the towing contract. The Cornell Steam-Boat Company refused to recognize the right to make this deduction, but the Delaware & Hudson Canal Company held back this amount from the towing bills until the statute of limitation was about to run in favor of the ferry-boat. Then the Cornell Steam-Boat Company assented to the deduction, and at once brought this action.

In determining the question raised by the exception it must be conceeded that payment by a mere stranger confers no right of subrogation. As declared in the authorities, the rule is not, however, limited to payments by a surety, but will apply "in every instance, (except in the case of a mere stranger,) when one man has paid a debt for which another is primarily liable." Bisp. Eq. § 337. The question, therefore, is whether the position of the libelants is that of a "mere stranger," within the meaning of the rule. In *Acer* v. *Hotchkiss*, 97 N. Y. 395, it is said that the right of subrogation may be claimed by one who pays the debt of another under some compulsion; and it seems to me that the libelants may fairly enough be said to have paid the debt due the Delaware & Hudson Canal Company by the ferry-boat under compulsion. That corporation owed them money exceeding the amount of this claim for damages, which it refused to pay except subject to a deduction of the amount of this debt. The libelants were thus compelled to either acquiesce in the deduction made by the Delaware & Hudson Canal Company from the monthly bill, and claim to be subrogated to the right against the ferry-boat, or to bring a suit against the Delaware & Hudson Canal Company under the towing contract, and so put that company to a second suit against the defendants. By acquiescing, under these circumstances, in the deduction made from their bills, and bringing this suit, they enabled the controversy to be settled by one suit instead of two, and equity should therefore uphold them in so doing. Furthermore, if a different course had been pursued, and the Delaware & Hudson Canal Company had been driven to sue the ferry-boat, it would have been within the power of the ferry-boat to bring the libelants into that suit, they having had charge of the navigation of the coal-boat at the time she was injured. This liability to be made a party to the controversy is in my opinion sufficient to prevent the libelants' payment from being held to be the payment of a mere stranger. Moreover, while the ferry-boat, if compelled to answer to the libelants, will be held to precisely the same extent, and in precisely the same manner, as if the action were by the Delaware & Hudson Canal Company; if not compelled to answer to the libelants, they will escape all liability, and in this way be enabled to cast upon the libelants a loss for which the ferry-boat alone may be found responsible. Evidently the position taken by the ferry-boat is devoid of equity.

Under such circumstances, it will serve the purposes of justice to compel them to answer to the libelants, and in my opinion no rule of law will be violated thereby. "The doctrine of subrogation," says the New

York court of appeals, (*Acer* v. *Hotchkiss*, 97 N. Y. 395, 402,) "is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is kept in view." It seems to me that the equity resulting from a recognition of the right of subrogation in this case, and the inequity resulting from its rejection, show that I shall not handle the doctrine unwisely if I apply it in favor of the libelants. The exception is overruled, and the case will proceed to a hearing on the merits.

THE SEMINOLE.[1]

LYNCH *v.* THE SEMINOLE.

(*District Court, E. D. New York.* March 15, 1890.)

ADMIRALTY—LIBEL FOR POSSESSION.

The yacht S., belonging to one Blunt, and then lying at Brunswick, Ga., was purchased by Leonard for $1,000, of which $150 was in cash, and $850 in notes. A bill of sale was delivered to Leonard, which contained no copy of the certificate of enrollment, and also an order on the person in charge of the boat to deliver her to Leonard or order. Leonard, the same day, sold the yacht to Lynch, this libelant, for $700, of which $110 was paid on the spot. Instead of a bill of sale, the order for delivery of the yacht was given to libelant, which he turned over to a person whom he employed to bring the yacht to New York. Leonard afterwards obtained this order from the employe without the knowledge of libelant, and delivered it to one Farnham, who started with the yacht for New York. Libelant thereafter demanded of Leonard the bill of sale, which was refused. After the vessel arrived in New York, Leonard delivered a bill of sale to Waterhouse, his brother-in-law, for an expressed consideration of certain moneys claimed to have been advanced on her. On libel for possession, the various parties above named appearing in the action, it was *held* that the title to the boat was in Lynch, and possession of her would be awarded to him on his payment into court of the balance of the purchase money, $590, less his taxed costs, which sum should be paid over to Waterhouse.

In Admiralty. Libel for possession.

On July 5, 1889, William Leonard purchased the yacht Seminole, then lying at Brunswick, Ga., from Edmund Blunt, for $1,000. He paid Blunt $150 in cash, and gave his notes, indorsed, for the balance, $850. He received from Blunt a bill of sale of the yacht, which contained no copy of the certificate of enrollment. He also received a written order on the person in charge of her to deliver her "to bearer, William Leonard, or order." Leonard, later on the same day, sold the yacht to the libelant, George M. Lynch, for $700. Lynch paid $110 in cash, and agreed to pay the balance on receipt of the bill of sale; Leonard stating that he had not yet received a bill of sale from Blunt. Leonard, however, gave the order for the delivery of the yacht to Lynch, and the latter delivered it to a person employed by him to bring the yacht from Brunswick to New York. Leonard, subsequently, on the same day, obtained the order from this person, without the knowledge or con-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

sent of Lynch, and delivered it to one Farnham, who started on the same evening for Brunswick. On learning these facts, Lynch made a formal tender of the balance of the purchase money to Leonard, and demanded a bill of sale, which was refused. Farnham arrived at New York with the yacht on September 21, 1889. On September 23, 1889, Leonard made and delivered a bill of sale of the yacht to William S. Waterhouse, his brother-in-law, for an expressed consideration of $1,200, which Waterhouse claimed to have advanced on her. This bill of sale contained a copy of an old certificate of enrollment in the name of one Douglas. No new enrollment was had by either Leonard, Lynch, or Waterhouse, and neither of the bills of sale was recorded. On January 17, 1890, the libelant, on learning the whereabouts of the yacht, filed this possessory libel. A claim and answer were filed by Waterhouse, claiming title by bill of sale from Leonard. Leonard answered, denying the sale to Lynch, and alleging the sale to Waterhouse. Blunt intervened by petition, claiming the right to rescind the sale to Leonard, and that no title had passed from him to Leonard. He alleged that, at the time of his sale to Leonard, the latter represented himself and his indorser as responsible men and owners of certain specified real estate of great value; and that he only discovered the falsity of these statements after judgments had been obtained against Leonard on the promissory notes, and executions against his property had been returned unsatisfied.

Albert A. Wray, (*Joseph F. Mosher*, of counsel,) for libelant, cited *The Fannie*, 8 Ben. 429; *Bank* v. *Smith*, 7 Wall. 646; *D'Wolf* v. *Harris*, 4 Mason, 515; *The Lodemia*, Crabbe, 271; *The Active*, Olcott, 286; *The Amelie*, 6 Wall. 18; *Bank* v. *Jones*, 4 N. Y. 497; *City Bank* v. *Rome, W. & O. R. Co.*, 44 N. Y. 136; *Merchants' Bank* v. *Union R. & T. Co.*, 69 N. Y. 373.

H. E. Talmadge, (*Charles E. Le Barbier*, of counsel,) for Waterhouse and Leonard.

Alexander Cameron, for Edmund Blunt.

BENEDICT, J. Let a decree be entered in this case directing the sharpie Seminole to be delivered by the marshal into the possession of the libelant, George M. Lynch, upon the payment by the libelant, Lynch, into the registry of the court of the sum of $590, less the amount of the taxed costs of the libelant Lynch in this action; and further directing that the sum so paid into the registry, after deducting said costs, be paid over to the claimant, Waterhouse, or his proctor; and further directing that the claim of Edmund Blunt to the possession of the said sharpie be dismissed, without costs.

THE A. M. BALL.[1]

FROST *et al.* *v.* THE A. M. BALL.

(*District Court, E. D. New York.* July 24, 1890.)

1. TUG AND TOW—CASTING OFF TOW-LINE WITHOUT NOTICE.
It is a breach of the duty owed by a tug to her tow to cast off the tow-line without giving reasonable notice of her intention so to do, and reasonable time for the tow to take measures to insure her own safety.

2. SAME—NEGLIGENCE.
Where the master of a tug engaged to tow a schooner, and did tow her for a short period, and then, finding that there had been a mistake in the bargain with the schooner, cast off the tow-line, whereupon the schooner, in spite of all her efforts, was carried by the wind and tide against the docks, it was *held* that the tug was liable for the schooner's damage.

In Admiralty. Action for damage to a tow in being cast adrift by her tug.

Robert D. Benedict, for libelants.

Alexander & Ash, for claimants.

BENEDICT, J. This is an action to recover damages of the tug A. M. Ball for setting the schooner Ellen Eliza adrift in the East river. The schooner was sailing up the East river to College Point, heavily loaded with brick. When somewhere below the bridge, she was hailed by the tug A. M. Ball to know if she wanted a tow. The captain of the schooner told the master of the tug that the schooner was bound to College Point, and offered to give him four dollars to tow her to that place. The master of the tug accepted the offer, and taking the schooner's line, began to tow the schooner. It appears that the master of the tug, through carelessness, had supposed that the master of the schooner had said she was bound to Hunter's Point; and, on his deck-hand calling his attention to his mistake, he at once inquired of the master of the schooner whether he was bound to Hunter's Point or College Point, and on being informed that she was bound to College Point, told the master of the schooner that he could not tow him to College Point for four dollars. Shortly afterwards the schooner's line was cast off from the tug, and the tug went off in pursuit of other business. At the time when the schooner's line was cast off by the tug, she was above the bridge, and about off Jackson street. Her sails were down, and a strong breeze was blowing off the New York shore. The schooner at once endeavored to get up her sails; but, while getting up the sails, she was carried by the wind and tide across the river; and thus, before she could gather way, she brought up on the Brooklyn side, whereby she was considerably damaged.

The evidence satisfies me that the master of the tug did not take hold of the schooner with the intention to tow her to College Point, but under the mistaken idea that the schooner was bound to Hunter's Point. This mistake was the fault of the master of the tug; for no mistake was made

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

by the captain of the schooner, and the tug's deck-hand understood College Point to be given as the schooner's destination. But, although it is evident that the master of the tug never agreed to tow the schooner to College Point, the fact remains that he took the schooner in charge, and towed her a considerable distance to a place where, in the then wind, she could not safely be cast off with her sails down. There is testimony from the tug that, when the tug cast the schooner's line off, her sails were up; but the clear weight of the evidence is that they were down, and the attempt of the tug to show the contrary only renders it more plain that it was a violation of a duty owing by the tug to the schooner, under the circumstances, to give notice of her intention to cast off the line, and to give reasonable time for getting up sail, before casting the schooner adrift. This she did not do, and this failure of duty renders her liable for the consequences of her act.

It has been contended in behalf of the tug that the immediate cause of the damage to the schooner was the fault of the schooner in omitting to cast anchor. But I do not think the tug can be absolved in that way. If to cast anchor would have been a proper maneuver on the part of the schooner when she was set adrift, it was also a proper course to endeavor to get up sail. As it appears to me, it was entirely reasonable for the schooner to attempt to get out of the predicament in which she had been placed by the tug by means of her sails, instead of coming to anchor in the middle of the river; but, at the most, it was an error of judgment which cannot be charged to the schooner as a fault conducing to the subsequent accident. The sole fault was that of the tug in neglecting the duty owing to the schooner at the time when the master of the tug discovered that he had blundered in supposing that the schooner was bound to Hunter's Point. The libelant must have a decree, with an order of reference.

The King Kalakau.[1]

New York Lighterage & Transp. Co. *v.* The Pennsylvania R. Co.

(*District Court, E. D. New York.* July 24, 1890.)

Tug and Tow—Faulty Loading—Negligence of Tug—Remote Cause.

A tug took in tow libelant's barge, which was loaded with a deck-load of rails, and with burlaps below. The tug left the barge at a stake-boat, where, during the night, she rolled so heavily as to lose her deck-load overboard, and received damage herself. For the loss she sued the tug. *Held*, that the immediate cause of the loss was the top-heavy condition of the barge, and the act of the tug in leaving the barge at the stake-boat was but a remote cause of the damage, and did not render the tug liable.

In Admiralty. Action for alleged breach of towing contract.

Carpenter & Mosher, for the libelants.

Robinson, Bright, Biddle & Ward, for the claimants.

Benedict, J. On or about April 1, 1887, the Pennsylvania Railroad Company contracted with the libelant to tow the barge King Kalakau, loaded with old rails and burlaps, from Brooklyn to a dock at South Amboy, N. J. That barge, in tow of the tug Amboy, started from Brooklyn, and about 3 o'clock P. M. of the same day reached South Amboy. On arriving at South Amboy the barge was placed at the stake-boat there. The wind was high at the time, and a snow-storm prevailing. About 12 o'clock that night the respondent's tug went to the barge, still lying at the stake-boat, for the purpose of taking the barge into the dock, but all on board the barge were asleep; and, getting no response to various hails, the tug departed without the barge. At about 1 o'clock the barge rolled heavily enough to dump her deck-load of rails overboard, the boat herself receiving some damage thereby. These losses the libelant seeks to recover of the Pennsylvania Railroad Company. The argument in behalf of the libelant is that it was a breach of the towing contract to leave the barge at the stake-boat, and that this breach of the contract was the immediate cause of the subsequent loss of the iron. Reference is made to the following cases: *The W. E. Cheney*, 6 Ben. 178; *Cokeley* v. *The Snap*, 24 Fed. Rep. 504; *Phillips* v. *The Sarah*, 38 Fed. Rep. 252; *The Bordentown*, 40 Fed. Rep. 682.

Passing the question whether it was a breach of the contract to leave the barge at the stake-boat, and passing, also, the question whether the barge was not at her own risk while lying at the stake-boat subsequent to the time when the respondent's tug went to her, to tow her to the dock, and failed because unable to rouse from sleep those in charge of the barge, I am of the opinion that the immediate cause of the loss was the top-heavy condition of the barge, loaded as she was, with rails on deck, and burlaps below. It is evident that the accident was wholly

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

unexpected by any one. No one doubted the ability of the barge to lie in safety at the stake-boat, and it is plain that she would have encountered no loss if loaded in a different manner. It was, therefore, without contemplation of either party that leaving the barge at the stake-boat would put her in danger of losing her deck load. The act of the respondents in leaving the barge at the stake-boat—a remote cause, perhaps—was not the immediate cause of the loss that ensued, and did not render the respondent liable for the loss. For this conclusion the decision of the supreme court of the United States in *Railroad Co.* v. *Reeves*, 10 Wall. 176, is authority. The libel must be dismissed, with costs.

THE BOLIVIA.[1]

ADAMS *et al.* *v.* THE BOLIVIA.

SIPILA *v.* SAME.

(*District Court, E. D. New York.* April 25, 1890.)

COLLISION—STEAM AND SAIL—FOG-HORN.

When collision occurred in a dense fog between a steamer and a schooner, and the proof showed that the steamer was navigating cautiously; that the schooner was seen as soon as it was possible that she could be seen, when it was too late to avoid collision, and her signals were not heard before she was seen; and that the schooner was using an ordinary fog-horn, not the mechanical horn provided for by statute,—it was *held*, that the schooner's failure to comply with the statute was the cause of the collision, and her libel against the steamer was therefore dismissed.

In Admiralty. Actions to recover damages caused by collision.

Owen, Gray & Sturges, for the libelants, Adams and Sipila.

Wing, Shoudy & Putnam, for the Bolivia.

BENEDICT, J. These actions are to recover damages caused by the sinking of the schooner Eva I. Smith by the steamship Bolivia. The accident occurred on the open sea in a dense fog. The proof shows that all possible precaution was taken on board the steamer to hear any fog signal that might be blown from another vessel. No fog signal was heard from this schooner until she was seen, then close at hand, on a course crossing the steamer's bow, sailing free. The steamer at once ported to go under the schooner's stern, and reversed her engines; but the vessels came violently in contact, and the schooner shortly sunk. The witnesses from the schooner say that they heard the fog-whistle of the steamer, and blew their own fog-horn; that the steamer was known to be approaching, but could not be seen until right upon them. The fog-horn blown by the schooner was an ordinary tin horn. No mechanical horn, as required by the statute, was used by the schooner; nor did she have any such horn on board. On the part of the schooner the contention is, first, that

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

the failure of the steamer to hear the schooner's horn was want of a sufficient lookout. But the proofs from the steamer have convinced me that the steamer was not in fault in the matter of lookout. The next contention is that the steamer was going at an unlawful rate of speed. I do not see how it can be held that this collision was caused by the speed of the steamer. The fog was dense. The proof is clear that the schooner was seen as soon as it was possible to see her, and was not heard before she was seen. When she was seen the distance then intervening between the two vessels was so short that it would have been impossible for the steamer to avoid the schooner even had the speed of the steamer been much less than it was. But going as the steamer was, and able to do what she did when the schooner was seen, renders it quite clear that, if the presence of the schooner had been known somewhat sooner than it was, the steamer would have avoided the schooner. For some reason the schooner could not, by the horn she blew, make her presence known until she was seen by the steamer. Had she been able to make her presence known somewhat sooner, there would have been no collision. The presumption is that a mechanical horn would have accomplished what the tin horn used failed to do. The schooner did not use a mechanical horn to make herself heard, but a horn blown by the mouth. In so doing she violated the law, and this failure to comply with the law must be held to be a fault conducing to the collision that ensued. *The Pennsylvania*, 19 Wall. 135, 136. That this omission was the sole cause of the collision seems to me proved by the testimony.

The libels must be dismissed, and with costs.

The New Brunswick.[1]

Passano *v.* The New Brunswick.

(District Court, E. D. New York. July 24, 1890.)

Admiralty—Damage by Steamer's Swells—Evidence.

Suit was brought against a steam-boat to recover damages alleged to have been caused to a canal-boat, while loading at a dock, by the swell of the steamer. It appeared that while the canal-boat was loading she sprung a leak and sank, and that the leak was discovered about the time the steamer passed. The captain of the canal-boat and his wife testified that they felt a jar on the boat which the captain attributed to the swell of the steamer. The men engaged in loading the canal-boat did not notice any swell. *Held*, that it was not proved that the damage sued for was caused by the swell of the steamer, and the libel should be dismissed.

In Admiralty.

Suit to recover damages alleged to have been caused to a canal-boat by the swells of the steam-boat New Brunswick.

Carpenter & Mosher, for libelants.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

Hyland & Zabriskie, for claimants.

BENEDICT, J. This action is brought to recover for damages done to the canal-boat Herbert I. Davis, while loading iron pipes at the pipe dock at Elizabethport, by a swell in the water, alleged to have been caused by the steam-boat New Brunswick in passing. It is proved that the canal-boat Herbert I. Davis, while taking in heavy iron pipes at the pipe dock, suddenly sprung a leak, and sank before her master was able to get her to the dry dock. It is also true that this leak was discovered about the time the steam-boat New Brunswick passed the pipe dock on her way to New York. But it is not proved that it was a swell from the New Brunswick that caused the leak. The captain of the boat and his wife testify to a jar felt on the boat, which the captain at the time attributed to the swell of the New Brunswick, and he infers that this jar arose from a swell, and that this swell caused the boat to spring a leak. Several other witnesses engaged at the time in handling the pipes noticed no swell, and it is hardly conceivable that a swell sufficient to drive this new boat against the dock with such force as to start off the boat's bottom could have escaped the attention of all but the captain and his wife. Furthermore, the captain testifies that when he felt the jar he was on his knees, talking to the men in the hold about putting in two more pipes to give the boat a proper trim, while the evidence from the men makes it plain that the leak was discovered by them before the captain came to the hatch, and that he was there because of a call from them that the boat was leaking. This shows that the swell that is claimed to have been made by the New Brunswick, and to have been the cause of the leak, came after the leak had been discovered, and the captain called to attend to it. Moreover, the testimony from the steam-boat as to the depth of water there, the width of the channel, and the usual course of the boat, is sufficient to repel any inference that she caused an alleged swell, in the absence of any direct proof of the fact.

The opinion formed at the trial has been confirmed by reading all the evidence at the time of rendering this decision, and I am clear that the libel must be dismissed upon the ground that it is not proved that the damage sued for was caused by the steamer's swell.

THE JARLEN.[1]

TEBO *v.* THE JARLEN.

(*District Court, E. D. New York.* July 21, 1890.)

ADMIRALTY—SALVAGE.

The bark J. had passed through a storm, had lost some of her spars, and was leaking. When off Barnegat, under sail, and undoubtedly able to sail to New York without assistance, she was taken in tow by a tug and brought to New York over a smooth sea, the service occupying from 9½ A. M. to 6 P. M., and involving no risk or extra labor to the tug. The bark and her cargo was worth $20,500; the tug, $25,000. *Held*, that $400 was sufficient salvage.

In Admiralty. Action for salvage.

Goodrich, Deady & Goodrich, for libelant.

Butler, Stillman & Hubbard, for claimants.

BENEDICT, J. This is an action to recover for salvage service alleged to have been rendered by the tug B. S. Haviland to the bark Jarlen on the 14th of September, 1889. The service consisted in towing the bark from Barnegat to New York in a smooth sea; the time occupying from 9½ A. M. to 6 P. M., and involving no risk or extra labor on the part of the tug. The value of the bark and her cargo was $20,500; the value of the tug, $25,000. The libelants desire a decree for 25 per cent. of the value of the bark and cargo. The claimants claim that the value of the service rendered did not exceed $100, but have tendered $400, and paid the sum into court. This difference between the respective parties arises out of the difference in their estimate of the danger in which the bark was when taken hold of by the tug. The evidence has satisfied me that the danger to which the bark was exposed was very slight. She had been in peril during a hurricane, had been leaking, and had lost her foretop-mast, foretop-gallant-mast and jib-boom; but she had passed through her peril. When taken hold of by the tug, she was sailing along under maintop-gallant-sail, main-upper-top-sail, main-lower-top-sail, mainsail, maintop-mast-stay-sail, foresail, and jib. She was not leaking to any considerable extent, and was undoubtedly able to sail to New York without assistance. The contention of the libelant that she had signals of distress flying, that the wind was blowing strong, and a dense fog prevailing, is not borne out by the evidence. Her cargo of lumber had shifted, and she had a list, but not so great as to prevent her working without difficulty. The omission to call the American pilot, who was taken on board after the tug had hold of the bark, is commented on by the libelants. But the omission, in a case like this, tells as much against the libelant, upon whom is the burden of proof, as it does against the claimant. In my opinion the $400 tendered by the claimants was sufficient. The libelants may have a decree for $400, with costs up to the time of the tender.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

EVANS *et al.* v. DILLINGHAM *et al.*

(*Circuit Court, N. D. Texas.* June 2, 1890.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—RECEIVERS.
A suit against a receiver appointed by a federal court, brought in a state court without leave of the federal court, is removable, since it involves a federal question.
2. SAME—APPLICATION—TIME.
Where an amended petition is filed, which makes a substantially different suit from that stated in the original petition, the time for removing the cause is to be calculated with reference to the amended petition.

In Equity. On motion to remand.

R. S. Neblett, *W. J. McKie*, and *W. S. Simkins*, for complainants.

L. C. Alexander and *F. C. Dillard*, for defendants.

MCCORMICK, J. On the 13th day of September, 1889, several citizens of Corsicana brought this suit for injunction, a preliminary injunction having been granted by one of the state district judges, to restrain Charles Dillingham, receiver of the Houston & Texas Central Railway, from removing the division head-quarters of said road, and the machine-shops and other plant connected therewith, from Corsicana to Ennis. The suit was brought without obtaining leave of the court which appointed said receiver. The suit in which said Charles Dillingham was appointed receiver was pending on and before the 3d of March, 1887. A defective citation was served on the defendant in time, if the citation had been legal, to compel him to plead at the October, 1889, term of the state district court for Navarro county; that is, on or before the 18th day of October, 1889. On the 14th day of October, 1889, the defendant crossed certain interrogatories to a witness propounded by plaintiffs, and filed certain cross-interrogatories in the state court. At said term of said court, and on the 18th day of October, 1889, the defendant, appearing only for the purpose of moving to quash the citation, filed his motion to quash said citation. This motion, though never acted on, (for reasons hereafter shown,) was manifestly well taken; and it is admitted by plaintiffs' counsel that the citation was defective, and did not require defendant to answer. The defendant also, on the 14th day of November, 1889, filed in the state court a suggestion that the presiding judge of said court was disqualified by pecuniary interest in said suit to hear and try his motion to quash the citation, or any other question in said cause, and on the same day, (November 14th,) filed a written agreement signed by the attorneys of the plaintiffs and the defendant to the effect that the presiding judge was a citizen and resident of Corsicana, and owned real estate and personal property in said town of the value of at least $6,000. On the 16th day of November the court entered a minute to the effect that the judge, believing himself disqualified on the ground of interest, refused to pass on the motion to quash citation. On the 15th day of March, 1890, defendant Charles Dillingham filed his motion in the state court to dissolve the preliminary injunction, and at the same time filed his answer, beginning with this protest:

"And now comes Charles Dillingham, receiver, and protests that this court has no jurisdiction to determine this suit, or to enjoin him from the performance of the functions and duties as receiver of the property of the Houston & Texas Central Railway, and the management thereof, under the direction of the United States court for 5th circuit and the eastern district of Texas, from which he received his appointment."

On the 2d day of April, 1890, the original persons plaintiff, joined by three other persons as plaintiffs, filed in the state court what they call their "Second Amended Petition" in lieu of their original petition, filed 13th September, 1889, and their amended petition filed January 13, 1890. Notice of filing said amendment was served on the counsel for defendant on the 3d day of April, 1890. On the 7th day of April, 1890, the first day of the second term of the state court after the institution of the suit, the defendants filed their petition and bond for the removal of the suit to this court on several grounds, only one of which it is necessary to notice, and which is thus stated in the petition for removal, to-wit:

"Petitioners further show that this suit in controversy arose under the constitution and laws of the United States, because they say its correct decision depends upon the construction of the constitution and laws of the United States; and the rights of said defendant Dillingham as receiver may be defeated or sustained by the construction thereof, for petitioners show that plaintiffs have never obtained leave of said United States circuit court to bring this suit, nor has said receiver yielded to the jurisdiction of said state court; and whether said suit can be maintained and said receiver be enjoined by said state courts from the management of said railway property under the orders of said United States court, including its order of March 10, 1890, a certified copy of which is a part of the record, and attached to a special answer of said Dillingham on motion to dissolve an injunction, sued out by a part of these plaintiffs in above numbered and styled cause, depends upon the proper construction of an act of congress, (chapter 866) entitled 'An act to correct the enrollment of act approved March third, eighteen hundred and eighty seven, entitled "An act to amend sections 1, 2, 3, and 10 of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes, approved March third, eighteen hundred and seventy five,"' approved August 13, 1888,'—for petitioners say that said section 3 of said act, under which it is sought to maintain this suit, is in conflict with paragraph 1 of section 2 of article 3 of the constitution of the United States; that said act and said sections thereof did not authorize the bringing of this suit in said state court, because said circuit court had original jurisdiction thereof, and because, as shown by the said decrees, the suit in which said receiver was appointed was brought and pending before the passage of said act, and because it is not the character of action authorized by said act to be brought in a state court without leave, and because it does not confer the power on a state court to direct or enjoin the actions of a receiver of the United States court, or its process directed to him; and upon these grounds said receiver claims exemption from the jurisdiction of said court, and exemption from the claims to enjoin him as to his actions as the receiver and officer of said United States circuit court."

The application for removal was resisted in the state court, but on the hearing thereof in that court an order for the removal was granted, and the transcript was duly filed in this court. The plaintiffs now move

to remand on the ground—*First*, because the petition and bond for removal were not presented in time; *second*, because the petition for removal does not show a state of facts involving any federal question, or calling for the construction of any act of congress or of the constitution of the United States in the determination of the subject-matter of this suit.

In a case where one Owen Sullivan had after the 3d day of March, 1887, sued John C. Brown, receiver of the Texas & Pacific Railway Company, and recovered judgment in the state court, affirmed on appeal to the state supreme court, (10 S. W. Rep. 288,) and presented his petition of intervention in the suit of *Missouri Pac. Ry. Co.* v. *Texas Pac. Ry. Co.*, (41 Fed. Rep. 311,) in which said John C. Brown had been appointed receiver by the United States circuit court for the eastern district of Louisiana, which suit was pending on and before the 3d day of March, 1887, the court, the circuit judge of this circuit presiding and delivering the opinion, held "that the necessity of obtaining leave to prosecute a suit against a receiver appointed by another court is jurisdictional," citing *Barton* v. *Barbour*, 104 U. S. 126. The circuit judge's opinion proceeds:

"This court has exclusive original jurisdiction over its receiver as to actions based on negligence in the operation of the trust property when the act of 1887 was passed. If the third section of that act went into immediate operation *quoad* this cause, then it seems clear that such act affects the jurisdiction over a suit then pending, and this the repealing clause prohibits. It also seems clear that whatever jurisdiction the district court of Harrison county acquired by said act was so much jurisdiction taken away from this court. It would seem to follow that, as to the receiver of the Texas & Pacific Railway, the act of 1887 did not take effect, and that therefore the district court of Harrison county, Texas, was without jurisdiction to entertain a suit against such receiver." Page 314.

It is urged by defendant's counsel with certainly some apparent force that it is immaterial what is the sound construction of the act of 1887 affecting this case; that the fact that it must be construed in order to determine the plaintiffs' right to sue presents such a federal question as authorizes the removal. Whether this view be sound or not, it seems to me that in the, as yet, unsettled state of judicial opinion as to the correct construction of the provisions of the act of 1887 on this subject, the petition for removal does present a federal question, which the defendant is entitled to have passed on by the United States court, if he has not lost his right to remove by his delay in presenting his application therefor.

Was the application to remove made in time? The statutory rule governing the practice in the state courts requires the defendant who is duly served with legal citation to answer the petition on or before the fifth day of the return-term. Rev. St. Tex. art. 1263. Where the citation is defective, and the defendant moves to quash the citation, the practice requires him to answer on or before the fifth day of the succeeding term. Id. art. 1243. Motions to dissolve injunctions can be heard in vacation only "after answer filed." Id. art. 2891. The defendant had the right to file his petition for removal in the state court "at the time or any time before" he was required by the laws of the state to answer the

petition of the plaintiff. Act Aug. 13, 1888, § 1, (25 U. S. St. 435.) The provision is not, at the time or before he does answer, or at the time or before he crosses interrogatories, or at the time he enters his appearance in the state court. There is no question as to submitting to the jurisdiction of the state court involved in this limitation. It is purely a limitation of time definitely and clearly fixed by the rules of practice prescribed by statute or rules of court in the state tribunals. It seems clear to me that in this case the defendant was not required to answer the petition of the plaintiff before the fifth day of the April term, 1890, of the state court, before which day this application was made.

But the defendant also urges that plaintiffs' original and first amended petition presented no cause of action against the defendant, and that, the second amended petition now constituting the petition of plaintiffs, he certainly could not be required to answer before the first day of the first term of the court after it was pleaded, on which day his application for removal was made. It appears from an inspection of the pleadings that the original and first amended petition do not show any privity of the plaintiffs in the contract on which this suit is based. In a very similar case the supreme court of this state in announcing its decision use this language: "The suit for relief, it seems to us, will have to be prosecuted either in behalf of the city as a corporation, or by such of its citizens as participated in the transactions, and have in them a pecuniary interest." *Railway Co.* v. *Harris*, 73 Tex. 382, 11 S. W. Rep. 405. There is no question in my mind that, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff. As an illustration of the propriety and necessity of so holding, take the case where a party sues in the state courts, alleging the cause of controversy to be of less value, or not of greater value, than $2,000, and after the return-term, and after the defendant has answered, the plaintiff files an amended petition, setting up the same cause of action, but claiming damages in a sum exceeding $2,000, can it be doubted that, if the state of the parties or the cause of action be such as to have given the right to remove had the amount in controversy been sufficient to give this court jurisdiction, the defendant would not be denied his right to remove because the time within which he was required to answer the original petition had passed. I am of opinion that the defendant's application for removal was made in time, and the motion to remand will be refused.

FORD *et al.* v. DELTA & PINE LAND CO.

(Circuit Court, S. D. Mississippi. August 18, 1890.)

1. TAXATION—EXEMPTION—CONSTRUCTION.
An exemption from taxation of the capital stock and "all the property and effects" of a railroad company will not be extended by implication to outlying and detached lands which the corporation had no power to acquire when the exemption was granted, but which were acquired under a power granted by the subsequent charter.
2. SAME—CONTRACT.
Act. Miss. Feb. 13, 1867, (liquidating levee law,) levying a tax on the lands in the levee district for the payment of the levee bonds, and providing that, in case of default, the land should be sold, constituted a contract between the state and the bondholders that the taxes collected, and the lands purchased by the levee commissioners for default in the tax, should be held for the payment of the bonds.
3. TAX-TITLES—CURATIVE STATUTE.
Though the act provided that all the land on which the tax was not paid before a certain day in each year should on that day be sold for said taxes, such lands might thereafter be sold for such taxes, and the irregularity cured by act of the legislature.
4. PROCESS—RETURN CURED BY JUDGMENT.
A return of process, defective on its face, in that it does not show the relation of the person served to the defendant corporation, is cured by a recital in the judgment that the defendant had been duly and legally served with process.
5. CORPORATIONS—DISSOLUTION.
Code Miss. 1880, § 1038, provides that the franchise of a railroad corporation may be sold to satisfy a judgment, the purchaser to have the rights and duties given and imposed by the charter. Section 1039 allows six months for redemption. Section 1041 provides that all corporations, after their charters have expired or been annulled, shall nevertheless be continued bodies corporate for three years thereafter for the purpose of suing and being sued and closing up their business. *Held* that, where a railroad company franchise was sold with the rest of the property on a decree of foreclosure, and the purchasers organized a new corporation under an act of the legislature, the old corporation ceased to exist at the end of three years thereafter.
6. LIEN OF JUDGMENT—CONTINUANCE.
Code Miss. 1880, § 2674, provides that all actions on a judgment or decree rendered in the state must be brought within seven years thereafter. It further provides that no execution shall issue on such judgment or decree after seven years from the date of the last preceding execution, but it makes no provision for the continuance of the lien of the first judgment. *Held*, the rendition of a judgment on a judgment did not continue the lien of the first judgment.

In Equity.

Code Miss. 1880, § 1038, provides that the franchise of a railroad corporation may be sold to satisfy a judgment. Section 1039 allows six months for redemption. Section 1041 provides that all corporations, after their charters have expired or been annulled, shall nevertheless be continued bodies corporate for three years thereafter for the purpose of suing and being sued and closing up their business.

Whitfield & Sullivan and *Ed. Mayes*, for complainant.

Frank Johnson and *James R. Yerger*, for defendants.

HILL, J. This cause is submitted upon bill, answers, exhibits, and proofs, and argument of the counsel. The pleadings and proofs are exceedingly voluminous, but, after having been carefully examined and considered, they show the following facts:

On the 23d day of November, 1859, an act was passed by the legislature of this state "to incorporate the Memphis, Holly Springs & Mobile

Railroad Company," by the first section of which the corporation proposed to be chartered was authorized to purchase, receive, hold, and enjoy real and personal estate, and the same to retain to them, their successors and assigns, so far as it may be necessary for their accommodation and convenience in the transaction of their business, and such as may in good faith be conveyed to them by way of security, or satisfaction of debts, or by donation; and the same to sell, grant, or otherwise dispose of, provided said company shall not be allowed to have in their own name, or in any other manner, for their use and benefit, more land than is necessary for the convenience of their railroad therein provided for; including the right of way and grounds proper and necessary for depots, fixtures, and buildings, pertaining to said road, for a longer period than five years after the completion of said road, on pain of forfeiture to the original owners of such lands, all right and title thereto. The nineteenth section of this act enacts that the capital stock and all the property and effects of said company shall be exempt from taxation until said road is completed, provided it is commenced within two years and completed within ten years from and after the passage of this act. Acts 1859–60, pp. 51–60. Nothing more is shown to have been done until the 26th of February, 1867, when the legislature passed "An act to revive and amend the act of incorporation of the Memphis, Holly Springs & Alabama Railroad Company," by the first section of which it is provided that the above-recited act is revived, and that the style of the railroad company shall hereafter be known as the "Memphis, Holly Springs, Okolona & Selma Railroad Company." The second section of this last act provides that the company shall have three years in which to complete their road after the passage of the act. The third section of the act authorized the corporators to receive subscriptions in land to the capital stock of the company, provided the land shall be in five miles of the line of road, and shall be estimated at its cash value by three disinterested persons, and shall be taken by the company at their valuation, unless objected to as excessive, in which event there shall be a re-estimate by three persons appointed by the judge of the probate court of the county in which the land may lie. These lands were to be conveyed to the company with covenants of valid title, and the persons making the subscription were to pay all the costs of the valuation and conveyance, and 10 per cent. on the amount subscribed, in the same installments granted to those who subscribed for stock in money, and for the amount of said stock both in land and money he shall be entitled to receive certificates of stock as in other cases. The next section provides that nothing in the act shall be construed to prevent the state from levying and collecting such income taxes or tax upon the travel on said road as might be provided from time to time by law. Acts 1866–67, p. 654. On the 21st day of July, 1870, there was passed an act changing the name of this railroad company to that of the Selma, Marion & Memphis Railroad Company, and said company was authorized to receive, in the way of subscription to its capital stock, lands lying anywhere within the state of Mississippi. On the 16th day of March, 1872, there was passed an

act to facilitate the construction of the Selma, Marion & Memphis Railroad, by the third section of which it was enacted that all lands which had before that time been purchased by or forfeited to the state of Mississippi for taxes due and unpaid thereon, and which have been sold to said Selma, Marion & Memphis Railroad Company by the original owners of the same, shall be sold to said railroad company by the auditor of public accounts at two cents per acre, upon the presentation of satisfactory evidence of titles to said land to said railroad company from original owners, and satisfactory proof that not less than twenty-five miles of said road has been constructed: provided, the title to the lands shall have been conveyed by said owners to said company prior to the passage of the act, and that in all cases where the said lands had been forfeited to or purchased by any of the levee boards in the levee districts in this state in which any of the lands lie, and are now held or claimed by the levee boards for the non-payment of levee taxes, and where the title is held by said railroad company, said levee boards are required to arrange for the payment of said taxes by receiving, in payment of the same, any of the bonds of the levee board. Acts 1872, p. 313. On the 18th day of March, 1873, the Selma, Marion & Memphis Railroad Company paid to the auditor of the state two cents per acre for the lands embraced in this suit, and took from him deeds of conveyance therefor. This railroad company was consolidated with the Selma, Marion & Memphis Railroad Company of Tennessee and Alabama, and this consolidation was ratified by an act of the legislature passed on the 6th day of March, 1873, entitled "An act to amend the charter of the Selma, Marion & Memphis Railroad Company." No previous law was passed authorizing the consolidation, nor does it appear upon the face of the ratifying act under what charter the consolidation took effect, or what were the rights, privileges, and immunities accorded to the company by the act of consolidation. Acts 1873, p. 570.

The lands involved in this suit are those claimed to have been purchased from the original owners under the act of July 21, 1870, which authorized the purchase of lands situate in any part of the state of Mississippi, and under the provisions of the act of 16th of March, 1872, authorizing the sale by the auditor to the railroad company, at two cents per acre. The title to the other lands held by the company need not, therefore, be considered. It is admitted that the title to these lands was vested in the state of Mississippi by patents from the United States under what is known as the "Swamp-Land Act" of congress, and that the same have been entered under the act of the legislature of this state approved March 2, 1854, entitled "An act to provide for the further issue of swamp-land scrip, for the purpose of aiding in the completion of the levees upon the Mississippi river," and that patents have been issued therefor to the enterers thereof. The title-deeds, filed as evidence in the cause, show that the parties or their assignees have conveyed to the Selma, Marion & Memphis Railroad Company most of the lands described in the bill. The greater part of these conveyances bear date at different times during the year 1871. The deeds recite that the lands

described in them were sold and conveyed in payment for capital stock in said railroad company. The deeds from the auditor of the state to the company, filed as evidence, show that these lands were forfeited to the state for non-payment of taxes, and were sold therefor, and purchased by the state, and that they were sold by the said auditor to the Selma, Marion & Memphis Railroad Company at two cents per acre, under the provisions of the act of March 16, 1872. On the 18th day of March, 1871, the Selma, Marion & Memphis Railroad Company executed and delivered to Porter King, Abram S. Humphries, and J. M. Hill its mortgage or deed of trust, conveying to them as trustees all the property, real and personal, franchises, rights, and privileges then owned by said corporation, or to be by it afterwards acquired, as security for the payment of certain bonds, with interest coupons attached, issued by the authority of the said corporation, and which were transferred to *bona fide* holders. Said King never accepted said trust, and said Humphries some time afterwards died. Their places were filled, as authorized by said mortgage or trust-deed, by the substitution of J. W. Fant and A. A. Coleman, who accepted the trust, and continued to act as trustees until said corporation ceased to perform its functions. On the 18th day of December, 1874, Luke P. Blackburn, of the state of Kentucky, who was the owner and holder of five of said bonds, being of the denomination of $1,000 each, with matured interest coupons attached, amounting to more than $500, filed his bill in the circuit court of the United States for the western district of Tennessee against said corporation and trustees and a portion of the holders of like bonds and coupons, payment of the interest thereon not having been made, for the purpose of collecting the interest so due, and, if need be, the foreclosure of said mortgage or trust-deed. The bill in that case describes or sets out the lands designated in the bill in this as being embraced in said mortgage. Such proceedings were had in said cause that on the 24th day of July, 1882, a decree was entered by the court directing Bell W. Etheridge, clerk and master of said court and commissioner thereof, to sell the lands described in the mortgage and in the bill in that cause upon six and twelve months' credit, taking notes with approved sureties, and retaining a lien thereon for the purchase money. The record shows that the sale was made in pursuance to said decree, and was duly reported to and confirmed by the court. The decree ordering the sale provides and directs that, when the sale shall have been made and confirmed by the court, the said Selma, Marion & Memphis Railroad Company should be absolutely barred from all right of redemption of said lands, and that the purchasers should be vested with as full right and title thereto as was vested at any time in said company. The said sale was reported to and confirmed by the court on the 15th of May, 1883. The decree confirming the report provides and directs that Bell W. Etheridge, the clerk and commissioner, who made the sale, should, on the payment of the purchase money, make to the purchasers, respectively, a deed of conveyance to said lands so purchased by them, which should contain a covenant, and have the effect of absolutely barring the said railroad

company from all equity of redemption; and that the purchasers should thereby be invested with full right and title thereto, in as full and complete a manner as the same was vested at any time in said company. It is further directed that the trustees under the mortgage should unite in such conveyances. Deeds by Bell W. Etheridge as clerk and commissioner, in which J. W. Fant as trustee joined as directed, were executed and delivered to the purchasers of said lands, but the other two trustees, Hill and Coleman, failed to unite in such conveyances; the former being physically unable to do so, and having since died, and the latter being a non-resident of this state or the state of Tennessee. All the property conveyed in said mortgage other than the lands embraced in this suit was, by the decree of said court in that cause, sold, and the sale was confirmed, and the purchasers put in possession of the same on the 6th day of July, 1880. In the said cause of *Luke P. Blackburn* v. *The Selma, Marion & Holly Springs Railroad Company*, said company and the trustees under said mortgage or trust-deed were made and became parties to said suit, either by service of process or voluntary appearance, and the orders, decrees, and proceedings had in said cause remain unappealed from, and are in full force so far as the court had jurisdiction thereof. On the 2d day of December, 1878, Timpson & Tappan, assignees in bankruptcy of Henry Clews & Co., obtained in the district court of the United States for the northern district of Mississippi judgment against the Selma, Marion & Holly Springs Railroad Company for $481,227.98. On the 13th of November, 1885, W. H. Timpson, as the trustee in bankruptcy of said Clews & Co., brought his action in the district court of the United States for the northern district of Mississippi, founded upon the judgment recovered as aforesaid. The process was served upon R. A. Murdock, the return of the marshal being as follows: "Executed November 19, 1885, by handing to R. A. Murdock, Esq., of Okolona, Miss., a true copy of this writ;" and on June 19, 1886, judgment *nil dicit* was rendered in favor of the plaintiff against said Selma, Marion & Memphis Railroad Company for the sum of $737,-904.65. Upon this judgment executions were issued to the marshals of the northern and southern districts of Mississippi, to be levied by them upon the lands situate in their respective districts. They were by them levied on the lands herein involved, which were sold, and purchased by the complainants in this suit, to whom deeds were executed by the said marshals for those sold by each. These are all the facts deemed necessary to be stated in connection with the complainant's title and the effect of the sale made under the decree of the United States circuit court for the western district of Tennessee.

The defendants claim title under various conveyances made by county sheriffs and tax collectors and the auditor of public accounts, and under the decree of the chancery court of Hinds county, and sale and conveyance made in pursuance thereto. The facts upon which defendants rely to maintain their title, as shown by the proof, are briefly as follows: On December 2, 1858, a statute was passed by the legislature of this state for the construction of levees on the eastern bank of the Mississippi river,

to prevent the lands in what is known as the "Delta" from being overflowed by the Mississippi river; and it was provided that the levee commissioners, created by the act, should issue bonds to be used in payment for the construction of said levees. To provide for the payment of these bonds a tax was levied upon the lands within the levee district of a specified sum per acre, as a charge *in rem* to be paid annually to the sheriff and tax collector of the county in which the lands lay, and upon default the sheriff was to sell the land, subject to redemption within two years, and his deed was declared in advance to be *prima facie* evidence of the regularity of the sale. Under this act a large amount of work was done, and a large number of bonds were issued. The war intervening, but a small amount of taxes were paid, and a very large indebtedness remained due. To provide for the payment of this indebtedness, the legislature passed the act of the 13th of February, 1867, known as the "Liquidating Levee Law," at the request and with the consent of the holders of these bonds, by and under which a readjustment of said indebtedness was had, the bondholders remitted all interest, and new bonds were issued in place of the old ones, and a specific tax of five cents per acre on a portion of said lands and three cents on the remainder was levied *in rem*, and declared to be a lien on the same, to be paid annually to the sheriff and tax collector of the county in which the land was situate, on or before the 1st day of May in each year, and, upon non-payment of the same, said sheriff and tax collector was directed to offer the lands, in default, for sale to the highest bidder for cash. This tax was to continue and be collected until the entire debt so due was paid off and discharged. This last-named act required that all lands upon which said tax was not paid on or before the second Monday in May in each year, without further assessment or notice, should on that day be sold to the highest bidder for said tax and costs, and that the sale should vest in the purchaser a good and sufficient title against any and every person having claim thereto. A large number of acres of these lands were sold, and, no other person bidding therefor, they were struck off to the levee commissioners by their corporate name, as the purchasers, in accordance with said act. An act of the legislature was subsequently passed constituting the auditor of public accounts and the treasurer of the state the commissioners to transact the business and perform the duties required of the former liquidating levee commissioners. On the 26th day of February, 1877, Joshua Green, on behalf of himself and all others holding said liquidating levee bonds who might see proper to come in and make themselves parties complainant in said cause, filed his bill in the chancery court of Hinds county, in this state, against the auditor and treasurer as such commissioners, praying a sale of the lands so sold to and held by said liquidating levee commissioners and by said auditor and treasurer as their successors. Proceedings were had in said cause, by which a large portion of said lands were sold to E. C. Gordon, who paid the purchase money therefor, and received deeds of conveyance for the same from said commissioners in pursuance to the decree of said chancery court. This decree and sale stand unreversed.

The lands so sold and conveyed to E. C. Gordon embrace the lands in this suit, which were afterwards sold and conveyed by said Gordon to B. H. Evers. They were forfeited for non-payment of the taxes of 1882, and purchased by the state of Mississippi, and were afterwards purchased from the state by James D. Stewart, in the suit of *Watson* v. *Evers*,[1] in the district court of the United States for the northern district; and by its order and decree said lands were afterwards sold by James McKee, as special commissioner in said suit of *Watson* v. *Evers and others*, and purchased by said Thomas Watson, to whom deeds of conveyance were executed in pursuance of the order and decree of the court. They were afterwards sold and conveyed by him to the Pine & Delta Land Company, the defendants in this suit. These lands, while held in the name of the levee commissioners, were not liable to taxation for any purpose, and were not assessed for taxation; but when conveyed to Gordon, as before stated, they were assessed for taxes as other lands, and, the taxes not being paid, they were sold by the respective sheriffs and tax collectors as other lands, and were struck off and listed to the state, no one else bidding for the same, as were other lands upon which the taxes had not been paid; and, as before stated, they were sold by the state and conveyed to James D. Stewart as the receiver of this court in said cause. On March 1, 1875, the legislature passed a revenue statute, commonly called the "Abatement Act," which provided for the sale of all the lands held or claimed for taxes either by the state or any one of the levee boards. All taxes, state, county, or levee, were abated, except the taxes for the year 1874; and the only condition imposed for the former delinquency was the payment of the taxes for 1874. The sale for the non-payment of this tax was to be made on the first Monday in May, 1875. These taxes not being paid, the lands in controversy were sold by the different sheriffs and tax collectors, and, there being no bids offered by other persons, they were struck off and listed to the state and reported to the auditor. In accordance with the act of the legislature, this proceeding vested the title in the state, the land being taxable. These are all the facts that need be stated to facilitate an understanding of the numerous questions involved in this suit, and which have been ably and exhaustively presented by the counsel on both sides.

The proof fails to show that anything was done by the said railroad company under the charter of 1859, or that the conditions therein prescribed were complied with. Therefore, the effect of the charter of 1867 was substantially to create a new corporation under a new name, with the rights, powers, and privileges of the charter of 1859, and the additional provision extending the time for commencing and completing the railroad. This corporation was confined to the state of Mississippi, but with the power to consolidate with other railroad corporations, as authorized in the act of incorporation of 1859, which was not exercised until the 15th of April, 1881. It is provided in section 19 of the act of 1859, and

[1] See 13 Fed. Rep. 194.

is a part of the act of 1867, "that the capital stock and all the property and effects of said company shall be exempt from taxation until said railroad is completed: provided, it is commenced within two and completed within ten years," which limitation was extended by the act of 1867 to three and sixteen years. This is the only provision for exemption from taxation provided in any of the acts of the legislature. The question, therefore, is as to what was the legislative intent in respect to the exemption claimed by the said company, and how far it extended. It is true that the act uses the word "all," but I am satisfied it was only intended to embrace the property which the corporation was authorized to hold under the acts of 1867 and 1859, and did not extend or apply to such after-acquired property as was detached from the railroad and not necessary for its operation or the necessary transactions of its business, and does not embrace the lands involved in this suit. This conclusion is strengthened by the fact that the sale of the lands by the state to the railroad company under the act of 1872 for only two cents an acre was evidently intended, in addition to aiding the railroad, to subject to taxation this large body of land, which had for so long a time rendered no revenue to the state or county in which it is situated. These lands had yielded no revenue from, say, 1862 to 1871. The railroad company, by the conveyances made by the former owners to it, only obtained the right of redemption. The land was not redeemed by it, but purchased at the nominal sum of two cents per acre. It is not to be presumed that the legislature intended that lands thus sold should remain for 13 years relieved from contributing their portion of the public burdens imposed on other lands. Besides, it is the well-established rule that exemption from taxation in favor of railroad companies only embraces the property connected with the construction and operation of their railroads, and not outlying lands, or other property not necessary for their construction and operation; and I take it that, but for that word "all" used in the exemption clause, this exemption would not be claimed. By the act of the legislature authorizing the sale of said lands at two cents per acre it was upon condition that 25 miles of said railroad had been completed. This the proof shows was not then done, and never has been done, by said railroad company in this state. This failure renders the validity of such sale doubtful; but, in addition to what has been stated on this question, the proof shows the Selma, Marion & Memphis Railroad Company had, some time prior to January, 1881, ceased to construct said railroad, and was hopelessly insolvent; and that on the 19th day of March, 1881, all its property, franchise, and everything possessed by it except these lands, were sold under the decree of the circuit court of the United States for the western district of Tennessee, which remains unreversed, and under the decree of said court were turned over to the purchasers, and the railroad company foreclosed of all its right, title, and interest therein; so that practically the corporation ceased to exist after that time. The building, equipping, and operation of this road for the public convenience was the consideration for the exemption provided in the charter, and by the failure of the

corporation to build and operate the railroad the exemption has failed. It is difficult to maintain the exemption after that time. This is all that it is deemed necessary to say on the question of the exemption of the lands from taxation. The lands sold at two cents per acre were not intended to embrace lands claimed by the levee commissioners, and it may be well doubted whether the Selma, Marion & Memphis Railroad Company obtained any title under this purchase.

The next question for consideration is as to the legal effect of the sale of these lands under the decree of the circuit court of the United States for the western district of Tennessee, and the foreclosure of the right, title, and interest of the Selma, Marion & Memphis Railroad Company in them. The only question is as to the jurisdiction of the court to make the decree for the sale, for the reason that the lands are situate within this state, and not in the district of West Tennessee, or within that state. The court had jurisdiction of the parties and of the debts secured by the mortgage or trust-deed. If the court had jurisdiction, then the sale, its confirmation, and the payment of the purchase money vested a complete, equitable title to the lands in the purchaser; and the court, if the legal title has not been vested in the purchasers, has the power to cause it to be done. The validity of the sale of the other property is not questioned. It is clear that a judgment had in a court of law in one state cannot in any way affect the title to land in another state. Reference is made to the case of *Muller* v. *Dows*, 94 U. S. 444, to sustain this sale. That case is authority in point as to the property first sold in the *Blackburn Case*, as that property was an entirety; but I am of opinion it is not directly so with reference to the lands embraced in this suit. It is stated, however, in the *Muller-Dows Case*, as follows:

"It is here undoubtedly a recognized doctrine that a court of equity sitting in a state and having jurisdiction of the person may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant."

The same doctrine is held by the supreme court of this state in the case of *Richardson* v. *McLemore*, 60 Miss. 315. If a court of equity has the power to compel a conveyance of land outside the state in which the court is held, it is illogical to say that when a bill is filed to foreclose a mortgage by a railroad company covering property in several states, and all the parties are before the court, the mortgagor and the trustees in the mortgage and the bondholders, the court has not the power to decree a sale of the lands, and order the same to be made by its own commissioner, or by the trustee or trustees, and the conveyance to be made by the mortgagor or by all of them. But, as there are some doubts on this point, and there are others upon which the right of the parties may be determined with less difficulty, it will be passed without a decision the one way or the other.

The next question to be considered is as to the effect of the judgment, sale, and conveyance under which complainants assert title to the lands in controversy. It is insisted upon the part of defendants that the judgment was void for two reasons: *First*, because the return of the

marshal does not show that R. A. Murdock, upon whom the process was served, was in any way connected with the Selma, Marion & Memphis Railroad Company; and, *secondly*, because that corporation had, for years before that time, ceased to have an existence for any purpose whatever. As to the first of these objections the judgment entry recites that the court was satisfied the process had been properly executed, which must be understood to mean that it was executed upon the proper person, and this would not have been the case if Murdock was not at the time connected with the corporation in such way as that service upon him would bind the corporation. I do not believe this objection alone is maintainable if the corporation then had an existence. The more difficult question is, had the corporation itself ceased to exist before that time? If it had, no valid judgment could be rendered against it. At common law, a corporation created without limit to its existence was presumed to exist until its death was wrought by a voluntary surrender of its charter, or by the judgment of a court having jurisdiction upon a writ of *quo warranto* or otherwise. In case a corporation ceased to carry on its business, and owed debts and owned property, the remedy of the creditors was by bill in equity. Section 1039 of the said Code provides that the original corporation, or the original parties in any charter, may within six months redeem the franchise which may have been sold under execution by paying or tendering to the purchaser the amount paid by him, with 10 per cent. added thereto, but shall not be entitled to the profits received by the purchaser in the mean time; and upon such payment the title shall vest in the original owners. When such sale is made, and the franchise and property are not redeemed within the time limited, as in this case, it looks very much like the practical death of the corporation with a nominal existence for three years thereafter in order that any balance of its assets may be administered for the benefit of creditors and stockholders, as provided in section 1041 of the Code. The road-bed, franchise, and all other property connected with and necessary for the keeping in repair and operation of the road, were purchased by J. J. Busby and his associates, and they were put in possession of the same, and the purchasers and their associates organized a new corporation under the provisions of an act of the legislature of this state approved February 1, 1877, which organization took place on the 13th day of April, 1881. The Selma, Marion & Memphis Railroad Company had no existence after that date except for the purposes mentioned in section 1041 of the Code, and the existence limited and purely statutory continued for three years after that date, and ended on the 14th day of April, 1884. It is difficult under the statutes and these proceedings to come to any other conclusion than that the Selma, Marion & Memphis Railroad Company ceased to exist for any purpose after that date. The judgment under which complainants claim title was rendered on the 19th day of June, 1886, the process having been executed on the 19th day of November, 1885. The foreclosure decree as to these lands was entered on the 22d day of January, 1883. It is insisted upon the part of complainants that the judgment rendered on the 19th day of June, 1886, was but a revivor and

continuation of the judgment upon which it is founded, and that, under it, the lien of the prior judgment is continued, and that, having this continuous lien, they had a right to have the lands sold for the satisfaction of their judgment, notwithstanding the death of the corporation. Section 2674 of the Code of 1880 provides that all actions founded on any judgment or decree rendered in this state shall be brought within seven years next after the rendition of such judgment or decree, and not after, and that no execution shall issue on such judgment or decree after seven years from the date of the issuance of the last preceding execution on such judgment or decree; but it does not provide for the continuance of the lien created by the first judgment, and I know of no rule of law which gives it that effect. The former judgment is treated as any other ascertained debt when suit is brought upon it. The question as to the validity of the judgment of the 19th June, 1886, is not clear and satisfactory on the one side or the other, but the reasons weigh against its validity. The defendants *first* claim title under the deeds to the levee commissioners; *secondly*, under the conveyance of the commissioners to E. C. Gordon; *thirdly*, under the conveyance of Gordon to Evers; *fourthly*, under the conveyance of McKee, commissioner, to Watson; *fifthly*, under the conveyance of the auditor to Stewart, receiver; *sixthly*, under the conveyance of Watson to them.

The first question presented is as to the validity of the title acquired by the liquidating levee commissioners or levee board. The tax for which these lands were sold was a local and a special tax of five cents per acre on part, and three cents per acre on part, levied by the legislature, and declared by the statute to be a tax *in rem* on the lands situate in the levee district for the purpose of paying the indebtedness incurred by the general levee board prior to the year 1862. This statute has been held valid by the supreme court of this state in the case of *Gibbs* v. *Green*, 54 Miss. 592, and *Bunch* v. *Wolerstein*, 62 Miss. 56, and in subsequent decisions. In the cases above referred to it is said that the act of 1867 constituted a contract between the state and the bondholders, and that the taxes arising under its provisions, and the lands purchased and held by the levee commissioners, constituted a fund for the payment of the liquidating levee bonds and interest, which the legislature had no power to divert to any other purpose; that the legal title, vested in the levee commissioners by a sale and conveyance of the land for the non-payment of the taxes, was transferable at their pleasure for the purpose of paying said bonds.

Numerous exceptions are urged and taken to the validity of these sales. One of these applies to the lands in Sunflower county and portions of the lands in other counties, and is based on the fact that the lands were entered with what is known as "Swamp-Land Scrip," issued to other counties. The contention is that scrip issued to one county could only be located on lands situate in that county, and that, when not so located, the title to the lands remained in the state, and they were not subject to taxation for any purpose. After a careful consideration of this question I am satisfied that the objection is not well taken as to the lands in the

Yazoo Mississippi delta district. The purpose of the legislature was to furnish the scrip to the different counties along the Mississippi river to enable them to build and maintain the levees. For this purpose it was issued to Tunica and one or two other counties in which there were no swamp lands upon which it could be located; and from some reason no scrip was issued to Sunflower county, because, perhaps, it had no river front upon which to build levees. The scrip was authorized to be located on the swamp lands in the levee district. The provision of the act creating the swamp-land district east of the base of the hills bordering upon the Yazoo river and some of its tributaries is that the scrip shall be located on the swamp lands in the county to which it was issued. The purpose of the issuance of scrip to these counties was the improvement of the streams and swamp lands along them; but in the other act the object, as declared, was the building and maintaining of the levees along the Mississippi river, and thereby benefiting the whole district by preventing overflows from that river. But, if the position claimed were maintained, it would not inure to the benefit of complainants, as in such exigency no title has passed to them or the defendant railway company, and the lands are still the property of the state.

Objections are also taken to the time and manner of the sales and conveyances, which need not be considered in detail. A number of these objections would be maintainable but for the effect of the statutes of the state enacted before and since these sales were made, as determined by the supreme court of the state. It must be admitted that there is, at least, a seeming conflict in some of the decisions on these questions; but in the more recent adjudications this real or seeming conflict does not arise or exist. These are entitled to the greater weight; and, being a construction of these statutes by the court of last resort of the state, they are binding upon this court, and especially so when, after careful examination of the purposes of the statute imposing the levee tax, and the condition of the lands and the great conflict of the titles to them, I am satisfied that the recent decisions are sustained by the better reason. Owners of land are vested with certain constitutional rights of which they cannot be deprived by either legislative enactments or judicial decisions, one of which is that they cannot be deprived of their titles to their lands except by due process of law. It was held by this court on the demurrer in this cause that to deprive the owner of land of his title by reason of the non-payment of taxes thereon these things must concur: *First.* There must have been a lawful tax imposed by some body of men, or some one having authority to levy it. *Second.* If the tax was based upon the value of the land, it must have been ascertained by some one authorized by law to assess such value. *Third.* There must have been a default in the payment of the tax within the time prescribed by law. *Fourthly.* There must have been a sale and conveyance made by some one authorized to make the same. These are conditions which the legislature can neither dispense with nor cure by subsequent legislation, nor can the want of them be dispensed with or cured by judicial decision. But, under well-recognized rules, any irregularities in these proceedings,

which the legislature could have authorized to be done in the first instance, may be cured by subsequent legislation, but not so as to destroy vested rights. This rule is so generally acknowledged that reference to authority is unnecessary. For instance, if the sale was made on a day or at a place which the legislature might have authorized, or for delinquent taxes for several years made at one time after default in each year, or other such irregularities, these may be cured by subsequent legislation. This brings us to the consideration of the curative acts, statutes of limitation, or rules of evidence, for they may be considered as possessing one or more or all of these elements which are relied upon by the defendants. The first of these acts was passed on the 10th day of February, 1860, and provides as follows:

"—That all sales of lands hereafter made for non-payment of taxes, due under any law of this state, shall be valid to all intents and purposes,—said lands subject to redemption as provided by law,—and that no such sale shall be impeached or questioned in any manner or for any cause saving fraud or mistake in the assessment, or sale of the same, or upon the proof that the tax for which the same was sold had been paid prior to such sale; and no suit to set aside any title acquired under such sale, hereafter to be made, shall be brought unless within five years from the date of the sale." See Acts 1859–60, p. 216.

The provisions of this act were held by the supreme court of this state in the case of *Belcher* v. *Mhoon*, 47 Miss. 613, to apply to sales for levee taxes; and this ruling stands unreversed. By section 5, Acts 1873, amendatory of the liquidating levee law, it is provided:

"—That upon the expiration of five years from and after the sale of lands for levee taxes under the provisions of said acts no testimony or evidence to impeach or invalidate the deeds therefor * * * shall be entertained by any court of law or equity in this state except in cases of fraud."

And by the fourth section of the same act of power to sell for back taxes or more than one year's taxes is given where the land is delinquent; and all prior sales of this character are validated, whatever might have been the irregularity or informality. Acts 1873, pp. 151–153. The fifth section of the act of 1888 to quiet and settle titles to certain lands in the Yazoo Mississippi delta provides that all sales of lands in the levee district made for the non-payment of levee taxes due thereon shall be and are declared to be valid, and not subject to impeachment for any cause except that the tax for which the land was sold had been paid, and except in cases where the defendant had been in continuous adverse possession of the land, claiming under title or color of title since the date of sale to the levee board, and had continuously paid the taxes thereon, or against any one claiming the land under sales made by the sheriffs under the abatement act of 1878. Acts 1888, p. 42. The proof does not show that any of the lands embraced in this suit are now, or ever have been, in the actual occupancy of either party or any one else, so that the question of actual possession is not involved.

I am of opinion that, under the decisions of the supreme court of the state in the cases of *Nevin* v. *Bailey*, 62 Miss. 436; *Sigman* v. *Lundy*,

66 Miss. 529, 6 South. Rep. 245; *Paxton* v. *Land Co.*, 6 South. Rep. 628; and *Metcalfe* v. *Perry*, 66 Miss. 68, 5 South. Rep. 232,—the irregularities in these sales to which objection is taken are cured, and that the complainants are estopped from producing evidence to establish such irregularities so as to defeat defendant's title, and barred from maintaining their suit to recover the lands or to remove defendant's title as a cloud on their title. The constitutional requirements seem to have been complied with. The tax was levied by the legislature at five and three cents per acre upon the land,—not upon the owner,—and no valuation was required. That there was a default in the payment of the tax is admitted, and that neither the original owners of the land, the Selma, Marion & Memphis Railroad Company, nor any person through whom complainants claim title, ever paid one cent of taxes on these lands since 1861 or 1862 is conceded, though, allowing the exemption as claimed, they have been liable to taxation since the 21st of July, 1886. This default has continued for nearly 30 years, so that there is no question as to the delinquency in the payment of the taxes. It is in proof that a sale was in fact made by the sheriffs and tax collectors of most of these lands, and that deeds of conveyance were made by them to the liquidating levee commissioners with a few exceptions. There is no evidence that the complainants or those under whom they claim ever redeemed or offered to redeem these lands from the levee commissioners within the time limited by law. I am of opinion, therefore, that a good and sufficient title to the lands was vested in the levee commissioners, and, if so, no title passed to the state which could have been conveyed to the Selma, Marion & Memphis Railroad Company. The only title the state had before that time acquired to these lands was under sales for the non-payment of taxes, which included the war military tax, and this fact rendered the titles void, as held by repeated decisions of the supreme court of this state. If, therefore, the title was in the levee commissioners, the treasurer and auditor of the state were *ex officio* commissioners and their successors, and the title to these lands was vested in E. C. Gordon under their sale, and the conveyance made and approved by the chancery court of Hinds county in the case of *Green* v. *Gibbs and Hemingway*. They were conveyed by Gordon to B. H. Evers. The lands were sold by McKee, commissioner, under the decree of this court in the suit of *Watson* v. *Evers*, and purchased by Thomas Watson, to whom the commissioner conveyed the title. This sale was confirmed by the decree of the court, and the same lands were sold and conveyed by Watson to the defendants in this cause. The defendants, therefore, have a good title to the lands unless they have been forfeited by reason of the non-payment of the taxes since they were conveyed to Gordon. The proof shows that a forfeiture did take place by reason of the non-payment of the taxes for 1882, and that the lands were sold and conveyed to the state in 1883, and that the state sold and conveyed its title to Stewart as received, who conveyed to Watson under the order and decree of the court. There are no irregularities shown in this sale, and, as the time for redemption had expired before the sale to Stewart as re-

ceiver, and as all the taxes due were paid to the state by Stewart, Watson's title, obtained through this conveyance, was paramount. If a sale, as I believe it was, then it would be independent of all other titles; but, if a redemption, it would remove all incumbrance upon the title derived through the sale and conveyance by McKee, commissioner, and this title was passed to the defendants by Watson's deed to them. This conveyance by the state included any title which was derived at the sale under the abatement act made in 1875. The conveyance by the state to the Selma, Marion & Memphis Railroad Company having occurred before the sale under the abatement act, the title derived under it did not pass by the said conveyance; but, if I am correct in my opinion, that these lands were not exempt from taxation, any title which the company may have had was forfeited by reason of the non-payment of such taxes, and the lands were liable to be sold for non-payment of such taxes.

It may be that a more minute examination of the evidence would develop the fact that a few of the tracts of land described in the pleadings will not be found to belong to either party, as is the case with regard to the lands in Sunflower county, conveyed by S. M. Thompson, which were located with scrip issued to Choctaw county; and other lands in which there is not sufficient evidence of defendant's title, especially certain lands in Bolivar county, unless the title was obtained under the sale of 1875 and the conveyance to J. D. Stewart, the receiver. Such tracts, if they exist, are few in number; and as the lands the title to which is involved in this suit amount to 200,000 acres, and the value in the neighborhood of $1,000,000; and as the title to more than the same number of other acres of equal value, and most of which are now in suit in this court and in the circuit court of the United States in the northern district of this state, depends upon the same law and facts involved in this cause; and as I am so strongly impressed with the uncertainty as to whether the Selma, Marion & Memphis Railroad Company had ceased for any purpose to have an existence before the suit of Timpson against the railroad company was instituted; and, if so, that the judgment and all proceedings had in said suit were void, and the complainants are without any title to any of these lands whatever; and also as to the invalidity of the title under the sale made in pursuance of the decree of the United States circuit court for West Tennessee in the cause of Luke P. Blackburn, above referred to,—I deem it best to dismiss complainants' bill to the end that an appeal may be taken at once to the supreme court of the United States, where the errors in the conclusion reached by me will be corrected, and such decision rendered as will finally and conclusively settle the vexed questions of title to this large body of land, which is rapidly increasing in value. In justice to myself, as well as to the learned and distinguished counsel on both sides who have aided me by their diligent research into the facts and law presented in this case, I cannot conclude this opinion without returning my thanks for their able and exhaustive arguments in presenting the questions of law arising on each side. It gives me great pleasure to state

that these arguments have seldom been equaled in any cause heard by me during the many years I have presided in the federal courts of this state.

McConnaughy *v.* Pennoyer *et al.*

(Circuit Court, D. Oregon. July 28, 1890.)

1. Suit against State—Injunction—Sale by Commissioners.
A suit by a citizen of California to enjoin the persons constituting the board of land commissioners of the state of Oregon from selling certain swamp lands, claimed by the plaintiff, as forfeited to the state for non-compliance with a condition of a former sale of the same lands by the state to the plaintiff's grantor, is not a suit against the state of Oregon; it appearing that the legislation under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the state with such grantor.

2. Swamp Lands—Application to Purchase—Contract.
An application for the purchase of swamp lands under section 3 of the act of October 26, 1870, for "the selection and sale" of swamp lands, from the date of its receipt and filing by the land commissioner constitutes a contract between the state and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to the immediate possession thereof; and, on the performance of the conditions subsequent, of payment and reclamation, within the terms and requirements of said section, the applicant, or his assigns, is entitled to a patent therefor.

3. Same—Obligation of Contracts—Acts October 18, 1878, and February 16, 1887.
Section 9 of the act of 1878 does not, when fairly construed, include an application for the purchase of swamp land under the act of 1870, where there is no default in the payment of the 20 per centum of the purchase price, as provided in said act of 1870; but, if it does include such a case, then it is unconstitutional and void, as impairing the obligation of the contract of the state with the applicant, which gave him until 90 days after the publication of the notice of the filing of the map of such lands in the office of the clerk of the county in which they lie, to make such payment; and section 1 of the act of 1887, which declares all certificates of sale of swamp lands void on which the 20 per centum of the purchase price was not paid prior to January 17, 1879, is, in the case where the 20 per centum was paid when due, according to the contract of sale, whether before or after said day in 1879, unconstitutional and void for the same reason.

(Syllabus by the Court.)

In Equity. Suit for an injunction.

Charles B. Bellinger, for plaintiff.

Lewis L. McArthur, for defendants.

Deady, J. By the act of March 12, 1860, congress granted to the state of Oregon the swamp and overflowed lands within its border.

On October 26, 1870, the legislature passed an act "providing for the selection and sale" of such lands. Sess. Laws, 54.

By this act it was made the duty of the governor, as land commissioner, to select such lands by means of deputies, who were required to return their selections to the commissioner for examination. Upon the selections being made in any county, the commissioner was required to make out, in duplicate, maps thereof, one copy of which was to be filed in the office of the clerk of such county, the date of which filing was to be certified by said clerk to the commissioner, and thereupon the latter was required to give notice of such selection and filing by publication

in a weekly paper, published in the county, for four successive weeks.

The act also directed the commissioner to sell such lands at a price not less than one dollar per acre in gold coin. Any citizen of the United States over 21 years of age might apply "for the purchase of any tract or tracts" of such lands by filing his application therefor with the commissioner, who shall indorse thereon the date of such filing, describing the same by the "survey," or, if no survey is made, then by fences, ditches, monuments, or other artificial or natural landmarks; and, in case of adverse applicants for the same parcel of land, the commissioner shall sell the same to the person whose application is first filed.

Within 90 days from the date of the notice aforesaid, 20 per centum of the purchase money must be paid to the commissioner, who shall "issue to the applicant a receipt therefor." The balance of said purchase money shall be paid, and proof of reclamation made, within 10 years from said date, when a patent shall issue to the applicant; but, in default of such proof and payment, the land "shall revert to the state, and the money paid thereon shall be forfeited."

On October 18, 1878, the legislature passed "an act providing for the selection, location, and sale of state lands, and the management and disposition of the proceeds arising therefrom," including swamp and overflowed lands, and the express repeal of sundry acts relating thereto, not including the act of 1870. Sess. Laws, 41.

By this act the governor was "appointed" land commissioner for the state, as he had been since 1862, by the act of October 15 of that year, (Comp. 1874, p. 629,) with power "to locate all the lands to which the state is entitled under the laws of the United States;" and the board of commissioners for the sale of school and university lands were authorized to sell the swamp and overflowed lands theretofore or thereafter "selected," not exceeding 320 acres to any one person at not less than one dollar per acre.

After providing at some length for the manner of applying for the purchase of swamp lands, and the purchase and conveyance of the same, the act (section 9) declares as follows:

"All applications for the purchase of swamp and overflowed lands, * * * made previous to the passage of this act, which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever."

On February 16, 1887, the legislature passed an act, entitled, in part, "to declare void certain certificates of sale, and to forfeit certain lands," (Sess. Laws, 9,) the first section of which declares as follows:

"That all certificates of sale issued by the board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom for swamp or overflowed lands on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, are hereby declared void, and [of] no force or effect whatever; and said board of commissioners is hereby authorized and directed to cancel said certificates of sale."

These certificates of sale are the receipts provided for in the act of 1870.

The date, January 17, 1879, mentioned in this section, is the date of the act of 1878, plus the 90 days which elapsed before it took effect. Section 7 of this act provides:

"All swamp or overflowed lands reverting to the state under the provisions of this act shall be sold as provided in the act approved October 18, 1878, relating to swamp lands."

This suit is brought by the plaintiff, a citizen of California, to restrain the defendants, citizens of Oregon, constituting the board of land commissioners of the state, to restrain them from selling certain swamp lands claimed by the plaintiff, as having reverted to the state under section 1 of the act of 1887.

The cause was heard on a demurrer to the bill.

From the latter it appears that prior to October 18, 1878, Henry B. Owen had regularly applied, in pursuance of the act of 1870, for the purchase of certain swamp lands, thertofore certified to the state by the secretary of the interior as swamp and overflowed, under said act of 1860, including those now here claimed by the plaintiff; that thereafter, on November 23, 1881, and on April 3, 1884, and prior to the expiration of the 90 days from the date of the public notice provided for in the act of 1870, the said Owen duly paid to the board of land commissioners the 20 per centum required by said act on 43,207.60 acres of said lands, situate in Lake county, Or.; that about October 15, 1884, the plaintiff purchased said last-mentioned lands from Charles N. Felton, the grantee of Owen, and now occupies the same for hay and pasturage; and that he paid Felton for said lands the sum of $30,000, and assumed to pay the state the remainder of the purchase price therefor when it became due; that said defendants, assuming to act as the board of land commissioners, and pretending that the certificates of sale issued to Owen are void for the reason that the 20 per centum of the purchase price was not paid before January 17, 1879, have canceled the same, and have ordered said lands to be sold, under the act of 1887, as reverted to the state, and have actually sold about 1,000 acres thereof.

It is also alleged in the bill that the defendants are acting in this matter without authority of law; that the act of 1887, in so far as it declares the certificates given on the sale of the lands claimed herein by the plaintiff because the 20 per centum of the purchase price was not paid prior to January 17, 1879, is void and of no effect, because it impairs the obligation of the contract with the state, under which the plaintiff claims, for the sale of these lands, which are of the value of $50,000.

The demurrer to the bill is, in substance, that the suit is in effect one against the state, and therefore this court is without jurisdiction.

The question, is this a suit against the state? is the question in the case, and this involves the construction and validity of the state legislation on the subject.

If the legislation is invalid under which the defendants assume to act, they do not represent the state. They are acting without its authority, —without the authority of law,—and are responsible for their acts as private individuals. On the other hand, if this legislation is valid, they represent the state, and the suit, in substance and effect, is against the state. Such a suit is forbidden by the eleventh amendment to the constitution of the United States, which declares:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

Fortunately, the law on this subject has been so carefully and explicitly laid down by the supreme court in numerous cases, from *Osborn* v. *Bank*, 9 Wheat. 738, (1824,) down to *Poindexter* v. *Greenhow*, 114 U. S. 270, 330, 5 Sup. Ct. Rep. 903, 962; *Allen* v. *Railroad Co.*, 114 U. S. 311, 330, 5 Sup. Ct. Rep. 925, 962, (1884;) *Hagood* v. *Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, (1885;) *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, (1887,)—that nothing remains for this court to do but to state the same and follow it.

In *Cunningham* v. *Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, Mr. Justice MILLER, after stating that, "whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction," proceeds to classify the cases in which jurisdiction has been maintained. One of these, the second, is where an individual is sued in tort for some act injurious to another, in regard to person or property, to which his defense is that he has acted under the orders of the government.

In this class of cases he says the defendant "is not sued as, or because he is, an officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him."

In support of this proposition the justice cites a number of cases decided in that court, including the then recent case of *U. S.* v. *Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, in which the plaintiff below maintained an action to recover the possession of certain real property against persons claiming to occupy as the agent and under the authority of the United States, on the ground that the alleged authority, which consisted of a purchase at an alleged tax-sale, was invalid.

In the able, and I think unanswerable, argument contained in the opinion of the supreme court by the late Mr. Justice MATTHEWS, in *Poindexter* v. *Greenhow*, *supra*, the question is thoroughly considered in the light of all the authorities, and the jurisdiction of the court unqualifiedly maintained.

The case was briefly this: On March 30, 1871, the legislature of Virginia authorized the coupons of the funded debt of the state to be re-

ceived in payment of taxes due thereto, and by subsequent legislation forbid their being so received.

The plaintiff in error and below regularly tendered the defendant, the collector of taxes, coupons in payment of his taxes, which were refused, and certain of his personal property was levied on for the same. The plaintiff then brought an action of detinue in a court of Virginia to recover his property, in which the defendant had judgment. From there the case was taken by a writ of error to the supreme court of the United States, where the judgment of the court below was reversed, and it was held that the legislation of Virginia, forbidding these coupons to be received for taxes, impaired the obligation of its contract with the plaintiff, and was therefore void; that, as the plaintiff had paid his taxes by the tender of his coupons, the defendant had no authority of law to enforce other payment by the seizure of his property; that in so doing the defendant ceased to be an officer of the law, and became a private wrong-doer, in which character he took and detained the property of the plaintiff.

In the course of the opinion, (page 288, 114 U. S., and page 913, 5 Sup. Ct. Rep.,) it is said:

"The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character. and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense."

Further on, (page 291, 114 U. S., and page 914, 5 Sup. Ct. Rep.,) after stating the difference in this respect between the government of a state, its agents, and the state itself, it is said:

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarkation that separates constitutional government from absolutism, free self-government, based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the state to declare and decree that he is the state; to say 'L'Etat c'est moi.' Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written too often with the blood of martyrs, shed upon the battle-field and the scaffold, if their

limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them, and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, state and federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked, and of communism, which is its twin; the double progeny of the same evil birth."

In *Allen* v. *Railroad Co.*, *supra*, the court allowed a perpetual injunction against the auditor of public accounts and treasurer of the state of Virginia, to prevent the enforcement of a tax by the seizure and sale of the plaintiff's property, for which coupons of the bonds of the state had been duly rendered and refused.

These cases go upon the theory that proceedings to enjoin the seizure and sale of property, or for the recovery of the possession of the same when seized, to enforce the payment of a tax for which a valid tender has been made, are defensive in their nature, in which the plaintiff does not seek to compel the state or its agent to do or perform any particular act, but to prevent or redress a wrong to his property by a person acting professionally on behalf of the state, but without the authority of law.

And that is this case exactly. The defendants, a board of commissioners for the sale of swamp lands, are assuming to sell certain of such lands as the property of the state. The plaintiff claims the lands under a contract of purchase from the state, and asks to have the defendants enjoined from doing an unlawful act, to his irreparable injury. The defendants claim that they are acting in obedience to an act of the legislature, which the plaintiff maintains is unconstitutional and void.

If the legislation under which the defendants assume to act is valid,—an act of the state of Oregon,—then the defendants stand for and represent the state, which, although not a party on the record, is, in substance and effect, the real defendant, and therefore the suit is forbidden by the eleventh amendment, otherwise not.

And, before proceeding to consider this question, it may be well to suggest that in this matter the defendants are not acting as governor, secretary, and treasurer of the state, but simply as a board of commissioners for the sale of the swamp lands belonging to the state.

The state constitution (article 8, § 5) constitutes these persons by their title of office, and during their continuance therein, "a board of commissioners for the sale of school and university lands," and subsequently the legislature devolved on them the additional duty of disposing of the swamp lands.

A qualified applicant for the purchase of swamp lands under the act of 1870 had a contract with the state for the sale and conveyance to him of the land specified in his application, from the receipt and filing of the

same, according to the terms and conditions mentioned in the act. *McConnaughy* v. *Wiley*, 33 Fed. Rep. 452.

The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal, standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board, and complying with the subsequent conditions of payment and reclamation.

The purchaser, the applicant, is entitled to enter into the possession of the land at once, and commence the work of reclamation and cultivation, and appropriate the products thereof to his own use. The application is a written acceptance of the offer of the state, in relation to the land described therein, and, on the filing of the same, the minds of the seller and the purchaser—the state and the applicant—came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them, until released therefrom by some substantial default of the other, not overlooked or excused.

This contract, as soon as made,—as soon as the acceptance of the offer of the state is filed,—comes under the protection of that restraint on the power of the state which prohibits it from passing any law "impairing the obligation of contracts." Const. U. S. art. 1, § 10.

The experience of a century, and more, has demonstrated that, but for this wholesome restraint on the action of the state legislatures, a contract with a state would be subject to modification or rescission with every whim of public opinion or gust of popular passion.

Section 1 of the act of 1887 is assumed in the bill as the legislation which impairs the obligation of this contract, and under which the defendants are wrongfully attempting to sell this land. It expressly avoids all sales of swamp land on which the 20 per centum was not paid prior to January 17, 1879. This is broad enough to include the purchase by Owen, under which the defendant claims. But, as appears, the contract with Owen gave him 90 days after the publication of the notice in which to make this payment. This period had not expired on January 17, 1879, and before it did expire the 20 per centum was duly paid and accepted by the board.

It appears that the legislature of 1887 undertook to annul this contract, and require the certificates given the purchaser to be canceled, on the ground that he had not complied with section 9 of the act of 1878, by paying the 20 per centum prior to January 17, 1879, the date when that act took effect.

But the act of 1878, fairly and reasonably construed, did not require such payment to be so made. It declared void and of no effect applications where the purchaser had not fully complied with "the terms and requirements of the law" under which they were made, "including the payment of the 20 per centum of the purchase price."

Counsel for the defendants insists that this act must be construed as

requiring the payment of this 20 per centum prior to January 17, 1879, even if the same was not then due according to the terms of the sale, as stated in the act of 1870. If this be so, then the act is so far void, because it impairs the obligation of the contract of sale, whereby the purchaser was to have until 90 days after the publication of notice to make the payment in, without reference to when such publication should be made. The state had the right to make this publication whenever it was ready, and so compel the payment within 90 days thereafter; but it had no power to require or compel the payment sooner than this, and before it was due. This is a matter material to the purchaser. He ought not to be required to make this payment before it is due; and every moment of time which the law gives him to make the payment in prolongs, by so much, the expiration of the succeeding 10 years within which he may reclaim the land and pay the balance of the purchase price.

But I do not think the act of 1878 ought to be so construed, or that it will even bear such a construction. By its express terms it does not include any case except where there is a default on the part of the purchaser. The failure to pay the 20 per centum is included in the failure to comply with the terms and requirements of the law generally. It is not the mere non-payment of this per centum by a given day that is to have the effect to make void the application or the purchase, but the failure to do so when and as required by law, namely, within 90 days after the publication of the notice of filing the map. Any other construction of the section would not only be strained, but would impute to the legislature a purpose to impair the obligation of the contract of the state with the purchaser, which ought not to be done if it can be avoided.

Prior to the passage of the act of 1887, the act of 1878 was not regarded as affecting sales where there had been no default in the payment of the 20 per centum, or otherwise, on the part of the purchaser or his assigns.

In an opinion delivered by the board of land commissioners some years before the passage of the former act, entitled "In the matter of the application of H. C. Owen for a certificate of purchase of certain swamp lands," it was held that the act of 1878 does not apply to a case where the period prescribed by the act of 1870 for the payment of the 20 per centum has not expired; and such I understand has been the uniform construction heretofore given to the act by the board.

The construction given to a statute by the executive or administrative officers of the government charged with its execution is entitled to respectful consideration, and ought not to be lightly overruled. Endl. Interp. St. § 360; *U. S.* v. *Moore*, 95 U. S. 763; *Scanlan* v. *Childs*, 33 Wis. 666; *Westbrook* v. *Miller*, 56 Mich. 151, 22 N. W. Rep. 256.

In conclusion, the act of 1878 does not authorize the board to treat this land as reverted to the state, because the 20 per centum of the purchase price was not paid before it took effect, and would be unconstitutional and void if it did. The per centum was duly paid and accepted by the board when it was due.

Section 1 of the act of 1887 is void and of no effect in the case of contracts like this, where this per centum was not due and payable prior to January 17, 1879.

This being so, the defendants are acting without the authority of law, —without the authority of the state. They do not represent the state. The state is not a party to this suit either on the record or in substance or effect, and therefore the court has jurisdiction of the same as a suit between private persons who are citizens of different states.

The plaintiff is entitled to a perpetual injunction against the defendants, and for costs.

CONSOLIDATED TANK-LINE CO. *v.* KANSAS CITY VARNISH CO.

(*Circuit Court, W. D. Missouri, W. D.* September 5, 1890.)

APPOINTMENT OF RECEIVER.

Where a manufacturing corporation has debts exceeding its capital stock, and it is unable to meet its paper as it matures, and its assets are in such condition that they are not available either as security or collateral for the purpose of borrowing or for the purpose of conversion, and it is apparent that enough would not be realized from a forced sale of its plant and accounts to meet its obligations, which will soon become due, and where its credit is gone, and its directors have of their own accord executed a deed of trust of all the corporate property for the benefit of certain creditors to secure paper indorsed by the directors, and where the trustee has taken possession, an application by the non-preferred creditors to enjoin further proceedings under the deed of trust and for the appointment of a receiver will be granted.

In Equity.

Henry Wollman, for complainant.

Lathrop, Smith & Morrow, *J. L. Wheeler*, and *D. J. Hoff*, for defendant.

PHILIPS, J., (*orally.*) This is an application for injunction and the appointment of a receiver. I have given the case such consideration as the limited opportunity would permit. Of course, on this preliminary hearing, before the coming in of an answer, the principal questions to be determined by the court are as to the existence of the solvency or insolvency of the defendant corporation, and the necessity for the appointment of a receiver under the circumstances. It appears from the face of the bill, and the affidavits *pro* and *con* submitted on the preliminary hearing, that this Kansas City Varnish Company, with a paid-up capital stock of $26,000, in the course of a year's business or more, has to-day an existing indebtedness of about $32,000 in round figures. The affidavits show, as well as the allegations of the bill and the correspondence with its creditors, that for some time past it has been under great financial distress. It has been under an irresistible pressure, unable practically to meet its accruing and maturing obligations. While it is true that the great body of the indebtedness of this concern does not mature until this month, yet part of the obligations are due, and

for some time back some of its creditors have been exigent and urgent, and they have complained that the debtor has been delinquent and slow. On one debt of $2,500, owing to the Consolidated Tank-Line Company, one of the creditors here, some time ago the last payment of $250 was all that it could make. It has no money in bank, but has been overdrawing, and the matter of a check of a hundred dollars was repudiated and protested for non-payment. It claims by affidavits read on this hearing to have about $25,000 of assets in the form of bills receivable, notes and accounts, and outstanding claims; but the court, at least on this preliminary hearing, is clearly justified, from all the facts and circumstances in evidence, in concluding that these claims are not in tangible shape; that its assets are not available for immediate emergencies. Otherwise, either by placing these assets or accounts and notes as collateral security, it might have obtained loans, or it might have converted some of them by reasonable discounts, to have raised sufficient money at least to keep the concern going; to impart to it some vitality and some life. It is, however, quite inferable from the character of the correspondence and other facts disclosed that it has run its length of credit about to the end; so that on the 25th day of August last past, the board of directors, who seem to be its principal and almost exclusive stockholders, on final conference and consultation concluded that the best thing they could do was to make a conveyance in the form of a deed of trust, in which they assigned every article and item of property it has, all its notes and accounts, even its lease on the property, down to a little pony and surrey; everything, with great particularity, were transferred to the trustee for the benefit of certain specified creditors. In other words, it transferred by this deed of trust everything it has except the mere franchise. It simply reserved the franchise *ad hoc;* all else it conveys. This deed of trust seems to have been made under some emergency. It was put to record at 9 o'clock and 50 minutes at night, and at 10 o'clock the same night, as stated by the trustee, he took possession of the concern.

Now, it is true that, as a rule of equity practice, the courts are very reluctant to appoint receivers, upon the idea that it is a practical displacement of the board of directors. It is an assumption of the functions of the directors. It displaces the board of managers placed there by the stockholders, who sustain the relation of trustees for the stockholders, trustees for the corporation, and trustees for its creditors; and, before the court will take charge of the corporation, and thus displace its chosen directors and managers, it ought to have the clearest evidence of the absolute necessity for such extraordinary action for the protection of the creditors, stockholders, and all parties concerned. But the court, in this case, has been relieved of this aspect or embarrassment of the question somewhat by the conduct of the board of directors. This deed of trust, by which they have placed the entire assets and property of the concern in the hands of this trustee, and authorized him to take immediate possession, which he did do at once, and has since been in the absolute, unrestricted, and un-

divided control of the whole property, amounts in effect to an abdication of the functions of the board of directors. They thereby confess the fact that the concern can no longer go under their management, and they have given up its control by their own voluntary act to a trustee. In that attitude it is now a question, in respect to these non-preferred creditors, whether a court of equity should interpose and take charge of this property and manage it.

There is one very prominent fact connected with the history of the case which is not unworthy of consideration. It appears that on a part, in fact a very considerable part, of the indebtedness secured by this deed of trust, the board of directors, or at least a part of them, are themselves indorsers. They are sureties upon these notes; and this movement on the part of the board of directors was entirely voluntary. It does not appear that they were urged to the making of this deed of trust by the creditors, but they did this without the knowledge of at least some of the creditors; and it is to be assumed for the purpose of the present inquiry that the board of directors in making this deed of trust, by which they preferred the debts upon which they were sureties, were more concerned for their own protection than for that of the creditors, because they are bound to the creditors for the debt, and it appears that they are solvent. That presents this question: It has been held—and I had occasion to consider the question very thoroughly while on the court of appeals, (*City of Kansas* v. *Allen*, 28 Mo. App. 132,) and the opinion has been followed since by the supreme court of this state, or cited with approval—that, after a business corporation ceases to be a "going concern," and is no longer possessed of vitality enough to survive and continue its business, and the board of directors conclude that they can go no further, then the directors become, *eo instanti*, by that very act, trustees for the benefit both of the stockholders and the creditors; and it is not within the power or competency of the trustees to prefer themselves, the board of directors, as creditors of the concern. Their relation becomes one of trustee to the whole property. They must administer the whole assets of the corporation for the benefit of all of the creditors, to be distributed *pari passu* equally between them; and they cannot, after the corporation reaches that juncture and condition of affairs, make a preference for themselves. Now, these directors, in so far as the debts are concerned on which they are sureties, if this deed is sustained, are in effect doing by indirection what they cannot do directly, provided this concern is insolvent, and no longer a going concern. I do not undertake to say at this hearing or at this juncture that the case as presented comes within the rule laid down in the cases to which I refer, but it strikes me, upon first impression, as being so nearly in line with the principle involved, that for the purposes of this preliminary hearing the court ought to treat the matter for the time being as if these directors had undertaken to secure and prefer themselves to the exclusion of other creditors of the concern, taking advantage of their inside knowledge of the actual condition and workings of the corporation to gain a personal advantage. They are bound to consider themselves as trustees of a trust

which they are to administer as any other trustee, with absolute impartiality, having no friends to reward or enemies to punish; and when they undertook to do what has been done, to say the very least, it creates suspicion. Of course, that is a question which lies beyond the present decision for ultimate consideration and determination, when all the facts are before the court; but I think for the purposes of this preliminary hearing the court ought to construe that special act against the board of directors, as one which ought to invoke and invite the interposition of a court of equity for the protection of the interests and rights of all the parties concerned, *ad interim*.

Going back to the question of solvency, it is very difficult for a court to lay down a definition of solvency or insolvency that is applicable interchangeably to every case. A great many authorities have been cited by counsel under the bankrupt law. I would not in this case be disposed to apply the rigor of the rule that obtains in bankruptcy proceedings,—that whenever a business concern is unable to meet its commercial paper as it matures, in the ordinary course of business, it is insolvent. The term must necessarily be construed with reference to the particular facts of the case. Take the case of a farmer who has his farm and stock. He may have a note outstanding, and may be unable to meet it at maturity, and yet he has property, both land and stock, subject to execution, which could be seized and applied to the payment of debts. We would not apply to him the rigors of the commercial law. Then take a corporation like this, a business concern. I think a medium ground is to be taken between the bankrupt law and that in the case of the farmer such as I have presented. A business concern like this, with nothing but its franchise, its capital stock, and the intelligence and business capacity of its board of directors, depends for its very life upon credit. It could hardly run a day without credit. It is buying material, manufacturing and selling it. It must have credit in bank. It must have credit with its vendors,—the parties from whom it buys. I think it would be a very safe rule to say in a case of that character that where it is unable to meet its paper in bank and to other creditors as it matures, and its assets are in such a condition that they are not available either as security or collateral for the purpose of borrowing, or for the purpose of conversion, and, in addition to that, it is apparent that there would not be sufficient money realized by sale under execution to meet these liabilities, it is practically insolvent.

Respondents estimate in their affidavits the plant of property at $20,000, and the paper owing the concern—notes and accounts outstanding—at $25,000. I think the court would be very safe in saying that, if on a forced sale or execution it had to be wound up within a reasonable time and under ordinary circumstances, there should be realized 50 cents on the dollar of those assets, it would be a pretty large dividend; and it would take about 75 per cent. to meet the debts due and maturing in this month and shortly after. So that I think the concern, with $32,000 of outstanding indebtedness now nearly due, with no money in bank, credit gone, unable to meet a check of a hundred dollars sent to

bank, is sick, and almost sick unto death; and whether it can survive will depend much on the good nursing a court of chancery can give, and by which it may possibly be resuscitated. Now, these respondents seem to think—and hope is always a great thing in commerce—that they can survive with a little rest. I know of no better means for them to keep life in them and stay on their feet than for the court to take charge of this matter for them. In the management of a concern like this, in an insolvent condition, with the latitude which a court of equity has in running the business, and giving it provisional credit, authorizing a receiver to go ahead with the business, keeping it going, if the court discovers there is any hope and vitality in it, seems to me to be best for all parties in interest. If the assets turn out as respondents seem to think they will, there will be no end put to the corporation. They can pay off these debts, or the court will pay them from the business, and they have their franchise. I think this a case where sound discretion and a proper regard for the interests of all parties concerned will justify the court in interposing to enjoin further action under the deeds of trust for the present, reserving the question of the rights of the respective parties for determination upon final hearing. The court does not desire to be understood as casting any reflection upon the competency or trustworthiness of the present trustee. There is only this to be said in respect to that: He was chosen by this board of directors; he is in the employ of the president of the concern in another branch of his business; he is without bond, and is possessed of little property. While he might manage the affairs of the concern with ability and fidelity, yet a receiver is required to give bond. He then becomes an officer of the court, and is under the direction and supervision of the court. This is better for all the creditors. As to the preferred creditors, it is to their interest that the very most be realized out of the assets possible. It is also better for the non-preferred creditors that the matter be managed by the court for the time being. So that as the matter stands the prayer of the petition will be granted provisionally. A provisional order of injunction will be made, and if you can agree upon a receiver the court will appoint him, otherwise the court will select one.

CARTER *et al. v.* ALLING *et al.*

(Circuit Court, N. D. Illinois. June 30, 1890.)

CONTRACT—VALIDITY—RESTRAINT OF TRADE.

A contract between a manufacturing corporation, whose business extends throughout the United States and Canada, and one of its traveling salesmen, who has been in its employ for several years, whereby he agrees not to enter the service of any business competitor of the corporation for three years after leaving its service, is valid.

In Equity.

J. L. High, for complainants.
Cratty Bros. & Ashcraft, for defendants.

BLODGETT, J. The bill in this case seeks an injunction against the defendant Alling, restraining him from entering into the employment of the other defendant, the L. H. Thomas Company, and for other relief. The material allegations of the bill, so far as necessary for the disposition of the case, are: That on the 2d day of January, 1888, and for many years prior thereto, complainants were and had been copartners doing business under the firm name and style of Carter, Dinsmore & Co., engaged in the business of manufacturing and selling inks and mucilage, having their manufactory and principal office in the city of Boston, in the state of Massachusetts, with depots or warehouses in the city of New York and the city of Chicago; that in the conduct of their business they had employed, and still employ, traveling agents, canvassers, and salesmen, to introduce and sell the products of their manufacture throughout the United States and Canada; that the inks so manufactured and sold by complainants have always been known to the trade and to the public under the name of "Carter's Inks;" and that under said name such inks, and the mucilage manufactured by the firm, have, by reason of their excellence, and through the means of such traveling men, canvassers, and salesmen, as well as by extensive advertising at large expense to complainants, become widely and favorably known throughout the United States and Canada, as well as in various foreign countries, whereby complainants have established a large and profitable business in the manufacture and sale of said products throughout the United States and Canada; that about the year 1881 the defendant Edward H. Alling entered into the employment of said firm as a general salesman, involving the duties of canvassing, and introducing samples to and soliciting the trade of customers, and in part of selling to the trade, and to the advertising departments of such business. It is further alleged that on the 2d day of January, 1888, the said Alling entered into a certain written agreement with complainants for a further employment by them, by which agreement Alling agreed to work for complainants in the traveling, canvassing, and advertising departments of their business, and to do work in such other departments as they might request, from January 1, 1888, to July 1, 1890, for which service complainants were to pay him as salary $200 per month during said two and a half years, and at the expiration of said two and a half years a further sum, calculated upon a percentage of the net profits of the firm for the entire period of such employment, over and above the amount of said monthly payments, complainants also to pay all of Alling's traveling expenses. It was also provided by the contract that either party might terminate the same by giving one month's notice in writing, provided the other failed to comply with all the terms and provisions therein expressed. Alling, in and by the contract, further covenanted that he would not, within three years from the termination of his employment by complainants, whenever that might be, travel, canvass, or advertise

for, or otherwise assist any one engaged in, nor himself engage directly or indirectly in, any line of business carried on or contemplated at the time of the termination of his employment by the complainant, nor furnish information directly or indirectly to any one engaged or interested in any such line of business. He further agreed not to communicate during the continuance of said agreement, or at any time subsequently, any information relating to the secrets of the traveling, advertising, and canvassing departments, nor any knowledge or secrets which he then had or might from time to time acquire pertaining to the other departments of the business of said complainants, to any person not a member of complainants' firm, except as requested in writing by complainants; and in case of violation of said covenant the defendant Alling agreed to pay complainants or their legal successors the sum of $5,000 as liquidated damages, but such payment was not to release him from the obligations undertaken, or from liability for further breach thereof. And it was further provided that, in case of any termination whatever of said contract, the obligations of the defendant Alling, as expressed in the covenant just recited, should remain in full force. The bill further charges that the defendant Alling left the employment of complainants in the month of January, 1889, and that he soon thereafter entered into the employment of the defendant the L. H. Thomas Company, which is a corporation organized under the laws of the state of Illinois, for the purpose, among other things, of manufacturing and selling inks and mucilage; that its manufactory is located in the vicinity of the city of Chicago, and its principal office is in the city of Chicago; and that the business of the said L. H. Thomas Company is of the same nature with that of complainants, and is conducted in substantially the same manner,—by the employment of canvassers and traveling salesmen, and by advertising and selling its products throughout the country,—and that it is a competitor with complainant in such business. The bill also charges that the defendant the L. H. Thomas Company was fully advised at the time of employing Alling of his obligation to complainants under the agreement of January 2, 1888, and that complainants fear that in the course of his employment with said L. H. Thomas Company, Alling is communicating to and using for the benefit of said company the information which he has obtained as an employe of complainants' concern, and the methods of complainants' business, and will communicate to said company the trade secrets pertaining to complainants' business so acquired by him while in complainants' employ, and will avail himself of such trade secrets to promote the business and further the interests of said company as a competitor of complainants, to the great and irreparable injury of complainants. The bill prays an injunction restraining Alling, for a period of three years from the termination of his employment with complainants, from traveling, canvassing for, and otherwise assisting the L. H. Thomas Company, or any other corporations or persons engaged in, or from himself engaging directly or indirectly in, the business of manufacturing or selling inks, writing fluids, and mucilage, and from furnishing any information, directly or indirectly,

to the L. H. Thomas Company, and to any other person or corporation engaged in or interested in such business, or from communicating directly or indirectly to any such person or corporation any information relating to the secrets of the traveling, advertising, or canvassing departments of complainants' firm. And that the L. H. Thomas Company, its officers, agents, and employes, may also be enjoined and restrained for a like period from employing Alling to travel, canvass, or advertise for, and otherwise assist said company in the business of manufacturing and selling inks, writing fluids, and mucilage.

There is no dispute as to the facts in the case. It is conceded that complainants were manufacturers and sellers of inks, etc., as charged in their bill; that Alling entered into complainants' employ under this contract, and continued in their service, as a traveling salesman and canvasser and advertiser of their inks, up to about the 20th of January, 1889, at or about which time difficulties arose between said parties touching the manner in which Alling should conduct the business for complainants, and he was notified that complainants had discharged him; and that within a very short time after such discharge defendant Alling became connected with the said L. H. Thomas Company as its president, taking the general charge and management of its affairs, including the selling of its inks, mucilage, bluing, and writing fluids; and that the other officers of the L. H. Thomas Company were duly notified, at or before the time when Alling went into their employ in the capacity aforesaid, of his obligations under said contract to complainants.

The only defense seriously insisted upon in the case is that this contract is void as a contract in restraint of trade. There is no difference between counsel as to the tenor and scope of the earlier English doctrine upon the subject of contracts like that now under consideration. It was held that they were contrary to public policy and void; but, as the later cases came before the court, this doctrine was much relaxed, and the first modification of the doctrine was the recognition of the validity of contracts of this nature where the restraint was limited as to space or time, and reasonable in its nature, and the reported cases are abundant in which an undertaking by one person not to carry on a given business within a limited area and within a fixed period of time has been sustained, and a breach of the undertaking enjoined, in a court of equity. In later years a further relaxation of the old rule has grown up both in England and America, and the courts have repeatedly recognized the validity of contracts in restraint of trade throughout an entire state or country, where such restraint was not unreasonable, in view of the nature and extent of the business of the covenantee. In *Machine Co.* v. *Morse*, 103 Mass. 73, where the defendant had conveyed to the plaintiff certain patents for improvements in twist drills and collets, with an agreement to use his best efforts to perfect improvements in the business, and to do no act that might injure complainant or its business, and that he would at no time aid, assist, or encourage in any manner any competition against the same, he agreeing to serve as superintendent of complainant for three years, performing all such duties as should be assigned to

him, and the defendant having left the employment of complainant and gone into the employ of the competitor of complainant in the same business, an injunction restraining defendant from violating his covenant was allowed by the court, although it was there urged strenuously that the covenant sought to be enforced was in restraint of trade, and contrary to public policy, and void; the court saying:

"The language of the contract implies that when the plaintiffs joined the defendant in his new business they had confidence in his mechanical skill and ingenuity, and intended to avail themselves of it for the benefit of the business in which he induced them to embark, and that it was a material part of the consideration for which they paid him so considerable a sum and invested their capital. It was not in restraint of trade nor contrary to public policy that the defendant should contract to render to the plaintiffs his exclusive services in this respect. This part of the contract he is alleged to have violated."

In *Whittaker* v. *Howe*, 3 Beav. 383, complainant had purchased the interest of the defendant, Howe, in the business of a firm of attorneys for £5,000, the defendant agreeing that he would not practice as a solicitor or attorney in any part of Great Britain for the space of 20 years without Whittaker's consent. The defendant resumed practice as an attorney in England within the period of 20 years after the purchase, and a bill was filed to enjoin him from practicing or in any manner carrying on business as a solicitor or attorney in any part of Great Britain. The injunction was granted as prayed, Lord LANGDALE, master of the rolls, saying:

"The question, therefore, is whether the restraint ought to be considered as reasonable in this particular case. The business is that of an attorney and solicitor, which to a large extent may be carried on by correspondence or by agents, and as to which it has already been decided that a restraint of practice within a distance of 150 miles was not an unreasonable restraint. * * * Agreeing with the court of common pleas that in such cases 'no certain, precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say as Lord KENYON said in *Davis* v. *Mason*, [5 Term R. 118:] 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.' At present, therefore, I cannot come to the conclusion that this agreement is void; and I do not think that this court can refuse to grant an injunction to restrain the violation of a contract or covenant because there may be some part of the agreement which the court could not compel the defendant specifically to perform."

In *Rousillon* v. *Rousillon*, 14 Ch. Div. 351, (1880,) the defendant was employed by a firm engaged in the wine business to travel for them in England, Scotland, and Holland, and in his agreement he covenanted as follows:

"I undertake not to represent any other champagne house for two years after having left you, if at any time I leave your house for any reason whatever, whether it be on your part or on my own. I also undertake not to establish myself, nor to associate myself with other persons or houses, in the

champagne trade, for ten years, in case I should leave you as already mentioned above."

Plaintiffs having discontinued their business, defendant within a year thereafter started business as a retail wine merchant in London, selling champagne and other wines, whereupon complainants prayed an injunction to restrain defendant from carrying on the business of a champagne merchant for a period of 10 years from the time he left their employment. The injunction prayed for was granted, the court, by Mr. Justice FRY, saying:

"Now, what is the criterion by which the reasonableness of the contract is to be judged? I will take the law on that point from the language of Chief Justice TINDAL, in delivering the judgment of the court of exchequer chamber on appeal from the court of queen's bench in *Hitchcock* v. *Coker*, [6 Adol. & E. 438.] He said: 'We agree in the general principle adopted by the court that, where a restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void.' That passage was adopted by Lord WENSLEYDALE, when a baron of the court of exchequer, in delivering judgment in *Ward* v. *Byrne*, [5 Mees. & W. 548, 561;] and therefore the rule so expressed is the authority of the courts of queen's bench, exchequer, and exchequer chamber. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable. * * * But then it is said that over and above the rule that the contract shall be reasonable there exists another rule, namely, that the contract shall be limited as to space, and that this contract, being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local."

Match Co. v. *Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, decided in 1887, is the latest reported case upon the subject that has been brought to my attention. In that case the defendant, who was a manufacturer of friction matches in the state of New York, with a large business throughout the United States and territories, sold his business and goodwill to the complainant corporation, with a covenant that he would not at any time within 99 years engage in the manufacture or sale of friction matches, except as an employe of complainant, within any of the states or territories of the United States except Nevada and Montana. He subsequently entered into the employment of a rival company to manufacture matches in the state of New Jersey, and, on suit being brought by the complainant to obtain an injunction restraining his employment with a competitor, it was urged, among other things, that the covenant was void as against public policy, because it was in restraint of trade. The injunction was awarded, the court, in an exhaustive opinion, saying:

"Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the

restless activity of mankind, striving to better their condition, has greatly enlarged the field of human enterprise, and created a vast number of new industries, which give scope to ingenuity, and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire, for the same or similar purposes, to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. * * * When the restraint is general, but at the same time is co-extensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells?"

And in *Navigation Co.* v. *Winsor*, 20 Wall. 64, Mr. Justice BRADLEY, speaking for the court, said:

"It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. * * * This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state."

Many more cases of similar import might be cited, but I deem it unnecessary to multiply quotations. It seems to me that the rule clearly deducible from all these authorities is that an employer has the right to bind an employe not to go into the employ of a competitor, for a reasonable time after his employment terminates, within the territory where the employer seeks his market; and whether such covenant is reasonable and binding is a judicial question which must depend in each case upon its peculiar facts and circumstances. It has been well said that trade has obliterated state lines. The modern agencies of commerce have enlarged the field for the manufacturer and salesman to, or even beyond, the limit of the continent; and to whatever extent a manufacturer or dealer has by his energy and enterprise made a market for his wares, to that extent he has the right to protect his business from piratical competition by contracts like the one under consideration. In the case now under consideration the complainants were manufacturers of inks and similar commodities, and their business extended throughout the entire United States and Canadas. The defendant Alling was em-

ployed to canvass for purchasers, and to advertise the products of complainants' business. Prior to making the contract now under consideration, he had been for several years employed in a similar capacity by the complainants, and it must be presumed that he had acquired an extensive knowledge, not only of the complainants' business methods, but of their trade secrets, and this knowledge he had acquired while under the pay of complainants, and acting for them. It does not, therefore, seem to me unreasonable that the complainants should exact from him a covenant that he would not reveal their trade secrets, and would not enter the employ of any competitor of complainants for the time specified in his covenant after his employment by complainants should terminate. In the wine dealer's case, just quoted, the restriction was for a term of ten years after the employment ceased, and the court held that, under the circumstances, not unreasonable. Here the restriction is for three years only, which, it seems to me, was entirely proper for defendant to agree to and for complainants to exact. A decree may therefore be entered for the complainants.

WHITNEY *v.* CITY OF NEW ORLEANS.

(*Circuit Court, E. D. Louisiana.* June 16, 1890.)

1. MESNE PROFITS—LIABILITY OF DISSEISOR—PARTIES—EQUITY.
A suit was brought by the owner of land against the parties in possession for mesne profits. The defendants notified their grantor, who had warranted the title, and he conducted their defense. After recovering judgment, the plaintiff sued said grantor to recover the amount of such judgment. The defendants in the original suit were not made parties, and no objection was raised on that ground. *Held*, that the fact that some of said defendants had died after entry of judgment against them did not affect the suit against the grantor.

2. SAME—ASSIGNMENT BY TENANT.
Plaintiff had had transferred to her the right to sue said grantor for the price paid him for the land. *Held*, that this fact did not affect her right to recover for mense profits.

3. SAME—PRINCIPAL AND SURETY—RELEASE.
Where an owner of land, who has recovered two judgments against a person in possession,—one for the land, and the other for rents and profits,—exchanges her judgment claim for rents and profits against an evicted tenant for the right of the tenant to recover over from his grantor the same amount on the latter's covenant of warranty, and relinquishes all claim against the evicted person personally, such agreement is no defense to a suit against such grantor for said rents and profits, since he is the principal debtor, and the evicted person is only the surety; but equity will deduct from the amount to be recovered against the principal the amount paid by the surety as part consideration for such transfer and personal release.

In Equity.

Suit by W. W. Whitney, as administrator of the succession of Myra Clark Gaines, against the city of New Orleans. For a full statement of the facts in the case, see 9 Sup. Ct. Rep. 745.

T. J. Semmes and *A. Goldthwaite*, for complainant.

J. R. Beckwith, for defendant.

BILLINGS, J. This cause is submitted upon exceptions to the master's report. Very many of the exceptions present the question as to the scope of inquiry included in the order of reference. This matter was dealt with by the court in the order referring the matter to the master. That order involved a defining of the question committed to this court by the mandate, as stated in the accompanying opinion of the supreme court. See 9 Sup. Ct. Rep. 745. The supreme court submitted the cause to this court, as involving a sum in subtraction. It fixed the minuend at $576,707.92, with interest from January 10, 1881, and the subtrahend as the aggregate of the judgments against the tenants or defendants in the *Agnelly* and *Monsseaux Cases* for rents and profits, which the decedent, Mrs. Gaines, should be found to have compromised or settled for less sums than their face.

1. It is objected that one of the defendants in the *Agnelly Case* was dead when the judgment for rents and profits was rendered. The record shows this to be the fact. His heirs voluntarily appeared, and the judgment was based upon the statements rendered by the heirs. There was no formal decree of revivor. But all this appeared of record. From the opinion, it is clear that the *Agnelly* and *Monsseaux Cases* were not to be tried over again, and this and similar ojections were not to be considered, but solely how much reduction the minuend, the Agnelly and Monsseaux judgments, should suffer by reason of judgments compromised or settled for less than their face.

2. It is also objected that the Agnelly and Monsseaux judgments do not aggregate the said sum of $576,707.92, as is stated by the supreme court. This is a mistake. Besides the judgments set forth in Schedules B and C, there were some $60,000 of judgments rendered in the *Agnelly* and *Monsseaux Cases* after the bill in this case was filed. In fact it is stated by the master the judgments shown by the record to have been rendered in the *Agnelly* and *Monsseaux Cases* aggregate several thousands of dollars more than the amount as arrived at by the supreme court.

3. It is also objected that some 20 of the judgment defendants in the *Agnelly* and *Monsseaux Cases* had died after the entry of judgment against them, and before the reference to the master in this cause. This is immaterial. The supreme court were clearly of the opinion that, as an original question, the defendants in the *Agnelly* and *Monsseaux Cases* were necessary parties to this case. But since this objection had not been taken by the defendant in this case, and since the defendant herein was the party ultimately liable in the *Agnelly* and *Monsseaux Cases*, had been notified as warrantor, as warrantor had appeared and herself conducted the defense, and in her own right taken an appeal in those cases, the court thought the whole of her opportunity to protect herself had been as ample as it would or could have been if she had been made a party defendant by the complainant, with the single exception, viz., the opportunity to ascertain and establish what defendants, if any, had settled or compromised after the rendition of the judgment. The supreme court accordingly held that the numerous defendants in the two former cases (the *Agnelly* and *Monsseaux*) were not necessary parties; their death could have

no effect, especially as the opportunity was reserved to the defendant in case of death as much as in the case of life. They were not parties, and their death deprived the defendants of no equities, and did not affect the result or judgment in this cause.

4. It is objected that the decedent, Mrs. Gaines, had had transferred to her the right to sue the defendants for the price of some of the property recovered in the *Agnelly* and *Monsseaux Cases* by the defendants in those cases, and had sued on those rights, and, in some cases, had recovered from the defendants the amounts thereof. This does not affect the inquiry or the result in this case. When the owner evicts a tenant in an action of ejectment the tenant may, upon eviction, recover over from his warrantor (1) the price which he paid, and (2) the rents and profits recovered against him. But the price is one thing and the rents another. The judgments for price and for rents are different things. The transfer of the right to sue for and recover the price, or its recovery, would leave the matter of the rents unaffected.

There remains the question whether, and, if yes, to what extent, Mrs. Gaines compromised or settled any judgments for rents in the *Agnelly* and *Monsseaux Cases* for less than the face of those judgments. This question is presented in written agreements which are, in all the cases, in words as well as substance, the same. The agreements recite that Mrs. Gaines has recovered two judgments against the tenant,—one for land, the other for rents. (1) It exchanges the land for a transfer of the right of the evicted tenant to recover the price from the tenant's warrantor and all preceding warrantors, including the defendant. (2) It relinquishes all claims against the tenant personally upon divers considerations, among which is the transfer of the right to recover the rent from the defendant. If the actual tenant was the principal debtor, and the defendant was the surety, then such an agreement would be a complete discharge of the whole debt for rents. If the actual tenant was the surety, and the defendant was the principal debtor, then such an agreement would leave the debt of the defendant, as principal debtor, unimpaired. The supreme court, in their opinion in this cause, *New Orleans* v. *Gaines' Adm'r*, 131 U. S. 212, 9 Sup. Ct. Rep. 745, say:

"As between the city and its grantee, the former, by reason of its guaranty of title, is really the principal debtor, and bound to protect the grantee as a principal is bound to protect his surety."

This proposition is exactly in accordance with the decisions of our own supreme court. *Millaudon* v. *McDonough*, 18 La. 108. I think, therefore, that it was neither the intention of the parties, nor the legal effect of what had been done, that the principal debtor should be discharged. It was an agreement on the part of the creditor to look to a principal debtor, instead of a surety against whom judgment had already been obtained. Upon the transfer of the right to look to a principal, the surety was personally discharged. The law placed the primary obligation upon the warrantor. The agreement left him the sole debtor. In no respect did it injure the original situation of the warrantor, or affect his obligation. The test as to whether there was a settlement or

compromise of the judgments would seem to be whether there was anything done which could prevent a subrogation. I understand this as being the test which the supreme court intended. A judgment had been obtained against a surety. The creditor, having in equity a resulting subrogation, takes an express one, and agrees to release the surety personally from the payment of the judgment, but that it shall survive as a basis of claim against the principal. I think the transaction is most nearly assimilated to an agreement between the surety and the creditor, whereby it is agreed that the right springing out of the judgment to look to the principal shall survive, and be transferred to the creditor, and that the creditor simply covenants not to enforce his claim against the surety. Such an agreement would be permissible in law and equity, and would leave the subrogation raised up by equity, as well as the express subrogation, to an unimpaired right to compel payment from the principal. It is urged by the solicitor for the defendant that a judgment is extinguished, and is still made a basis of a claim against another party. This is not an altogether exact statement of the case. So far as it is a personal judgment against the tenant, he is released from it. So far as it is the basis of a claim against another, who is a principal in the transaction out of which it arose, it is agreed that it shall continue in force. It is as if Mrs. Gaines had covenanted not to enforce the judgment personally against the tenant, and, in consideration therefor, had received a transfer of the judgment. It could make no difference to the defendant whether the tenant paid the judgment in money to the creditor and brought his action over against the defendant for the amount of the judgment, or whether the tenant paid the judgment by transferring to the creditor all his rights under it, and the creditor brought the action over against the defendant. In either case the city would but once satisfy her obligation to the warrantee or his subrogee. If these written and printed agreements represent the real transaction between Mrs. Gaines and the tenants in the *Agnelly* and *Monseaux Cases*, and the master finds, and the evidence shows, they do, then they have not the characteristics of compromises or settlements, but rather present a contract whereby a creditor released a surety, and agreed to look to a principal.

It also appears from the report of the master and from the evidence adduced before him that the amount received by Mrs. Gaines, as the consideration for releasing the tenants in the *Agnelly* and *Monseaux Cases* from personal liability, amounts in the aggregate to the sum of $16,501; and that in two cases,—that of J. B. Slawson, $900 was "for costs, attorney's fees, marshal's and other officers';" that in the case of A. Rochereau, she received $206.50 for court costs. The receipt of the costs did not prevent or qualify the subrogation. As to the balance of the $16,501, namely, the sum of $15,394.50, nothing appears from the agreements or from the other testimony showing for what it was paid or received. As to this last amount, the case stands, therefore, that it was an amount paid by the surety as a consideration of the substitution of the principal in his place as the debtor,

and of the agreement on the part of the creditor to look exclusively to the principal debtor for payment. Interpreting as I do the opinion of the supreme court as meaning to regard the Angelly and Monsseaux judgments as conclusive upon the defendant down to the time of their rendition, and as limiting the inquiry in this court to what had subsequently been done by the creditor and the surety, which compromised or settled them, I nevertheless think that the scope of the inquiry includes any transaction which would qualify the right to subrogation, and that the amount received by the complainant, exclusive of that received for costs, should be deducted from the account of the judgments, since equity would not subrogate for the portion paid. In all other respects the exceptions to the master's report are overruled, and a decree will be entered for the sum of $576,707.92, less the sum of $15,394.50, viz., the sum of $561,313.42, with interest from January 10, 1881, and the costs since the filing of the mandate in this court.

DOE *v.* WATERLOO MIN. CO., (two cases.)

(Circuit Court, S. D. California. August 8, 1890.)

MINES—ADVERSE SUIT—EQUITY.

A suit brought pursuant to Rev. St. U. S. § 2326, which provides that one who has filed in the land-office an adverse claim to an application for patent shall "commence proceedings in a court of competent jurisdiction to determine the question of the right of possession," is cognizable in equity.

In Equity. On demurrer to bill.

C. J. Perkins and *Mesick*, *Maxwell & Phelan*, for complainant.

A. H. Ricketts, for defendant.

Ross, J. These suits were commenced in one of the superior courts of the state, pursuant to the provisions of sections 2325, 2326, Rev. St. U. S. It is by those sections in substance enacted that a person who has located and set up a claim for mineral land, and who desires to get a patent for it, shall file in the proper land-office an application for such patent, showing a compliance with the laws on that subject, and a plat and field-notes of the claim, and shall post a copy of such plat, with a notice of the application for the patent, in a conspicuous place on the land for 60 days. If no adverse claim for the same is filed with the register and receiver within 60 days from this publication, and if the papers are otherwise in proper form, the patent shall issue; but where an adverse claim is filed during the period of publication, it shall be upon oath of the person making the same, showing the nature, boundaries, and extent of his claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be thereupon stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived; and "it

shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." Both suits were removed from the state court to this court on motion of the defendant, and here defendant filed, to the original complaint, in case numbered 160, a plea in abatement, in which it was alleged that the suit had not been commenced at the date indicated by the record, nor within 30 days after the filing by the plaintiff of his protest in the land-office. To this plea a replication was filed by the plaintiff, and the issue of fact thus raised was, against the objection and exception of the defendant, referred by the court to the master in chancery to take testimony and report the same, together with his conclusions, to the court, which was done, and the plea found and adjudged to be false, and therefore overruled. Subsequent to the filing of the plea the defendant interposed a demurrer to the complaint, which is now here for determination.

In case numbered 161 the defendant filed in this court a demurrer to the original complaint, and a motion to strike out certain portions of it, which motion, after argument, the court denied. The demurrer was confessed by the plaintiff for the reason, as stated by his counsel, that an exhibit attached to the complaint when filed had in some way disappeared from the record, and he was given leave to amend. The ground of the objection made by the defendant to the reference to the master in case numbered 160 and in support of the motion to strike out in case numbered 161 was that the suits were actions at law, and, therefore, that in the one case the reference was improper, and in the other, that the matter sought to be stricken out had no place in a complaint in an action at law. On the other hand, the plaintiff contended that the suits were on the equity side of the court, and, that being the ruling of the court, the plaintiff in amending his complaint in case numbered 161 gave it the formal fashion of a bill in equity. To this bill the defendant filed the demurrer now here for decision in case numbered 161.

Both demurrers raise the same point, which is, in substance, that the suits should be dismissed for the reason, as it is contended, that the bill of complaint in each case shows upon its face that the complainant has a full, adequate, and complete remedy at law by the ordinary action of ejectment, or some other legal remedy, not, however, specifically pointed out by counsel. In support of his position counsel for defendant has filed three elaborate briefs, in which are cited a vast number of authorities, very few of which, in my opinion, are at all applicable to the present cases. It seems to me to be entirely clear that the proceeding directed and authorized by section 2326 of the Revised Statutes has no relation whatever to the action of ejectment, or to any other common-law action. Those actions are for the recovery of some specified property or thing. "Actions," says Chitty, "are, from their subject-matter, distinguished into real, personal, and mixed. Real actions are for the specific recovery of real property only, and in which the plaintiff, then

called the demandant, claims title to lands, tenements, or hereditaments. * * * Personal actions are for the recovery of a debt or damages for breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the person, personal or real property. In mixed actions, which partake of the nature of the other two, the plaintiff proceeds for the specific recovery of some real property, and also for damages for an injury thereto, as in the instances of ejectment, or of waste, or *quare impedit*." 1 Chit. Pl. 97. In such actions the judgment is and always was, if in favor of the plaintiff, that he "have and recover;" or, if against him, "that he take nothing;" and for defendant, that he "have and recover his costs." And execution went for the satisfaction of such judgment. But, manifestly, in the proceeding contemplated by the statute in question no such judgment can be rendered. The proceeding there provided for has not for its object the recovery of the possession of the mining ground, nor is possession made by the statute the test of either party's right. Whether in or out of actual possession, to make his protest against the issuance of a patent to his adversary available the contestant must commence the statutory proceeding within the prescribed time. The sole object of the proceeding in court is the determination of the contest that arose in the land-office, the point of which is, which of the applicants, if either, is entitled to receive the patent from the government. The right of possession referred to in the statute under consideration is not the right which flows from and is a part of the title or ownership of private land, and which is enforced in an action of ejectment by the recovery of the land. It has no relation to such a right, but it is the right that flows from a compliance with the laws prescribed by congress for the acquisition of the government patent for mineral lands. Such a right never was, and never could be, the subject of any common-law action, and its determination, therefore, on the equity side of the court, cannot be, as argued for the defendant, a violation of that provision of the constitution which declares that the right of trial by jury shall be secured to all, and remain inviolate forever. That language, as said by Judge FIELD, in *Koppikus* v. *State Capitol Commissioners*, 16 Cal. 248, "was used with reference to the right as it exists at common law. * * * It is a right 'secured to all;' and inviolate forever, in cases in which it is exercised in the administration of justice, according to the course of the common law, as that law is understood in the several states of the Union."

The proceedings here in question are purely statutory, and they had their inception, not in the court in which the suits were commenced, but, as said by the supreme court in *Wolverton* v. *Nichols*, 119 U. S. 488, 7 Sup. Ct. Rep. 289, by the assertion of the defendant's claim to have the patents issue to it for the land in controversy. The next step was the filing of an adverse claim by the plaintiff in the land-office, and the present suits are "but a continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties is entitled to the patents. The act of congress requires that the certified copy of the judgment of the court

shall be filed in the land-office, and shall be there conclusive. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties." In that case, a statute of Montana, where the case arose, provided for the bringing of an action by any person in possession, by himself or his tenant, of real property, against any persons claiming an adverse interest therein, for the purpose of determining such adverse claim. A nonsuit was granted by the district court, and affirmed by the supreme court of the territory, upon the ground that the plaintiffs were not in possession of the property at the time of the bringing of the suit; but the supreme court held that as the suit was brought pursuant to the provisions of sections 2325 and 2326 of the Revised Statutes, the view taken by the territorial court of the local statute was too restricted, and accordingly reversed the judgment. In California, the statute authorizing the bringing of an action to determine conflicting claims to real property does not require that the party bringing it shall be in possession of the property. Code Civil Proc. § 738. Under this statute the state court has held that any and every species of adverse claim may be determined, and that it is not now necessary, as formerly, that the plaintiff should first establish his right by an action at law. *Castro* v. *Barry*, 79 Cal. 446.[1] See, also, *Holland* v. *Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495; *Reynolds* v. *Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213. That the suit provided for by section 738 of the state Code is, in the state court, an equitable proceeding has been repeatedly decided by the supreme court of the state. In *Polack* v. *Gurnee*, 66 Cal. 266, 5 Pac. Rep. 229, 610, it was held that the fact of the plaintiff being out of possession, and defendant being in,—the parties, in that respect, having changed places during the pendency of the suit,—did not change the character of the action. "The action," said the court, "has always been on the equity side of the court, and the *gravamen* of it has always been to determine the conflicting claims of the parties to the property in question." If section 738 of the Code of Civil Procedure of California was the appropriate section under which to institute the proceeding, directed and authorized by section 2326 of the Revised Statutes, and under which the present suits were in fact commenced, it is apparent that in the state court these suits were upon the equity side of the court, and their removal here did not change their nature. But, regardless of the state statute referred to, I am of opinion that these suits are special statutory proceedings, which, in the absence of a statutory provision that there shall be a jury trial in them, belong, from their nature, on the equity side of the court. Not only is the right the court is required to determine not the appropriate subject of an action at law, but the sole purpose of its judgment is for the guidance of the land department. No writ of any nature issues for its enforcement, but a certified copy of it is required to be filed with the officers of the land department, and they required to act in accordance with it. Congress saw proper to refer contests for mineral lands to the courts for trial; but it need not have done

[1] 21 Pac. Rep. 946.

so. It could have directed such contests to be tried by the officers of the land department, just as contests respecting pre-emption claims and rights are required to be tried. Did anybody ever hear that either party's constitutional right to a trial by jury was violated by the requirement that the last-mentioned contests be tried by the officers of the land department? The truth is, in each case the property belongs to the government, which it is willing to convey to the party who has complied with the laws established for its disposition, and the question to be determined in cases of contest is, which of the parties, if either, has complied with those laws, and therefore acquired the right to the privilege given by the government. The present cases are strictly analogous to the cases of contests frequently arising in the state land-office respecting the right to purchase lands from the state, and which, by a state statute, are authorized, and under certain circumstances required, to be determined by a court of competent jurisdiction. In such cases no one has ever claimed, so far as I am aware, that either party had a constitutional right to a trial by jury. It is true that in such cases juries are sometimes, perhaps often, impaneled, as they are in cases brought under section 2326 of the Revised Statutes; but in these, as in other equity cases, the verdict, I think, is but advisory to the court. In each case an order will be entered overruling the demurrer, with leave to the defendant to answer within the usual time.

FARMERS' L. & T. Co. *v.* TOLEDO & S. H. R. Co., (YOUNG, Intervenor.)

(*Circuit Court, W. D. Michigan, S. D.* August 20, 1890.)

MORTGAGE—FORECLOSURE—INTERPLEADER.

A judgment creditor, who has levied on the property of his debtor after it has come into possession of a receiver appointed in a foreclosure suit, which, the creditor alleges, was collusively brought in order to defeat his recovery, may, on disclaiming any intention to interfere with the possession of the receiver, be permitted to intervene in the foreclosure suit.

In Equity. On petition for intervention.

Russel & Campbell and *Turner, McClure & Rolston*, for complainant.

Edward R. Annable, for defendant.

Bondeman & Adams, for intervenor.

SEVERENS, J. It appears that the petitioner, Young, as the result of a litigation in the state courts between him and the defendant railroad company, obtained a decree in the supreme court of the state for the sum of $3,500, on the 28th day of December, 1889, which was, by the terms of the decree, payable to him on the surrender of certain certificates of railroad stock in a company which had been consolidated with another to form the defendant company. Upon a subsequent application to that court, showing that a tender had been made of the certificates, and pay-

ment of the money refused, the supreme court, on the 9th day of April, 1890, made a supplemental order that the complainant, Young, have execution for the amount of his decree against the defendant. Certain conditions to the issuance of the process having been complied with, an execution was accordingly issued out of the said supreme court on the 10th day of June, and the same was on the 16th of the same month levied on all the real estate and personal property of the company. Meantime, and on the 11th of June, the Farmers' Loan & Trust Company filed in this court its bill to foreclose a mortgage given by the defendant railroad company upon all its said property to it, as trustee for the holders of the company's bonds mentioned in the mortgage, and, pursuant to stipulations in the mortgage professing to authorize it upon default of payment of the money due on the bonds, made an application for the appointment of a receiver to take and manage the mortgaged property. The railroad company appearing and assenting thereto, a receiver was accordingly appointed on the same day. The receiver qualified, and took possession on the 12th of June, and has been in the management of the property since that time. Thus, at the date of the levy of the execution, the property was in the hands of the receiver of this court. Young complains that the present suit is collusive, and is designed to prevent his enforcing collection of the amount decreed in his favor by the supreme court. He alleges, in substance, that the bonds in question were never negotiated, and that there is nothing due thereon; that, notwithstanding this, the railroad company makes no defense, but has suffered default; and that the complainant is likely to obtain a decree for the whole amount named in the bonds, and for a sale of the mortgaged property to satisfy the same. He therefore asks to be allowed to intervene, and be at liberty to defend the suit. This the complainant resists, and insists that (1) the petitioner is in contempt by his levy, and therefore not entitled to move the court for any relief; (2) that, the levy being void, he has no standing thereon, and he is therefore simply a creditor at large, having no lien, and that such a creditor is not entitled to intervene. It is further suggested that Young would have his remedy against any fraudulent decree that might be rendered here by an independent bill filed for that purpose. All these propositions are *prima facie* sound, but it is evident that, if the facts be as Young's petition alleges, the court, by a stringent application of them, would permit itself to be an agency for perpetrating a fraud by its decree, relief from which could only be obtained by overreaching such decree by an independent suit. No attempt has been made by Young to get possession under his levy, or to disturb the receiver, and his counsel declared at the hearing of this motion, and, I am satisfied, in good faith, that the levy was made for the sole purpose of getting a foothold on which to make the present application, and with no intention to disturb the receiver, or to dispute the authority of this court. I do not see that a levy thus made in subordination to the authority of this court would injuriously affect the rights of the present parties, when the same party submits to the jurisdiction here, and must, of course, be bound by the order and decree

which the court may make in this case. In my opinion the court would assert its dignity with a needlessly high hand if it rejected an application to come in and prevent the court from being made the agent of wrong by parties acting collusively, upon purely artificial reasons. If what Young alleges is true, the court, with only the present parties on the record, would find no other way than to go on to decree a sale, giving title to the purchaser of the mortgaged property, turning over the proceeds to parties having no right, and thus deprive a judgment creditor, who was on the threshold, at the time of this court's taking cognizance of the case, of all remedy, unless it be the circuitous one of an independent bill. In my opinion the proper course is to take the precaution in the principal case, if the means are afforded. It may turn that out all these charges made by Young are unfounded; but there is sufficient color to them to require the court to give them attention. At the hearing an offer was made on behalf of the petitioner to release the levy made altogether, or with leave to make a new one in terms subordinate to the receiver's possession, and the control of the court in this cause, as this court might direct. In my opinion it is not necessary to do this. A party may purge himself of actual contempt by oral explanation before the court, and upon the petitioner being admitted the court will have full control of his levy. Whether actual possession under a levy is necessary to the perfection of a lien by execution I do not consider, for I am impressed that an inchoate levy is sufficient, and am inclined to think that the court ought to concede the right to intervene where its process by concurrence of the original parties has interrupted the creditor with an execution in his hand, and a purpose to forthwith levy it, and the object of using such process is to defeat the creditor; and that an actual levy might be dispensed with. An order may be entered giving the petitioner leave to intervene as a defendant, and to answer the bill within 20 days after the entry of this order.

BRUSH-SWAN ELECTRIC LIGHT CO. *v.* BRUSH ELECTRIC LIGHT CO.

(*Circuit Court, S. D. New York.* June 20, 1890.)

SPECIFIC PERFORMANCE—INSOLVENCY AS DEFENSE.

The insolvency of the party seeking the specific enforcement of a contract is no bar to the suit when the contract was renewed by the other party with knowledge of such insolvency.

In Equity. Bill for specific performance. On motion for rehearing. For former opinion, stating the facts, see 41 Fed. Rep. 163.

Joseph H. Choate and *William G. Wilson*, for complainant.

John E. Parsons, *Albert Stickney*, and *Gilbert H. Crawford*, for defendant.

COXE, J. The questions involved in this controversy have been again carefully examined. Some of the points before argued are reiterated

with, perhaps, additional force; but no new proposition, either of law or fact, has been advanced. 41 Fed. Rep. 163. It is again argued that the complainant's insolvency is a bar to relief, but the authorities cited seem hardly applicable to the present facts. I cannot find that it has ever been held that mere insolvency, even occurring after the agreement, is a sufficient answer to a bill like this. Such doctrine would, therefore, be quite out of place in a cause where there is neither concealment nor fraud, and where the defendant voluntarily made the contract with full knowledge of the complainant's financial condition. Surely, no case has gone to the extent of holding insolvency a barrier where such facts concur. The defendant was under no obligation to continue its business with an insolvent party, but having chosen to do so it cannot now take advantage of a fact which was as obvious when the renewal was made as it is to-day.

The court at *nisi prius* used its best endeavors to untangle a complicated controversy. As the situation remains unchanged the case may be one for an appeal, but not for a rehearing.

The motion is denied.

NATIONAL PARK BANK OF NEW YORK *v.* REMSEN.

(*Circuit Court, S. D. New York.* July 21, 1890.)

1. CORPORATIONS—TRUSTEES—LIABILITY FOR CORPORATE DEBTS.
   3 Rev. St. N. Y. (8th Ed.) p. 1957, § 12, provides that, for failure to file the annual report of the capital and indebtedness of any corporation, as therein prescribed, the trustees shall be liable for all debts of the corporation then existing, or contracted before such report shall be filed. *Held*, that the trustees cannot be subjected for an alleged liability of the corporation accruing on an accommodation indorsement, which, under its charter, it had no authority to make, and which consequently did not bind it.
2. NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—NOTICE.
   The fact that a note is presented for discount by the maker is notice to the discounter that the indorsement thereon is an accommodation indorsement.

At Law.

Francis C. Barlow, for plaintiff.

William H. Ingersoll, for defendant.

COXE, J. This action is to recover of the defendant, as trustee of the German-American Mutual Warehousing & Security Company, the amount due upon two notes, indorsed by it, upon the ground that the trustees are liable for the debts of the corporation because no annual report of its financial condition was filed, as required by the general manufacturing act of 1848. Section 12 provides that for failure to file, the trustees "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." 3 Rev. St. N. Y. (8th Ed.) 1957. First in the order of proof it is necessary for the plaintiff to establish that the amount

in question was a debt of the corporation. If it was not a debt of the corporation, of course, the trustees are not liable. In October, 1889, the court of appeals of New York, in an action brought against the warehousing company upon these identical notes, held that there was no liability, for the reason that an accommodation indorsement by the warehousing company was *ultra vires* and that the plaintiff was chargeable with notice of the character of the indorsement, because the notes were presented for discount by the makers, who received the avails thereof. *National Park Bank* v. *German-American, etc., Co.*, 116 N. Y. 281, 22 N. E. Rep. 567. This decision sets at rest forever the question of the liability of the warehousing company upon these notes. They can never be enforced against that company and it is certainly a grave question whether, in any view, a trustee can be held upon an obligation from which his corporation is, in fact, released. But the highest tribunal of this state has decided that the notes never were an obligation of the warehousing company. In order to hold the defendant liable it is necessary for this court to disregard that decision. Although the power to do this may be conceded, it is only in exceptional cases, where there is a conflict between federal and state authority or where important public considerations are at issue, that it should be exercised. Even where the question is one of general commerical law considerations of comity and the orderly administration of justice are against the assertion of the power. No decision of the supreme court of the United States or of the circuit court of this circuit is cited which conflicts with the rule of the court of appeals, and were there a likelihood that the doctrine contended for by the plaintiff would ultimately be accepted by the United States courts it is, in the circumstances referred to, appropriate and decorous that the supreme court of the United States and not the circuit court should pronounce the judgment of dissent.

Although the foregoing considerations are sufficient to dispose of the case I have examined the questions involved in the decision of the court of appeals and the authorities cited to sustain the propositions of law there enunciated, in the light of the able and elaborate brief submitted for the plaintiff, and am constrained to say that I see no reason to anticipate a conflict of authority upon these questions. The argument is plain, and, if the premises are correct, is conclusive. *First.* The indorsements were accommodation indorsements. *Second.* The warehousing company had no power under its charter to make these indorsements. *Third.* A party who discounts such paper cannot recover of the indorser if he has knowledge of the fact that the indorsement was made for the accommodation of the maker. *Fourth.* Where the makers of the note present it for discount it is notice to the discounter of the character of the indorsement. The first of these propositions is supported by the proof, the others are, it is thought, amply sustained by authority. They are reaffirmed. Every fact necessary to the decision was considered by the court of appeals. The circumstance that a consideration was paid for the indorsements was not overlooked. It is three times referred to in the opinion and the conclusion reached that the warehousing company

had no power "to bind itself by making or indorsing promissory notes for the accommodation of the makers for a consideration paid." Nor was the court in error in holding that the plaintiff had notice of the fact that the notes were not indorsed in the usual course of business. The presentation, for discount, by the makers was something more than a suspicious circumstance. There was notice direct and explicit upon the notes themselves that the indorsements were invalid. The discounter when confronted with such facts cannot protect himself by inaction. If there is a possible explanation he must seek it, but where, as in this case, nothing of the kind is required and no statement is made inconsistent with the plain provisions of the notes, the unerring presumption attaches. As the non-liability of the warehousing company defeats the plaintiff's action at the threshold it is, of course, unnecessary to pass upon the difficult but interesting questions relating to the liability of the defendant as trustee. There must be a judgment for the defendant.

ALLEN *ex rel.* SPICKLER *v.* BLACK, Sheriff.

(*Circuit Court, S. D. Iowa, C. D.* August 11, 1890.)

INTOXICATING LIQUOR—ILLEGAL SALE—ORIGINAL PACKAGE.

A box containing whisky in bottles was shipped from Illinois to Iowa, and while in the latter state the box was opened by a resident of Iowa, who sold one of the bottles of whisky, contrary to the Iowa statute. For this he was convicted by a justice, and he applied to be released on *habeas corpus*, because his sale was protected under the interstate commerce clause of the national constitution. *Held*, that he should not be released, since the question whether the bottle or the box was the original package was sufficiently doubtful to make the proper remedy an appeal, rather than an application for *habeas corpus*.

At Law. On petition for *habeas corpus*.

B. J. Salinger and *F. A. Charles*, for petitioner.

F. A. Church, for respondent.

SHIRAS, J. Upon the petition of E. E. Spickler, averring that one Ed. Allen was illegally restrained of his liberty by the sheriff of Greene county, Iowa, a writ of *habeas corpus* was issued, and due return has been made thereto by the sheriff, setting forth that said Allen is in custody of said sheriff by virtue of a commitment issued by one R. P. Morden, a justice of the peace in Greene county, Iowa, and the counsel for the respective parties have agreed on the facts of the case, in substance as follows: That the relator, E. E. Spickler, resides in the state of Iowa, and is engaged in the business of acting as agent of parties residing in the states of Nebraska and Wisconsin in the selling of intoxicating liquors in the state of Iowa, shipped to him by them from said states; that said Allen was the clerk of said relator, employed to sell such liquors for relator at Cooper, in said county of Greene, Iowa, at a place provided for the purpose by relator; that said relator, Spickler, had authority

from his principals to employ subagents in the conduct of said business; that neither Allen nor Spickler had a permit to sell intoxicating liquors for any purpose under the provisions of the statutes of Iowa; that there was shipped to said Spickler at Templeton, Iowa, from his principal in Nebraska, a wooden box containing a number of bottles of whisky; that said box and contents were received by said Spickler at Templeton, Iowa, and were by him reshipped to Allen, at Cooper, without change in their condition; that when received by Allen at Cooper he opened said box, took therefrom the bottles of whisky, and sold one or more of the same; that said bottles were not removed from the box until they were sold by Allen; that an information was brought before a justice of the peace, charging Allen with selling intoxicating liquors contrary to law; that upon the hearing before the justice the evidence showed a sale of one bottle of whisky to Thomas Anderson, the said bottle so sold being one of those contained in the box shipped to Allen by Spickler, under the circumstances hereinbefore detailed; that the justice found Allen guilty of the offense charged, fined him $50, and in default of payment ordered his committal to the custody of the sheriff. On behalf of the petitioner it is claimed that Allen is protected in making sales of intoxicating liquors, under the circumstances of the sale to Anderson, under the interstate commerce clause of the federal constitution, as construed by the supreme court in the recent case of *Leisy* v. *Hardin*, 10 Sup. Ct. Rep. 681. In the opinion in that case it is pointed out that by the previous decisions of the supreme court it had been settled that the power of the state to tax or control the disposition of property brought from another state or from a foreign country did not commence until the importer had so acted upon it that it had become incorporated and mixed up with the mass of property in the state, or, to quote the language used in the *License Cases*, 5 How. 504:

"These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the state."

Applying these principles to the facts of the particular case before the court in *Leisy* v. *Hardin*, it was held that Leisy & Co. "had the right to import this beer into that state; and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or non-resident importer." The question of fact which will arise in each case is whether the property imported from another country or state has, by the act of the importer, become mingled with the common mass of property in the state. When so mingled it becomes subject to the laws of the state, may be taxed, or the sale thereof may be controlled or prohibited by such laws. Under the rule laid down in the *Leisy Case*, beer or liquors imported into Iowa, so long as they are kept in the original packages imported, and in the

hands of the importer, do not become part of the common property of the state, and while in that condition the importer has the right to sell the same. It does not seem probable that this matter of sale will be held to be the only test by which to determine when property passes from under the protection of the interstate commerce clause of the constitution. For instance, cattle or horses may be imported into Iowa by a citizen of another state, not for the purpose of immediate sale, but to be placed upon the farms in Iowa to be fed for one or more years. May not the same be taxed in Iowa, and be otherwise held subject to the laws of that state? In the *Leisy Case* the evidence showed that the beer owned by Leisy & Co., who were citizens of Illinois, was taken to Keokuk, Iowa, to be there sold in the original packages, and under these facts the court held that it was only when sold by the non-resident importer that the property became part of the common mass of property within the state, so as to become subject to the operation of the prohibitory law of the state. In other words, it is settled that a non-resident of Iowa may import into the state intoxicating liquors, and sell the same in the original packages, and that, so long as the same remain in the original packages in the hands of the importer, they do not become so intermingled with the common mass of the property in the state as to lose the protection afforded to importations by the interstate commerce clause of the constitution. Whether this clause will protect the importer in selling at retail, and whether the term "original package" is to be confined to the box, crate, or barrel in which the bottles of liquor are placed for convenience in shipping, or is to be construed to apply also to the bottles in which the liquors are contained, and whether any distinction exists in the rights of a non-resident importer as compared with those of a resident of the state, are questions which have not yet been passed on by the supreme court. The charge against Allen was for a violation of the statute of Iowa in that he had sold intoxicating liquors contrary to the provisions of the statute. The justice of the peace had jurisdiction to hear and determine the case. The evidence disclosed the fact that Allen was a clerk for Spickler; that Spickler resided at Templeton, Iowa, and Allen at Cooper, in the same county; that Spickler acted as agent for parties in other states, receiving liquors from them; that Spickler had received from a party in Nebraska a box containing a number of bottles of whisky; that he had reshipped the box to Allen, who opened the same for the purpose of selling at retail the bottles of whisky therein contained; that he sold one bottle thereof to one Anderson; that he had no permit to sell for any purpose under the provisions of the state statute, but that he claimed the right to sell the same under the protection of the interstate commerce clause of the federal constitution. The justice held that the clause in question could not be extended to include a case of this character.

Can it be denied that the case presented doubtful questions of the kind heretofore indicated? Can it be fairly said that the ruling of the justice was unquestionably wrong? Does not the case stand simply thus: If the ruling of the justice upon these debatable questions of law was right, then

the conviction and sentence of Allen was rightful; but if the justice erred in his view of the law, then the conviction was erroneous? Under the facts of this case, I do not think that the writ of *habeas corpus* is the proper proceeding to determine the questions involved. The decision of the justice complained of could have been carried by appeal to the higher state courts, and thence to the supreme court of the United States, and thus the rights of the state and of the defendant could alike have been protected. The present proceeding is before me as a judge and not as the circuit court, and hence no appeal can be taken to the supreme court from the ruling now to be made. Certainly I would not be justified in holding the action of the justice in sentencing Allen to imprisonment to be illegal and void unless such illegality is made clear, and I do not think it can be fairly said that such illegality is apparent. It may be that it will ultimately appear that the ruling of the justice in construing the rights of Allen under the federal constitution was erroneous, but it is certainly yet a debatable question, and under these circumstances I do not think he has established his right to be discharged by means of a writ of *habeas corpus*. The writ will be discharged, and Allen will be remanded to the custody of the sheriff.

TIMBERLAKE *et al.* *v.* FIRST NAT. BANK.

(Circuit Court, N. D. Mississippi, E. D. April 25, 1890.)

1. USURY—WHAT CONSTITUTES—BANKS.
   Where drafts are from time to time deposited in a bank, some of them being payable on demand and some on time, an agreement between the bank and the depositor that credit shall be given for such drafts on the day after their deposit, the depositor being charged the full legal rate for any overdraft, does not constitute usury when such agreement is made in good faith in order to save involved calculations.
2. SAME—COMPOUND INTEREST.
   Charging a depositor, by agreement, at the end of each month, with interest at the full legal rate on his overdraft, and adding such charge to the overdraft, does not constitute usury.
3. SAME—DISCOUNT—NATIONAL BANK.
   Under Code Miss. 1880, which only allows interest on the amount of money actually lent, a national bank in that state cannot deduct interest in advance.
4. SAME—ACTION TO RECOVER BACK—PLEADING.
   In an action for the recovery of interest alleged to have been charged in excess of the legal rate for oral contracts, a plea setting up a written agreement to pay the interest charged, without denying that the charges alleged in the declaration were made before the written agreement was entered into, and without stating the date of the written contract, is bad.
5. SAME—PARTIES—NATIONAL BANK.
   Under Rev. St. U. S. § 5198, which empowers one paying illegal interest to a national bank to recover double the amount paid, one of the joint makers of a note on which illegal interest is charged cannot recover the penalty from the bank where the illegal interest was paid by the other maker.

At Law.

Sullivan & Whitfield and *Beall & McClelland*, for plaintiffs.

Barry & Becket and *Fox & Roane*, for defendant.

HILL, J. On the 1st day of September, 1887, the defendant was organized under the laws of the United States as a national bank, and the plaintiffs drew checks on the bank in payment of the cotton purchased by them, and deposited with defendant, in payment, drafts or checks on the parties to whom the cotton was sold or shipped. The declaration charges that defendant charged plaintiff with interest on the sums so checked out by them, less the interest on their deposits, at a greater rate of interest than that allowed by the laws of the state of Mississippi, the accounts being balanced at the end of each month, and interest charged on the balance found; that during said transaction the interest charged on such balances amounted to the sum of $5,174.72; that the rate of interest charged in said transaction was greater than the rate allowed by law. The second count in the declaration avers that the plaintiffs, together with T. C. King, negotiated a loan with the defendant for $10,000, to secure the payment of which they executed their two notes,—one for the sum of $5,000, payable in eight months after date; and the other for $5,000, payable in ten months after date,—each note to bear 10 per cent. interest per annum after due until paid; that 10 per cent. per annum interest from the date of the notes until the maturity thereof, amounting to the sum of $758.30, was retained by the defendant as such interest. The third count in the declaration further avers that on April 25, 1889, the defendants charged plaintiffs with $251.96, on a balance before that time due defendant, which charge embraced more interest than was then allowed by the laws of the state. The declaration further avers that all the interest so charged to the plaintiffs, and which was paid by them, embraced interest greater than was then allowed by the laws of the state of Mississippi, and was so knowingly charged, and was in violation of sections 5197, 5198, Rev. St. U. S., by which the whole interest so charged became forfeited; and that, the same having been paid, by the provisions of section 5198 an action has accrued to the plaintiff to have and recover of and from the defendant double the amount of said interest, to-wit, the sum of $12,547.70.

The first plea is the general issue. The second plea avers that on September, 23, 1887, the defendant had with the plaintiffs an agreement in writing, which provided that the plaintiffs should pay to the defendant 10 per cent. per annum on all overdrafts drawn on it, and that the plaintiffs' account with defendant was to be due at any time on demand with three days' notice. That during the time averred in the declaration the overdrafts were paid by drafts on Boston, Providence, Philadelphia, and other places, sometimes on demand drafts, sometimes on cash drafts, and sometimes on sight or time drafts, on which there were three days of grace allowed; and to equalize these drafts, and to save numerous calculations of interest, it was agreed that the plaintiffs should be credited with their drafts on the day succeeding the day on which they were drawn, which was to the advantage of plaintiffs. That the plaintiffs were charged with interest at the rate of 10 per cent. upon the sums checked and from the date of the payments, and credited with interest at the same rate for the proceeds of said drafts, thus adopting the commerical instead of the

statutory rule, which was to the advantage of the defendant; and that it was under this rule that the sum of $84.25 was charged for the month of September, the same not having been paid on the 1st of October, 1887, and was charged to plaintiffs in their account as principal, by their consent; and that in the same way the other interest was charged on their monthly settlements. That plaintiffs were furnished with a bank or pass book, in which all debits and credits, including the interest charges, were entered and accepted, and they promised to pay the same. The third plea, in substance, avers that two notes of $5,000 each were executed after banking hours had closed, and the proceeds were not placed to the credit of plaintiffs until the next day, and that the notes were not paid until the 25th of April, 1889; the amount paid on one being $5,088.10, and on the other, $5,002.76; and that in said transaction there was no intention to charge usury. The fourth plea avers that the interest on the overdrafts for September, 1888, was the sum of $40.25, which was added to the sum of $3,697.94, making the sum of $3,720.19, which plaintiffs promised to pay, but which was not paid until April 25, 1889; and that there was no purpose to evade the usury laws or the provisions of the statute. The fifth plea to the declaration in substance avers that T. C. King & Co., a firm composed of T. C. King, was, in September, 1888, a successor of Timberlake & Nance, and so continued until after April 25, 1889, and if any usury was paid as alleged it was paid by T. C. King & Co., and not by the plaintiffs, Timberlake & Nance.

The demurrer to the pleas sets out several grounds of demurrer, to-wit: (1) A general demurrer; (2) that neither of the pleas sets up a complete defense to the action; (3) that the second plea does not state the date of the agreement, how long to continue in force, and what overdrafts it included; (4) that the agreement set out in the second plea was void, and could not justify the taking of interest at 10 per cent. per annum. The fifth ground is also a general demurrer. Several grounds are insisted upon by plaintiffs' counsel in support of the demurrer, which will be considered in the following order:

First. It is insisted that the taking of 10 per cent. per annum interest, prior to October 1, 1887, in the absence of a written contract, was usurious, and avoided all interest in the dealings of the parties subsequent to that time. The national bank law is a law unto itself, which congress had the power to enact; and in express terms it allows the banks organized and doing business under its provisions to take and receive the highest rate of interest allowed by the state in which they are located and doing business. The rate of interest allowed by the law of this state is 6 per cent. per annum, but 10 per cent. per annum may be contracted for in writing. This may be in the note or other written contract, or in a separate paper governing or embracing their subsequent dealings, stated in the written agreement. The charging, taking, or receiving of more than 6 per cent. interest per annum, in the absence of such written agreement, if none, was a violation of the act of congress, and forfeited the interest due on the debt, and its being paid rendered the defendant liable to an action for double the amount of the interest

paid on the debt to the persons paying it, as the penalty for the violation of the law. Congress, in the act, did not adopt the state law on the question of usury further than to adopt the rate of interest allowed by the laws of the states; and 10 per cent. per annum is the highest rate of interest allowed by the statute of this state, when the contract is made in writing, and 6 per cent. when it is not; so that the question is: Was there more than 6 per cent. paid when there was no contract in writing, or than 10 per cent. when there was? To subject the defendant to the penalty there must have been paid not only a larger rate of interest than that allowed by law, but that larger rate knowingly received; that is, the officers of the bank must, at the time they received the money, have known that the amount was in excess of the interest allowed by law.

The *second* plea alleges that the checks or drafts received by the bank in payment should be credited on the day succeeding the day on which they were drawn; that some of them were cash or demand drafts, and some were sight or time drafts, on which three days were allowed; that this was done to equalize the same, and to save the numerous calculations, and not for the purpose of obtaining any additional interest; that the plaintiffs were charged with interest on the payments made on the checks drawn by them on the defendant at the rate of 10 per cent. on the drafts or checks received in payment as above stated, thus adopting the commercial instead of the statutory rule. The plea alleges that the mode above stated was to the advantage of the plaintiffs; that the interest was calculated according to the commercial rule allowing 360 days to the year or 30 days to the month, which was to the advantage of the defendants; that this mode was adopted for convenience, and to save numerous calculations of interest, and not to receive more than the legal rate of interest. I am satisfied that the parties had a right to agree as to the time the credits should be made, and, if done without objection at the time, the agreement will be presumed; and, if made in good faith to equalize the interest, and not for the purpose of receiving a greater rate of interest than that allowed by law, that any difference in the result, one way or the other, will not be a violation of the law, or subject the defendant to its penalty. Therefore this ground of demurrer is not well taken. It is insisted on the part of the plaintiffs that the mode of keeping the accounts and balancing them at the end of each month, and charging the balance to the plaintiffs, including interest, as set out in the second plea, was compounding the interest. The plea avers that the interest for each preceding month was so much, stating the sum, and that by consent of the plaintiffs it was, on a certain day of each month, charged as principal, and so on during the continuance of the business. But it does not state whether this was the balance of interest on both the debit and the credit sides of the account, or only the interest on the advances made by the defendant's bank. When not frequent, the interest may by agreement between the parties be added to the principal debt, and thus the interest become part of the principal, and not be a compounding of the interest. On the other

hand, when the transactions are very frequent, they may be held as a compounding of the interest. But I am in doubt whether the transactions in this cause, as shown by the accounts of the bank, shall be held as a compounding of the interest; but, as the statute under which the penalty is claimed is quite penal in its character, the doubt will be resolved in favor of the validity of the transactions, so that the defendant will not be subjected to the penalty provided in the statute. The second plea does not deny that 10 per cent. interest was charged upon the advances made before the written agreement was entered into, and does not distinctly state the date of the written contract, and for this reason the demurrer to the plea must be sustained.

The *third* plea admits that the sum of $758.30 was retained by it out of the two notes of $5,000 each at the time the same were discounted, and that the balance of the amount of the two notes, being $9,241.70, was then paid to the plaintiffs. The Code of 1880 of this state only allows interest on the amount of money actually loaned, and does not allow it retained in advance, as is provided in the national bank law, where no rate of interest is fixed by the state statute. It follows that under the law of the state only 10 per cent. interest could be charged upon the amount actually advanced, and that the interest on the amount retained until the maturity of the notes was that much over and above the 10 per centum interest on the money loaned, and a violation of section 5197, and subjects the defendants to the penalty prescribed in section 5198, Rev. St. U. S. The statute also forfeits all the subsequent interest on the notes, which is added to the penalty.

The defense set up in the *fourth* plea is governed by the same rules stated in relation to the second plea, and, if proven, is a valid defense to the action so far as it relates to the matter set up in the plea.

The *fifth* plea alleges that T. C. King & Co. were the successors of Timberlake & Nance, and that whatever amount of interest was paid, if any, over and above the interest allowed by law, was paid by T. C. King & Co., who alone are entitled to recover the penalty therefor. Section 5198 confers the right to recover the penalty to the party paying it, or to his legal representatives, so that this plea sets up a valid defense to this action if sustained by the proof.

The result is that the demurrer to the second and third pleas must be sustained, and to the fourth and fifth pleas must be overruled, with leave to plead over.

The questions as presented in this cause have been ably argued by the learned counsel on both sides, and numerous authorities read and commented upon; but the view of the question as presented to my mind depends upon the proper construction to be put upon the sections of the Revised Statutes of the United States referred to, and a few general and well-recognized rules, rendering citations to authority unnecessary.

FRANCOEUR *v.* NEWHOUSE.

(Circuit Court, N. D. California. August 6, 1890.)

1. PUBLIC LANDS—RAILROAD GRANT—EXCEPTION—MINERAL LAND.
Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect or which there was then satisfactory reason to be believe to be such.
2. ADVERSE POSSESSION—GOVERNMENT TITLE.
Possession held in subordination to the title of the United States may be adverse as to another claimant.

At Law.

This is the same case, the decision in which—on demurrer—is reported in 40 Fed. Rep. 618, where the facts alleged in the complaint are stated. Some three months before the commencement of the suit, for a consideration equal to the government price of agricultural land, the Central Pacific Railroad Company executed a quitclaim deed to plaintiff in which they "do remise, release, and quitclaim to the said G. H. Francoeur, his heirs, and assigns, all the right, title and interest that the said company, or the said trustees now have, or may hereafter acquire from the government of the United States in and to" the premises in question, "reserving however, all claim of the United States to the same as mineral land."

A. L. Hart and *Geo. H. Francoeur*, for plaintiff

J. M. Seawell and *J. B. Reinstein*, for defendant.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally charging jury.*) I announce to you that I have prepared some special issues in addition to the general verdict, upon which I desire you to find. It may save future litigation. I will read them to you so that you will be prepared to appreciate what I have to say upon these points. The first is—"We the jury in the above-entitled case find for the"—plaintiff or defendant, whichever it turns out to be. You will write in either "plaintiff" or "defendant," according as you find on all the issues in the case.

SPECIAL ISSUES.

The next one is: (1) Was the land in question known to be mineral, or was there good reason to believe it was mineral, at the date of filing the map of general location of the route of the road, and the withdrawal of the lands by order of the secretary of the interior, on August 2, 1862? (2) Was the land in question known to be mineral, or was there good reason to believe that it was mineral, at the time that the line of the road was definitely located in 1866? (3) Is the land in question, in fact, mineral land? (4) Had the defendant and his grantors been in the continuous, open and notorious adverse possession of the premises in question, claiming to be in the rightful possession under the laws, and afterwards under a patent of the United States adverse to

the claim of the plaintiff and his grantor, for a period of five years next before the commencement of this suit, on June 28, 1889?

Gentlemen, I will now proceed to state to you the law which governs this case, which is the province of the court to determine. You will take, and apply it as given to you by the court, whether it meets with your approbation or not. It will then be your province to find the disputed facts in the case, and those issues you are to find, upon the testimony before you, either for the plaintiff or for the defendant, as the preponderance of proof in your judgment requires. It only requires a preponderance of proof. You are the exclusive judges of the testimony, and to you alone belongs the finding of the facts. You are to examine the testimony of each witness. You are the judges of the credibility of the witnesses. You are to consider the intrinsic character of the testimony, whether it is intrinsically probable or not. You will consider any circumstances which affect the credibility of the witnesses, and give the testimony of each witness such weight as you think it is entitled to receive, and render your verdict as the preponderance of the evidence appears to be in your minds. The deed to the plaintiff from the Central Pacific Railroad Company is dated February 13, 1889, only two or three months before the commencement of this suit. The deed, it is true, is a quitclaim deed, but if the title to the premises in question was in the Central Pacific Railroad Company at that time, that deed conveyed the title to Francoeur, and in that case, if the title was in the Central Pacific Railroad Company and conveyed to Francoeur, there must be a verdict for the plaintiff on that issue, and the plaintiff will be entitled to recover unless the other defense of the bar, by the statute of limitations, is found in favor of the defendant, in which case, of course, that will control.

The first great question to determine, is, was the title in the Central Pacific Railroad Company at the date of that deed? If it was, it must have passed under the act of 1862, granting lands to aid in the construction of the Central Pacific Railroad Company, and if the title vested under that act, then the United States had nothing left in it, and it could afterwards convey no title by patent to the defendant in this case. The act of 1862 granted all sections numbered with odd numbers within a space of 10 miles on each side of the road to the Central Pacific Railroad, to which other right had not attached at the date of the final definite location of the road, and mineral lands were excepted. If the land in question was mineral land within the meaning of that act, the title never passed to the Central Pacific Railroad, because it was not granted. It was excepted out of the grant. If it was not mineral land, and there is no claim that any other rights had attached, then of course the title passed to the Central Pacific Railroad Company, so it is important to inquire whether, at the time the right of the company specifically attached to this land, it was mineral land, within the meaning of this provision of the statute. If you should determine that it was mineral land, that ends the case, because the company had no title which it could convey to the plaintiff in this case, and he relies upon

no other title. The complaint alleges and shows, and all of the testimony shows, and there is none to the contrary, that these premises are in fact mineral land. They were worked for years and a large quantity of gold taken out of them. They are in fact now, and were at the commencement of this suit according to their own allegations, mineral lands. If they were in fact mineral lands at the time of the commencement of this suit, they must necessarily have been in fact mineral lands in 1862, at the date of the passage of this act, and such lands as congress designed to exclude or except from the operation of the grant, for the character of the lands in this particular has not changed; but it has been held by the courts that only those are to be regarded as mineral lands within the meaning of the act of congress, which were known to be mineral, or which there was satisfactory reason to believe were mineral at the time of the attaching of the right of the company to those particular lands. As it has been stated in the language of the courts, the words "mineral land," as used in the act of congress, mean land known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant.

Gentlemen, you have the starting point that these premises were in fact mineral lands at that time. The question then arises, whether or not they were known, or there was sufficient reason to believe, at the time this grant attached—and that is when the line of the road became definitely fixed, according to my construction of the act—to be mineral land, or whether there was sufficient reason to believe they were mineral lands. Perhaps that is a little too restricted, because there may be mineral land on portions of land so apparent and obvious that any one seeing it, would know it on sight, and yet no one may have been at that point to observe it at the time; yet because no one happened to be there, if the fact of their being mineral land is so obvious that it would have been manifest to any one who inspected it, that, I take to be mineral land within the meaning of this act. But it is sufficient for this case to take the other definition. For the purpose of this case, these lands were in fact mineral. The question is, were they known to be mineral within the meaning of the act, or was there good reason to believe they were mineral.

Gentlemen, you have heard the testimony on that point. There is testimony here tending to show that persons did visit them, saw this mine, and saw men at work on this very ledge as early as 1862, and earlier. That is a long time ago. Of course you cannot expect to find very definite and precise testimony in regard to transactions that occurred so long ago, but you take that in connection with the fact that they were mineral, and take such other testimony as was presented to you and give it such weight as you think it entitled to, for the purpose of determining whether it was known to be mineral, or there was good reason to believe at the time, that it was mineral. All the testimony shows

the land was good for nothing for agricultural purposes, and there was very little timber on this piece of land according to the testimony. So, if it was good for anything, it was perhaps good for mining purposes. You heard the testimony that they did not take it up, or if they did, and abandoned it, that they abandoned it, because they were unable on account of the inaccessibility of the mine, and the want of funds, to proceed and work the mine. In determining that question, this is to be taken into consideration. It does not appear that the Central Pacific Railroad Company ever made any claim to this particular piece of land. They filed a list upon a claim of other land surrounding it, and on parts of the same section, but omitted to file this, nor did they so far as the testimony shows file any independent or separate claim to it. The testimony shows also that it does not appear that the Central Pacific Railroad ever interfered with the parties who finally took it up and mined there. It does not appear that they ever made any adverse claim. It does appear that they did not contest the application for patent even as late as 1885. When a person applies for a patent for mining land, the law requires that publication should be given so as to give plenty of time to advise the world of what is going on. The evidence shows, affirmatively, that the company took no steps to oppose the issuing of this patent, under which defendant claims; and within two or three months before the commencement of this suit, the company executed this deed to the plaintiff in this case, and took particular care to protect itself in the form of that deed. The deed is that "they do remise, release, and quitclaim to the said G. H. Francoeur, and his heirs and assigns, all the right, title and interest that said company, or the said trustees now have or may hereafter acquire from the government of the United States" in and to the following described tracts of land, "reserving however all claim of the United States to the same as mineral land." The small consideration of the deed with the vast amount of improvements upon it, and the fact that they only remise and release and quitclaim their right and title, and still protect themselves from any claims against the United States by this reservation, you are entitled to consider in connection with the other testimony as indicating the probability that the company itself did not consider that that was within the provision of the grant. That is not conclusive, but is a circumstance in connection with the other facts in the case that you are entitled to consider in determining the first question submitted as to whether, in 1862, these were known mineral lands, or there was good reason to believe they were mineral lands. If they were in a known mineral belt also (and there is some testimony tending to show that they were) that would be an indication that there might be good reason to believe there was a known mine here to those who saw the ledge. All these facts you will take into consideration. You will take into consideration, also, all of the contradictory testimony that you have heard from the defendants, and, as the preponderance appears to be, find "Yes," or "No," and annex your answer to that question.

The next question which you are called upon to answer is: "Was the land in question known to be mineral, or was there good reason to be-

lieve that it was mineral, at the time that the line of the road was definitely located in 1866?" That is, four years afterwards. The remarks I made with reference to the first inquiry are also applicable to this inquiry. Then there is additional testimony here with reference to the actual taking up of this claim and prospecting it between those times. The grant takes effect on the specific land from the time of the filing of the map of the definite location, or when no such map is filed from the time of the definite location in fact of the road. The map of general location was filed in 1862, but no map of definite location was filed until the completion of the road, so far as the evidence discloses. On the contrary, the allegations in the complaint are that the road was definitely located in 1866. There is no allegation that it was located earlier, and the presumption is that they allege it at the earliest day justified by the facts, and the jury are entitled to consider that that is the time when the road was definitely located, there being no allegation or averment that it was located on an earlier day, or you might say, the day before. Until that definite location, it could not be determined where the grant would fall, and to what land it would attach. When the definite location is filed, they cannot change it afterwards. Between the filing of the map of definite route, and the general location, there was a right to vary the line, because instead of being 10 miles on each side of the road, there was 15 miles withdrawn within which to swing, 5 miles on each side, to vary the line of the road and still retain their rights. At this time in 1866, was the land in question known mineral land, or was there good reason to believe it to be mineral land? Take all the testimony in the case, and find on that issue as you think the preponderance of testimony is. There is considerably more testimony with reference to that than there was in regard to the prior date—1862.

Is the land in question in fact mineral land? Upon that issue there is no conflict of testimony. It is alleged in the complaint itself that a gold mine was discovered as early as 1883, and the parties took it up, and took possession of it. The testimony all shows that it was worked for years, and large quantities of gold were taken out, so that there is no conflicting testimony in regard to that question. If you find that this was known mineral land, within the meaning of the act, or land that there was good reason to suppose to be mineral land, at the time the grant attached, then it is within the exception of the grant, and you must find for the defendant. If you find that it was not known mineral land, and there was not good reason to believe it was mineral land at the date, 1862, you will find for the plaintiff on that issue. As to the second date, 1866, the same rule will apply. If you find it was known mineral land in 1866, the date when the road became definitely located, or there was good reason to believe it was mineral land, you will find for the defendant. On the contrary, if you find that it was not known mineral land at that date, or there was not then good reason to believe it was, you will find for the plaintiff on that issue. If you find for the plaintiff on those two issues, the title would be in favor of the plaintiff, and you would have to find a general verdict in favor of the plaintiff,

unless the defendant establishes the defense of the statute of limitations. The defendant has set up the statute of limitations. The law of California is, that if a person has been in the actual, notorious, adverse possession of land for a period of five years, the right of action of the real owner is barred, and the title as to him becomes effectually vested in the defendants. This suit was brought, and the complaint was filed on June 28, 1889. The statute of limitations, therefore, began to run on June 28, 1884. If from 1884, or prior thereto, this defendant, and his grantors, were in the actual, adverse possession of these premises continuously until the commencement of this suit in 1889, then the bar of the statute attached, the plaintiff cannot recover, and your verdict in that case will be for the defendant. If he was not in such continuous adverse possession, your verdict on that issue will be for the plaintiff. If your verdict on all the issues is in favor of the plaintiff, then you must find for the plaintiff, but if you find for the defendant on either one of these issues, except the third, your general verdict must be for the defendant, and you must answer these questions accordingly.

What is an adverse possession? There is testimony tending to show that as early as 1882–83, parties went on this land, took actual possession of this mine, and continued to work it continuously down to the commencement of this suit. Those who first took up the mine, took up as the evidence shows, 1,500 feet by 300 or 600, I forget which, and conveyed to their successors in interest by those metes and bounds. The grantees went into possession, and finally conveyed to the Eagle Mining Company. Then that company went into possession. There is testimony tending to show that they worked continuously on that claim, expended a large amount of money, away up towards the hundred thousands, in improvements in and about the mine, and continuously worked down to the commencement of this suit. If they did, they actually took possession of a portion of that land, and worked on it, claiming title to the full boundaries and continued in possession; that is, possession of the whole, within the meaning of the law. They are not limited to the precise portion upon which they stood and worked. No one else appears by the testimony to have interfered. There is no testimony that the Central Pacific Railroad Company all this time made any claim to it at all, and the fact that the Central Pacific Railroad Company did not make any claim, is no evidence that these parties held it under it and by agreement with it. The testimony all tends to show that these parties held, claiming by their own right, first the mining claims as taken up and conveyed to them under the laws of the United States, and afterwards under the patent issued in pursuance of those laws of the United States upon such claim. I instruct you that the title for a portion of the time unless granted to the railroad company was in the United States. If it was in the United States, or believed to be in the United States, it does not prevent the operation of the statute of limitations, if the claim was adverse to the Central Pacific Railroad Company. At least, the most that can be said is, that the matter was doubtful as to where the title was, and there was a good foundation for claiming that this was

mineral land, and excepted from the grant, so that a party could very well go in there in good faith, buy a claim, located by some one else, and under the laws of the United States continue his possession, claiming under that claim, present his claim for a patent to the United States, obtain it, and continue under it in good faith. On that question I will read you a passage from the decision in the case of *Hayes* v. *Martin*, in 45 Cal. 563, which covers that exact ground. "It is not requisite that the party who relies on the statute should show that he claims his title in hostility to the United States." These parties did not claim in hostility, but went in under the laws of the United States, and finally got a patent. "He may admit the title in the United States, either with or without a claim on his part or the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which the plaintiff establishes in the action." Id. And this doctrine was repeated in *McManus* v. *O'Sullivan*, 48 Cal. 15. These parties not only admitted the title of the United States, but claimed the right to enter under their laws, and they claimed a patent under those laws and got it. They claim in hostility, as far as the evidence shows, to the title of this complainant. The testimony tends to show that their possession commenced as early as 1882 or 1883 at the latest. The testimony also tends to show that the possession was continuous under these claims to a part, with a claim to the whole, according to the boundaries of their deed, down to the commencement of this suit. If you find that to be a fact, the bar of the statute attaches, and you must find a general verdict for the defendant, and a verdict for the defendant under this last special issue submitted to you. If you find they did not, and were not in continuous possession adverse to this plaintiff during that time, and it was broken, they have failed to maintain the bar to the statute of limitation.

Gentlemen, this is all I think it necessary to say to you upon the subject. I hand to you the issues. The first one you will find for the plaintiff or defendant, as you find the case to be. If you find for the plaintiff, you must find in all the issues against the defendant, except the third. If you find on any one except the third against the plaintiff you must find a general verdict for defendant. As to the others you will answer "Yes," or "No," according as you find them to be.

The jury found for defendant, and in answer to each of the special issues answer "Yes."

In re CHRISTENSEN.

(*Circuit Court, N. D. California.* September 4, 1890.)

MUNICIPAL CORPORATIONS—ORDINANCES—CONSTITUTIONAL LAW.

A municipal ordinance, requiring all retail liquor dealers to procure a license, and making it an offense to retail liquor without such license, and at the same time forbidding any such license to be issued unless upon the arbitrary, uncontrolled, written consent of a certain designated number of persons, there being no other qualifications or conditions prescribed, violates the constitution of the United States, and is void.

(*Syllabus by the Court.*)

Petition for Writ of *Habeas Corpus.*
Alfred Clarke, for petitioner.
Davis Louderback, contra.
Before SAWYER, Circuit Judge.

SAWYER, J. I am always extremely desirous of avoiding any interference with the state courts in the execution of the laws, or what purport to be the laws of the state, and do not interfere when the circumstances are such that I can find it consistent with my duty to decline action, till the state courts have at least had an opportunity to act.

In *Ex Parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734, the supreme court, while holding that the circuit court had jurisdiction by writ of *habeas corpus* to take a prisoner out of the custody of the state courts at any stage of the proceeding, when alleged to be held in violation of the constitution and laws of the United States, and to summarily determine the case, further held, that where there were no special circumstances to influence its action, it had the discretion to decline to interfere till the state courts could try the case, and even after trial and conviction, till an appeal or writ of error, where an appeal or writ of error lies, could be taken to the United States supreme court, and the constitutionality of the law be there regularly determined in the ordinary course of judicial proceeding. This decision gave to the circuit courts and judges, in such matters, a much wider discretion than I had before supposed was vested in them. The petitioner in this case applied to me about a year ago for a writ of *habeas corpus* to discharge him from arrest under the same ordinance now involved in this case. Acting upon the decision in *Ex Parte Royall*, I declined to issue the writ, not because I did not suppose it was otherwise a proper case for a writ, but because I saw no special circumstances in the case to require me to act at that time, and I therefore required him to go to the state courts for his remedy, and to pursue it, as he was entitled to do, by the regular course of proceeding on writ of error to the United States supreme court. The only difference to him would be in the channel through which he would reach the court of last

resort. I was exceedingly averse to, unnecessarily, putting myself in antagonism to the courts, and especially the higher courts of the state, over whose action I had no appellate jurisdiction in the ordinary course of proceedings in the administration of the laws.

He went to the state courts, and after something like a year's litigation, as the petition and record show, the ordinance now in question under which he was held was, by a *divided* court, declared to be valid not only under the constitution and laws of the state, but also that it violated no provision of the constitution or laws of the United States, and he was remanded to custody. The record further shows, that after this decision, the petitioner applied to the chief justice of the supreme court of the state for the allowance of a writ of error, but that the chief justice, notwithstanding the fact that the decision was rendered by a *divided* court, refused to allow the writ, in consequence of which he was deprived of the right guarantied to him by the constitution and laws of the United States, to have the question as to whether the ordinance does violate the constitution or laws of the United States, reviewed by the supreme court of the United States—the tribunal having the jurisdiction to ultimately and authoritatively determine the constitutionality and validity of the ordinance in this particular. The justice of the supreme court allotted to this circuit being absent in Europe, he cannot apply to him for an allowance of the writ of error, and he is now utterly without remedy, unless it can be had on this writ.

Under these circumstances, I do not feel at liberty under the laws of the United States, and under the decision in *Ex Parte Royall*, to further decline to issue the writ, and, summarily, examine the case, even though it devolves upon me in the exercise of this jurisdiction imperatively imposed upon me, to review, and, however unpleasant it may be to me, if the ordinance is found to be unconstitutional, overrule the decision of the highest court of the state.

The ordinance requires that every party selling liquors at retail shall pay for and take out a "license at a specified rate," and that, "after January 1, 1886, no license as a 'retail liquor dealer' * * * shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco, to carry on said business; but in case of a refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco, owning real estate in the block or square in which said business of 'retail liquor dealer' * * * is to be carried on." It further makes it a misdemeanor to violate any of the provisions of the ordinance.

It also appears in the record, that the petitioner tendered the amount of his license fee, and requested the written consent of a majority of the police commissioners to the issue thereof, and it was refused; that there were not 12 citizens of San Francisco owning real estate in the block or square in which he desired to carry on his business as a liquor

dealer, and that it was therefore impossible to obtain the assent of 12 such citizens, and that a license was consequently refused; that proceeding with his business long before established, he was again arrested for violation of said ordinance, and he is now in custody in pursuance of such arrest.

I am, myself, after due consideration, unable to take the case out of the rule laid down in the second head-note to the decision in *Yick Wo* v. *Hopkins*, and *Wo Lee* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, which reads:

"A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality, violates the provisions of the constitution of the United States, if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or to the propriety of place selected, for the carrying on of the business."

In commenting upon the view of the supreme court of California, that the ordinance then in question vested "in the board of supervisors a not unusual discretion, in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, in view of the protection of the public against fire," the United States supreme court in that case, said, on page 366, 118 U. S., and page 1069, 6 Sup. Ct. Rep.:

"We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinance which points to such regulation of the business of keeping or conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a *naked and arbitrary* power to give or withhold consent, not only as to places but as to persons. * * * The power given to them is not confided to their discretion, in the legal sense of that term, but it is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The language quoted is just as applicable to this ordinance as to that, then under consideration. In that ordinance it was made unlawful for "any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors," etc., and in the ordinance in this case, it is made unlawful for any person to carry on the business of a liquor dealer without a license which could only be obtained upon the "written consent of a majority of the board of police commissioners," or in default of that, upon the "written recommendation of twelve citizens," having property in the block or square where the business is desired to be carried on. What difference is there in the provisions of the two ordinances, except that the consent in the laundry ordinance is to be by the board of supervisors themselves, while in the liquor ordinance the power to consent or reject, is delegated by the board of supervisors to the police commissioners, or to 12 citizens of the block. If the board of supervisors could not confer upon, or reserve to itself this unregulated arbitrary power, it, certainly, could not

confer it upon the police commissioners, or upon private parties having no official relations whatever to the subject matter.

In the *Case of Wo Lee*, 11 Sawy. 429, 26 Fed. Rep. 471, this court differed from the state supreme court upon the same point decided in *Yick Wo* v. *Hopkins*, and gave its reasons for so doing at length, but in deference to the decisions of the supreme court of California, it yielded its own convictions, and remanded the petitioner, thinking it more seemly that the question between the state and the national courts should be authoritatively settled by the United States supreme court, on appeal, than to bring these subordinate courts into antagonism. The result was, both cases went to the supreme court of the United States. That court quoted largely from the opinion of this court, and approved its views. It consequently reversed the judgment of the circuit court, as it did of the supreme court of California, which this court had followed. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. The decision of Justice FIELD in the *Laundry Ordinance Case*, 7 Sawy. 531, 13 Fed. Rep. 229, is also in point, and to the same effect. See *In re Wo Lee*, 11 Sawy. 429, 26 Fed. Rep. 471.

It is sought by counsel for the city, as was attempted by the state supreme court, to distinguish this case from the *Laundry Ordinance Case* cited, on the ground that the laundry business is a necessary business, and cannot be wholly suppressed, but only regulated, for the purposes of securing safety from fires; while selling liquors is supposed to be injurious to society *per se*, and may be wholly prohibited or permitted upon such conditions as may be prescribed—that the power to absolutely prohibit, necessarily includes the power to impose any terms or conditions, however arbitrary, no matter what, less than absolute prohibition, and consequently, that the power to grant or refuse a license may be delegated to the arbitrary and unregulated will of one or more persons, official or unofficial. I cannot as at present advised, assent to this proposition. This ordinance does not limit or regulate, or purport to limit or regulate the sale of liquors. It would seem to be upon its face—like other license ordinances—a mere revenue measure. It does not prohibit the sale of liquors, or limit their sale to any particular portion of the city, or to any number of persons, nor prescribe any qualifications whatever which shall be necessary to entitle a party to a license, or prescribe any conditions or characteristics which shall constitute a disqualification, and debar one from obtaining a license. It is not a matter of regulation at all. It simply provides that no license shall issue to any party unless he obtained the written consent of a majority of police commissioners, or of 12 property holders in the same block, without indicating any conditions whatever upon which the assent may or ought to be given, or withheld. It leaves it to the absolute arbitrary, unregulated will of the persons named. They can consent to grant a license to every vagabond and disreputable person in the city, and refuse to consent to a license to every respectable person in the city. The ordinance permits and authorizes such action. It puts it in the absolute, arbitrary power of these persons, to control the whole retail liquor trade

of the city—without regard to qualifications of the parties seeking a license, or to circumstances or conditions, or the interests of society. In my judgment, an ordinance that upon its face permits and authorizes such discrimination and inequality of operation, is a violation of the constitution of the United States. I admit the full power of the state to prohibit, limit and control the domestic liquor traffic, and to prescribe the qualifications and conditions applicable to all of those who are to be permitted to sell liquors, but this is a very different proposition from that which claims the authority to confer upon any one or more persons the arbitrary power in accordance with their uncontrolled will, to regulate these matters. It is not unlawful to deal in liquors or sell liquors at retail in California, or San Francisco, any more than it is to keep a laundry, which business also pays a license. The record shows that there are between 3,000 and 4,000 licensed retail liquor dealers in San Francisco. It is only made unlawful to sell liquors when you cannot obtain the written consent of a certain number of men whose action in yielding or withholding their consent is influenced by no qualifications or consideration other than their own arbitrary will, governed perhaps by prejudice or other unworthy motives. And that was one of the grounds upon which the laundry ordinance under consideration, was expressly and directly held by the United States supreme court to be unconstitutional. The police powers are the powers which come into play in the licensing and regulating of both occupations. And in both instances they operate upon the same legal principles, and they should have a similar equal and uniform application.

Under this ordinance the police commissioners for anything in its provisions to restrain them, might consent to the license as retail liquor dealers, of every immoral person in the city, while consent might be withheld from every person who is respectable and suitable for the business. If they do not do this, it is not because they are restrained by any provisions of this ordinance. These provisions permit it.

In the *Case of the Laundry Ordinance* cited, it appeared it is true, that the gross discriminations, which the ordinance permitted, were in fact made, in its administration. These arrests for such gross discriminations, were doubtless illegal on that ground also. But the discriminations in fact made, cannot affect the validity of the ordinance itself. The ordinance was declared void because it permitted a discrimination, not merely because its permission was in fact made available in practice. The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid irrespective of the manner in which it is, in fact, administered. Its capability of being abused is the test.

In the case of the ordinance now in question no evidence was introduced as to the way in which it has been, in fact, administered. The case was argued, submitted, and decided upon the character, terms and provisions of the ordinance itself.

But the mode of its administration would be irrelevant to the point decided, as the question, is, as to the validity of the ordinance itself.

as it appears upon its face; and not whether it has been honestly or dishonestly administered. The fact that it permits arbitrary discriminations, and abuses in its execution, depending upon no conditions, or qualifications whatever, other than the unregulated arbitrary will of certain designated persons, is the touchstone by which its validity is to be tested. That there are likely to be abuses as in the case of the laundry ordinance, both as to individuals and classes, there is no reason to doubt, when an outburst of popular prejudice shall demand or countenance it; and it is also liable to be abused from more unworthy motives, considerations and influences. The ordinance should prescribe some conditions, qualifications or disqualifications, by which those who are to issue licenses are to be guided in their action, other than their own unregulated arbitrary wills.

After careful consideration, I am unable to take this ordinance out of the rule laid down in the second headnote in *Yick Wo* v. *Hopkins* and *Wo Lee* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. As that decision is controlling so far as this court is concerned, I am bound to discharge the petitioner, however willing I might otherwise be to yield my individual views to the judgment of the supreme court of the state.

Let the petitioner be discharged.

Should the city desire to appeal to the supreme court of the United States, an appeal will be gladly granted. The question has reached such a state, that it is of the utmost importance that it be authoritatively decided. Until so decided the foregoing views will control the action of this court.

UNITED STATES *v.* HOLLIS.

(*District Court, W. D. South Carolina.* August 16, 1890.)

WITNESS—COMPETENCY—CRIMINAL LAW.

20 U. S. St. at Large, 30, which provides that a defendant charged with crime shall, at his own request, but not otherwise, be a competent witness, does not render competent a defendant who, by previous conviction of an infamous crime, has lost the privilege of testifying.

At Law.

The defendant being on trial for violating section 5392, Rev. St., (perjury,) was called as a witness in his own behalf. The district attorney objected, producing the record of his conviction for an infamous crime, making him incompetent.

A. Lathrop, U. S. Dist. Atty.

A. Blythe, for defendant.

SIMONTON, J. The act of 16th of March, 1878, (20 St. at Large, 30,) provides that a defendant charged with crime shall, at his own request, but not otherwise, be a competent witness; that is to say, he shall not labor under disability because he is a party in interest, and, not-

withstanding this, may testify. But when a party offers himself as a witness in his own behalf he must be treated as any other witness, and is subject to any exception which would apply to any other witness. In other words, the act frees him from a disability. It does not confer on him any peculiar exemption. So when a defendant is put on the stand as a witness his general character for truth may be attacked, and if he, by his conduct, had lost the privilege of testifying in courts of justice by the commission of an infamous crime, this will attach to him, and prevent him from testifying in his own behalf.

RAPID SERVICE STORE RY. CO. *v.* TAYLOR *et al.*

(Circuit Court. E. D. Michigan. August 3, 1887.)

1. PATENTS FOR INVENTION—ANTICIPATION.
   Letters patent No. 325,425, for a cash and parcel carrier, issued September, 1885, to Robert A. McCarty, consisting of the combination, with a way and a carrier adapted to move thereon, of a spring, arranged to give an initial impetus to the carrier for propelling it on said way, are not anticipated by the English patents for atmospheric railways, issued to Jacob Brett in 1845, and to Thomas Swinburne in 1846, nor by the loom patents.
2. SAME—LIMITATION OF CLAIM.
   The first claim of said letters patent for the combination, with a way and carrier "of means for giving an impetus to" said carrier, is limited by the concluding words, "substantially as set forth," and is but a claim for the way, the carrier, and the springs.
3. SAME—SPECIFICATIONS.
   The third and fourth claim of said letters patent are for the combination of a way, a carrier, and a spring, "constructed and arranged" to give the carrier an initial impetus. *Held*, that it was unnecessary for the details of such construction and arrangement to be specified.
4. SAME—INFRINGEMENT.
   Said letters patent are infringed by a device in which the carrier is propelled by the elasticity of air compressed between two pistons in cylinders of different sizes.
5. SAME—INVENTION.
   Claim No. 17 of letters patent No. 325,618, issued September, 1885, to Robert A. McCarty, for a cash and parcel carrier, consisting of the combination with a carrier of a receptacle, removably locked to such carrier, and a spring cover for the receptacle, held permanently by the carrier, is void for want of invention, being but the combination of two elements which are used separately in lanterns.

In Equity.

This was a bill in equity for the infringement of letters patent No. 325,425, issued to Robert A. McCarty, September, 1885, for a cash and parcel carrier; and patent No. 325,618, issued to McCarty upon the same date, for a new and useful improvement in store-service apparatus. The principal patent for a cash and parcel carrier contained the following statement of the invention:

"The invention consists, principally, in projecting the carrier containing or supporting the cash or parcel along the way over or upon which it travels, by giving it an initial impetus of sufficient force to impel it to its destination, as distinguished from impelling the carrier by a continuously acting force, as by gravity, in the use of inclined ways down which the carrier travels.

"In carrying out my invention, I prefer to employ springs in which the force is stored up to project the carriers, and these springs I prefer to make stationary, as distinguished from being supported by the carriers, and traveling therewith. I also prefer to use a horizontal way over which a carrier travels back and forth, and to locate a projecting device at each end of the way, for giving the carrier an initial impetus sufficient to drive it to the other end of the way.

"For the purpose of illustration, I have shown and shall now describe a specific form of apparatus embodying my invention, wishing it to be understood, however, that I do not limit myself specifically thereto, since the principle of the invention is capable of being embodied in various forms of apparatus."

Claims 1, 3, 4, 6, and 7 are charged to have been infringed by defendants, and they are as follows:

"(1) In a cash or parcel carrier, the combination with a way and carrier adapted to move on said way, of means for giving an impetus to said carrier, for the purpose of propelling it upon said way, substantially as set forth."

"(3) In a cash or parcel carrier, the combination, with a way and carrier adapted to move on said way, of a spring constructed and arranged to give an initial impetus to said carrier, for the purpose of propelling it on said way, substantially as set forth.

"(4) The same as the third, except that the spring is described as a 'stationary' spring."

"(6) In a cash or parcel carrier, the combination with a way and carrier adapted to move on said way, of a projecting device located at each end of said way, for giving such carrier an initial impetus sufficient to drive it over the way substantially as set forth.

"(7) The same as number six, except that the words 'stationary spring' are substituted for 'projecting device.'"

Patent No. 325,618 describes a peculiar detachable cup, and it was claimed that defendant infringed the seventeenth claim of this patent.

Messrs. Parker & Burton and *M. B. Phillip*, for plaintiff.

Geo. H. Lothrop, for defendants.

BROWN, J. 1. Objection is taken to the first claim of plaintiff's principal patent, (and the sixth is like unto it,) that it is an attempt to assert a monopoly for every method of giving an impetus to a cash carrier, irrespective of the motive power; in other words, that it is a claim for the principle of propulsion, and not for a mechanical contrivance. We think this claim is either too broad, or too indefinite to be of any service to the plaintiff. If it be construed as a combination of a way, a carrier adapted to move on such way, and of any and every means for giving an impetus to such carrier, then it is too broad, since it would include propulsion by the hand. It is an attempt to patent the principle of propelling a carrier by an impetus given at the end of the wire. It is well settled that this cannot be done. Thus, in *Wyeth* v. *Stone*, 1 Story, 273, it was held that a claim for cutting ice of a uniform size, by means of an apparatus worked by other power than human, was the claim of an abstract principle, and therefore void. So in *O'Reilly* v. *Morse*, 15 How. 62, 112, the eighth claim of the Morse patent, which was the use of the motive power of the electric or galvanic current,

however developed, for marking or printing intelligible characters at any distance, was held to be an attempt to shut the door against the inventions of other persons to bring about the same result, and, therefore, not maintainable. Curt. Pat. §§ 243, 244.

But if this general description is to be construed as limited by the concluding words of the claim, "substantially as set forth," and this we deem to be the proper construction, (*Stone* v. *Sprague*, 1 Story, 270; *Gray* v. *James*, Pet. C. C. 394; *Seymour* v. *Osborne*, 11 Wall. 516, 547,) a new difficulty is encountered, since his use of springs is only one, and the "preferable," method of giving the carrier "an initial impetus of sufficient force to impel it to its destination, as distinguished from impelling the carrier by a continuously acting force, as by gravity, in the use of inclined ways." The "initial impetus" here described is quite as general, and, in fact, a mere restatement, in slightly different language, of "the means for giving an impetus" stated in the claim, and is equally objectionable as embodying a principle.

We are forced then to construe this claim in connection with the springs described in the specifications and illustrated in the drawings; and thus limited, the first and sixth claims are practically the same as the third and fourth, viz., claims for the way, the carrier, and the springs used in producing the impetus.

2. No infringement is claimed of the second and fifth claims. It is also argued that the third and fourth claims are void upon their face, because they do not contain elements enough to make an operative combination. They are for a way, a carrier, and a spring, but no mention is made of the means of putting the spring under tension, viz., the cord by which the rubber spring is elongated, nor of any means of holding the car while the spring is being put under tension, viz., the catch, which holds the car until the spring is stretched, and then releases it and permits the spring to propel it. We had occasion to consider this subject very fully in the case of *Inspirator Co.* v. *Jenks*, 21 Fed. Rep. 911, and then came to the conclusion that in drawing the claims for a combination patent it was not necessary to include any elements except such as were essential to the peculiar combination, and affected by the invention. Other portions of the machine are usually shown in the drawings to exhibit their relations to the patented combination, but they are wholly unnecessary to the validity of the claims. As said by the supreme court in *Loom Co.* v. *Higgins*, 105 U. S. 580, 586: In setting forth his claims, the patentee "may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent, and delineated in the drawings." It is perfectly manifest to the ordinary observer that a cord passing over a pulley is necessary to stretch the rubber spring, and the catch to hold the car while the tension is being applied. But neither of them were any part of the invention. While the omission of anything absolutely material to the utility of the invention described is a fatal defect in a description, this rule does not apply where the omission would naturally

be supplied by any person skilled in the art when making the device. In *Carr* v. *Rice*, 1 Fish. Pat. Cas. 198, 204, it is said that the patentee need not specify the kind of power to be applied, nor the method of applying it in working the machine. Indeed, it is extremely dangerous to the validity of a claim to include unnecessary elements of a combination, since an infringement would be avoided by the omission of any one of the elements. Of course, the omission of an element becomes easier, as the number of elements increases. For example, if the patentee had included the cord and catch, and the infringer had discovered some method by which the spring could be operated without such cord or catch, it would be fatal to plaintiff's case, though the infringing device had included every other element of its claim. The claims themselves speak of a spring "constructed and arranged" to give the carrier an initial impetus, but the details of such construction and arrangement are quite unnecessary to be specified. In this view the cord and catch are really a part of the spring itself.

3. Starting then with the assumption that this is a patent for a spring projector of a carrier over a wire railway, we are next led to consider whether it is anticipated by any of the devices offered in evidence. The English patent to Jacob Brett, issued in 1845, for atmospheric propulsion, and the manufacture of tubes for atmospheric railways, covers an atmospheric railway in which compressed air distributed from a reservoir through pipes is employed to propel a car or train of cars. The The general arrangement of the device is as follows: At a central station, at which the air is compressed, is a reservoir or holder for the air. From this reservoir or holder the air is distributed through pipes to devices which project upward through the track, and which are intended to operate in connection with the car when it comes along. The projections upward through the track are placed at or about the distance of 8,000 yards apart, and, from one of these upwardly projecting devices to the other train, is supposed to travel by the impulse it receives while passing over the upwardly projecting device, which is, in fact, a fixed piston co-operating with a slotted tube placed underneath the engine or car. The patent is obviously the result of some of the futile experiments that were made in England, when the science of railway travel was in its infancy, and before the present method of propelling railway trains had become firmly established. The device does undoubtedly contain a way and carrier, and a method of propulsion by means of atmospheric elasticity, and is thus within the literalism of plaintiff's patent. At the same time, we think it very far from being an anticipation of this patent. It is not, in any sense of the term, a cash carrier, or a device adapted for use as such. Indeed, it is intended for a purpose so entirely dissimilar to that of a cash carrier that not only would it require invention to adapt it to that purpose, but we cannot conceive that it would be of any service to McCarty as a suggestion of a cash carrier. It lies so far out of the track of the patentee's invention that if he had seen it while engaged in his experiments, he would probably never have given it a second thought. We do not mean to say that a

railway car might not be constructed and propelled along a suspended cable in such a way as to suggest an adaptation of the same principle to that of a cash carrier device, but we are very clear that no such hint is contained in the Brett patent. We understand that under the case *Tucker* v. *Spalding*, 13 Wall. 453, in order to constitute a double use, the structure and action of the prior machine must be such as to suggest to the mind of an ordinarily skillful mechanic another use to which it could be applied without material change. Indeed, considering the recognized manner in which all railway cars are and ever have been propelled along the rail, we may take judicial notice of the fact that the Brett device is an old and abandoned experiment, which was never nor could have been of any practical use, although, as a mechanical device, it might be made to send a locomotive a short distance. The patent of Thomas Swinburne, of 1846, for an atmospheric railway, is open to the same criticism, and contains, if possible, a slighter suggestion of the McCarty device than the Brett patent. It refers to and describes an impossible and useless method of propelling trains over a track, by giving them at intervals, an impulse by the use of compressed air in the direction of their movements. As an anticipation of the McCarty patent, it is hardly worth a serious consideration. The Taylor patent is for a windlass water elevator. It shows an inclined track upon which travels a water-bucket and carrier. The wire, as it leaves the house, is for a short distance nearly horrizontal, and then descends rapidly to the spring. It is provided with a car to which is attached a bucket. The car and bucket are let down the wire by an ordinary windlass. After the bucket is filled with water, it is hauled up by the windlass and cord, and when it reaches the horizontal way it catches the end of the spring, and is drawn against the force of the spring to the house, where it is emptied. On the windlass being released or thrown in the other direction, the operation of the spring is to throw the car and bucket along the horizontal portion of the way until it reaches the incline, when it descends by force of gravity. This undoubtedly resembles the McCarty patent somewhat more nearly than the two devices heretofore considered. The initial impetus, however, given by the spring in this case was not designed to propel the car over the way, but as the patentee himself states, merely "to discharge it from the receiver, so that it may pass down the wire by its own gravity, the wire within the receiver being nearly horizontal." The weight of the rope attached to the car, and by which it is hauled up, and the friction caused by the necessity of unwinding the windlass, would effectually destroy the projectile force of the spring, and prevent its operating to give an initial impetus to the carrier for the purpose of propelling it on the way, in the manner described in plaintiff's patent. If the wire in the Taylor patent were horizontal, there would have to be another rope to haul it in the opposite direction from that in which the windlass hauls it, and the pull on this rope would not only be against the car, but also against the other rope, and the windlass for working it. No initial impetus could be given to the bucket and the carriage, which would be sufficient to suddenly set the windlass

in motion and keep it in motion. The device is a slight modification of another and familiar device, by which cars are drawn over wires by ropes pulling in opposite directions, or by a rope in one direction, and the force of gravity in the other.

The loom patents, in all of which a shuttle is thrown from one end of its path to the other by the blow or push of a picker-staff operated by the force of a spring, the Hotchkiss patent, by which a toy mouse is projected by an interior spring, and the Ireland patent, by which a toy fire-engine is propelled from its house by the recoil of a rubber spring, are all claimed as anticipations of the McCarty patent; but in none of them is there a way or a carrier in any proper sense of the word. They no more contain the principle of McCarty's invention than does the ordinary spring gun to which they are much more closely allied. They all resemble the McCarty patent, in that they contain the principle of propulsion by a spring, which is as old as the use of the bow and arrow, but none of them could be adapted to a cash carrier without the employment of the inventive faculty. But if there were any doubt regarding this question, we should still consider it our duty to resolve the doubt in favor of the patent in this case, since it is shown that the device has gone into very general use, and has largely supplanted cash carriers propelled by other means. While the single fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, does not establish in all cases that the later device involves a patentable invention, it may, however, always be considered; and when the other facts in the case leave the question in doubt, it is sufficient to turn the scale. *Smith* v. *Vulcanite Co.*, 93 U. S. 486, 495.

4. Beyond doubt the most important and serious question in this case is that of infringement. Defendant's apparatus, as described by the plaintiff's expert, Mr. Brevoort, is as follows:

"Defendant's device consists of an upright cylinder with a piston in it, which piston can be by the operator moved up and down within the upright cylinder. Projecting at right angles from the lower part of the cylinder is another cylinder smaller in diameter than the upright cylinder, and having within it a piston attached to one end of a piston-rod, which projects through the forward end of the horizontal cylinder. This piston-rod, at the end, is provided with a spring plunger, the shaft of which is smaller than the piston-rod. This plunger can be pushed into the piston-rod for the distance of about half or three-eighths of an inch. On the end of the horizontal cylinder two jaws are arranged, which are provided with springs, and which jaws are forced apart by the outward movement of the end of the piston-rod. The catches at their outer extremities are provided with hooks or jaws, which catch around the carrier. Thus, the carrier cannot move along the wire until these jaws or catches have separated, and this separation is effected by the advance movement of the piston-rod of the horizontal cylinder."

It will be observed here that the defendants do not employ a metallic or rubber spring to project its carrier, but we apprehend, and we understand it to be admitted in this case, that if the carrier be actually propelled over the way by the elastic expansion of an imprisoned body

of compressed air the McCarty patent is infringed. The theory of the defendants in this connection is that the air contained in the cylinders between the pistons is simply a medium, which transmits the power applied to the main or upright piston to the plunger or horizontal piston. It becomes material, then, to inquire whether the piston in the horizontal cylinder is propelled by the elasticity of the compressed air behind it, or whether, if the two cylinders had been filled with a non-elastic liquid like water, the same effect would be produced. It is very evident that if the two cylinders and pistons could be made perfectly air-tight, as they are in one of the exhibits furnished the court, the descent of the main piston would compress the air; and when this piston had reached a certain point, the elasticity of the air so compressed would be sufficient to drive the horizontal piston, which would start suddenly forward and project the carrier. On the other hand, if the pistons were very loosely fitted to the cylinders, no amount of force and no rapidity of movement would be sufficient to propel the horizontal cylinder, since the air would escape so rapidly as to be of no service. This is manifest in the defendant's device, since, if the lever is pulled down slowly, and the air is thus given time to escape, the horizontal piston is not moved. It is thus essential to the operation of defendant's device—*First*, that the pistons fit so tightly that the air will not escape as fast as it is compressed by the main piston, and yet so loose that it will move easily along the cylinder; *second*, that the lever be pulled rapidly down in order that the air shall not be given time to escape; so that for every inch of travel by the main piston the plunger piston travels five and two-tenths inches, the relative cubic capacity of the two cylinders being as nine to four. The experiments of Mr. Brevoort tend to show that assuming that it takes four-tenths of a second to make the whole stroke of the lever from top to bottom, the lever must pass over more than one-third of its stroke before the horizontal piston moves at all; in other words, the air must be compressed to a certain degree before the plunger will start. We apprehend that if the vertical cylinder and its piston were removed altogether, no amount of atmospheric force applied, as, for example, by a pair of hand bellows, would be sufficient to drive the plunger piston. The only impression we can get from the testimony and experiments is that it is the elasticity of the compressed air that drives the plunger piston forward, and hence that the device is an infringement. Even if the defendant's theory were correct that the air acts simply as a medium through which the power is transmitted from one piston to the other, we are inclined to think that this air-impelling device is such a well-known equivalent to a spring device as to constitute an infringement. In the Stever patent for the shuttle motion for looms, there is an example of initial impulse given directly by spring. An ordinary barrel or clock spring, having been previously wound up, is let off at the proper time, and throws the shuttle to the opposite side of the machine, while a duplicating arrangement throws it back again. In the Ross loom patent of 1873, there is a similar spring employed to drive the shuttle back and forth. In the Richardson patent of 1872, which

is also a loom mechanism, there is a car which travels across the machine and carries the shuttle. This car is impelled by the movement of the piston in a cylinder. The movement of the piston being transmitted to the shuttle carrier by a body of air interposed between them, there is, therefore, shown in this patent, an air-impelling device, having a large chamber and a small chamber, and means for compressing the air to throw a shuttle, as a mechanical substitute for the spring device used in the other patents. The patent in suit is one of considerable importance, and appears to be the first in which the idea of propelling the carrier over a way by an initial impulse was reduced to a practical form. We think it entitled to a liberal application of the doctrine of mechanical equivalents, and as defendant's device is a manifest attempt to seize upon the dominating idea of the patent, and to evade the letter of the claims, we think plaintiff is entitled to the benefit of any reasonable doubt upon the question of infringement.

5. The seventeenth claim of patent No. 325,618 is as follows:

"In a store service apparatus, the combination with a stretch wire of a wheel carrier traveling thereon, a receptacle removably locked to such carrier, and a spring cover for the receptacle held permanently by the carrier substantially as set forth."

The receptacle is locked to the carrier by a ring containing two slots in the ordinary manner in which a lamp is inserted in a lantern; from the bottom the spring is such as is sometimes used in the top of a lantern to hold the glass firmly in place. The invention consists only in combining the two, in inserting the cash box into the carrier, and in holding it firmly by the aid of the springs. As both elements of the combination are shown to exist in a lantern offered in evidence, though acting independently, we think there was no invention in combining the two, and the plaintiff's claim under this patent is not maintainable. There must be a a decree for the plaintiff upon the third, fourth, and seventh claims of the first patent, an injunction, and the usual reference to a master to compute the damages.

HENDERSON *v.* CABELL *et al.*

(Circuit Court, N. D. Texas. June 2, 1890.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—GROUNDS.
It is no ground for a motion to remand a cause to the state court that the petition for removal was not joined in by one of the defendants, who is merely a nominal defendant, against whom plaintiff seeks no relief, and who asks no relief against plaintiff.
2. SAME—JURISDICTIONAL AMOUNT.
The suit had been brought in the state court to recover $3,500. Plaintiff alleged as ground for his motion to remand that he had brought suit in the district court on the same cause of action to recover $4,500, but that defendants procured the dismissal of that suit on the ground that the amount actually due was less than $2,000, and that hence they were estopped from removing the present suit to the circuit court. *Held* that, by suing to recover $3,500, plaintiff is estopped from raising any objection to the jurisdiction of the circuit court based on the amount claimed.

At Law. On motion to remand.

C. C. Cobb, for plaintiff.

J. M. McCormick, for defendants.

MCCORMICK, J. On July 26, 1888, the plaintiff instituted this suit in the state district court for Dallas county, claiming damages in the sum of just $2,000. After the time at which defendants were required to answer this petition by the rules of practice in said state court, and after defendants had answered the same, the plaintiff filed his amended petition, claiming damages in the sum of $3,500; and thereupon the defendants presented their petition and bond for removal of the case to this court, on the ground that there was involved in the controversy a federal question, stated in the petition for removal. On the 1st day of October, 1889, the state court accepted said bond, and ordered the removal of the cause to this court; and the transcript was filed in this court on the 21st day of October, 1889. The plaintiff now presents his motion to remand the cause on the following grounds, to-wit:

"*First.* It appears from the record herein that all the defendants did not join in the petition and bond for removal filed herein; the defendant S. C. Carroll not joining in the same. *Second.* The bond for removal herein is not payable to S. C. Carroll, the defendant not joining in the removal; and there is no removal bond herein payable to said S. C. Carroll. *Third.* The bond for removal is not conditioned as required by law, in that it fails to bind the petitioners for removal to appear and enter special bail in such suit, if special bail was originally requisite therein. *Fourth.* The petitioners for removal did not file a copy of the record, and enter their appearance in this court, on the first day of its next session held next after filing the petition and bond for removal in the state court, nor within twenty days after filing said petition and bond for removal in the state court. *Fifth.* It appears that the transcript from the district court of Dallas county is an incomplete record of the proceedings had in said district court, in that it does not contain a copy of the answer of S. C. Carroll, which was filed in said district court prior to the filing of the petition for removal therein. *Sixth.* As further cause for remanding, they show that on May 3, 1887, the plaintiff herein filed in the circuit court of the United States for the northern district of Texas, at Dallas, a suit against W. L. Cabell and others, the defendants, petitioners for re-

moval herein, on the same and identical cause of action herein declared on by plaintiff, in which he claimed $4,500 damages, and that the defendants, petitioners for removal herein, appeared in said cause in said United States court, and on June 2, 1888, filed therein a plea to the jurisdiction, in which they set out that the plaintiff therein had wrongfully alleged the value of his goods taken, and damages suffered, at an amount exceeding $2,000, for the purpose of conferring jurisdiction upon said court, whereas in fact the value of his goods taken, and damages suffered, did not exceed $2,000, etc., and they prayed that his suit be dismissed for want of jurisdiction; that said plea to the jurisdiction was upon its merits submitted to a jury, who returned a verdict thereon in favor of the defendants petitioning for removal herein, and judgment was accordingly entered in said United States court in favor of the defendants therein, they being the identical defendants petitioning for removal herein, and against the plaintiff therein, he being the identical plaintiff herein, dismissing said cause, it being the identical cause herein sued on, from said United States court, for want of jurisdiction, and awarding costs against the plaintiff; that said judgment of dismissal was rendered on June 5, 1888, and still remains in full force and effect, in no wise reversed or made void, and this they are ready to verify by the said record. Wherefore, they say that it is *res adjudicata;* that the court has not jurisdiction to hear and determine this cause; and that it should be remanded to the state court, whence it was removed. *Seventh.* As further ground for remanding this cause, they say that by reason of the acts of the defendants petitioning for removal herein, done as above set forth, in not permitting this cause to go to trial upon its merits in the said United States court at Dallas, when the same was before said court, as above set forth, but in interposing said plea to the jurisdiction, and prosecuting the same to final judgment in their favor, as above set forth, and thereby forcing plaintiff to file his suit in the state court, or else abandon his cause of action altogether, they are forever estopped and prevented from removing this cause to this court, and therefore it should be remanded."

The plaintiff asks no relief against the defendant Carroll; expressly so states that the plaintiff asks no relief as against said Carroll. He is clearly a purely nominal defendant. He asks no relief against the plaintiff, except to be let alone. By thus joining a nominal defendant who will not unite with the real defendants in an application to remove, the plaintiff cannot defeat the real defendants' right to remove. *Allen* v. *Miller*, 11 Ohio St. 374. This disposes of the first, second, third, and fifth grounds of the above motion.

As to the fourth ground, the facts are these: The first term of the circuit court for this district, after the order of removal was made, was held at Graham, in Young county. In this district there is only one clerk for the circuit court; but he has three deputies, who in point of fact reside and usually remain at the several points where the terms are held. Charles H. Lednum, Esq., is one of these deputies, and resides at Dallas, and the one who received the transcript in this case at Dallas on the 21st day of October, 1889, and placed the file mark on it on that date. The defendants, while insisting that placing the transcript in the hands of the clerk, at any of his offices or places for the proper custody of such papers, within the 20 days from the day of the order of removal, was a compliance with their duty, yet present as a reason for placing it in the hands of the clerk's deputy at Dallas, instead of at Graham, that

they were unable to get the transcript from the state court until the 21st day of October, the last day of the 20 days allowed when the next term occurs within less than 20 days from the making of the order of removal. From the record it appears that all the parties reside at Dallas. The attorneys also reside at Dallas. The matter is not jurisdictional. I do not think the fourth ground well taken.

As to the sixth and seventh grounds of the motion, the plaintiff, having sued the defendants for the sum of $3,500 in the state court, will not be heard in this court, on a motion to remand, to say that the amount involved is not sufficient to give this court jurisdiction. Whatever use the defendants may be able to make of the matters presented in these grounds of the motion, it is clear to my mind that the plaintiff is estopped by his subsequent institution of this suit for $3,500 in the state court from presenting these grounds for his motion to remand. The motion is refused.

SCRIPTER *v.* BARTLESON *et al*

(*Circuit Court, D. Minnesota.* July 7, 1890.)

1. MORTGAGES—REDEMPTION—CREDITORS OF MORTGAGOR.
A judgment creditor who has redeemed sufficient property of his debtor from foreclosure to satisfy his judgment cannot make a valid redemption of other property.
2. SAME—SALE BY CREDITOR.
Persons purchasing from a judgment creditor lands redeemed by him after enough had been previously redeemed to satisfy his judgment cannot claim as innocent purchasers.

In Equity. On bill to remove cloud from title.
Warner, Stevens & Lawrence, for plaintiff.
Chas. J. Bartleson, for defendants.

MILLER, Justice. It seems that one Sprague was the owner of certain lots, the subject of controversy in this suit; that he and his wife afterwards sold his interest to Scripter, the present plaintiff. The object of the bill is to relieve the title which thus came to him through the Spragues of a cloud cast upon it by an attempt to redeem the lots in controversy from a judicial sale against Sprague. The redemptioner, Francis Martin, had a judgment against Sprague in the common-law court. Sprague had several pieces of property covered by different mortgages. The mortgages were foreclosed, and the property sold under them. Martin, exercising the right of a judgment creditor to redeem, redeemed some of the lots which were first foreclosed and as to which the time of redemption would have been first to expire. After a while he proceeded upon the same judgment to redeem the lots sold later, which are the ones in controversy. Martin, after redeeming these lots, sold them to various persons, who are made parties to this proceeding, and the object

of the bill is to have a declaration that all these attempted redemptions which were a cloud on the title of Scripter, who got his title direct from Sprague, were void and ineffectual, and there is a prayer to have the cloud removed.

It is conceded that Martin, under the first redemption, received property which was three times the value of his judgment, and that it never was redeemed from him. Plaintiff insists that his judgment was thereby satisfied, and that he had no power or authority under that judgment to redeem the second pieces of land, which he attempted to do, though the sheriff permitted him to go through the forms of redemption, and gave him certificates. The supreme court of Minnesota, in a case growing out of one of these lots, (not a direct bar to this suit, because it was not between the same parties,) has decided that when an owner of a judgment undertook to exercise the right of redemption, and got property which was sufficient in value to satisfy his judgment, the judgment thereby became ineffectual, and he could not redeem any further, or from any one else, under it. Not only do I feel bound to follow the ruling of the supreme court in this case, but I concur in it. I believe where a man exercises this rather extraordinary right of redemption, which is really a proceeding of his own, and says, "I redeem," that if the property redeemed is sufficient to satisfy his judgment the judgment is satisfied, and is extinct. The objection urged to this view of the subject is that these other parties who bought from Martin are innocent purchasers, and they are not affected by the fact that his judgment is satisfied by his first redemption. But I do not think that position is correct. In the first place, I think it is settled, although there is some variance of opinion, that whenever a judgment is paid off, satisfied, or discharged, although it remains of record, and although execution was issued and property sold under it, the whole proceeding is void and ineffectual; and the fact that no entry was made satisfying it of record does not make it a valid judgment, so that a purchaser under the execution becomes an innocent purchaser in the true sense of the law. It is true in such case the purchaser might claim that he had all the evidences of judicial sanctity for the purchase, and say, "There was a judgment of record. I did not rely wholly upon that. The clerk of the court, or the proper officer, issued an execution, and the sheriff levied an execution on that property. The property was liable to that judgment, and I bought it without knowing any defect in it." But in that class of cases the weight of decisions, both as regards the ability of the courts and the number of cases, is in favor of the proposition that the purchaser takes nothing, and that all the steps subsequent to the actual payment or satisfaction of the judgment are void. If that is the case in a judicial proceeding of sale under execution, a process under the seal of the court, and in the hands of the proper officer, how much more would it be the case when the former owner of the judgment steps in and says "I redeem this land?" He is doing no judicial act. He is not a judicial officer. There is no sanction to what he has got, except the facts of the case. If he has the authority to redeem he must show that

authority. Therefore, in view of the agreed fact in the present case that the first redemption was sufficient in amount to satisfy the judgment, I hold that the judgment was *functus officio*, and the redemption void. There is no need to inquire about these innocent purchasers. A decree will be entered according to the prayer of the bill.

MILLER *et al. v.* MERINE.

(*Circuit Court, W. D. Missouri, W. D.* September 1, 1890.)

1. DEED—RECORDING—PRIORITIES.
   In 1870 G. conveyed certain land to B., and before the deed was recorded conveyed the same land to H., who paid the price in reliance on B.'s representations that G. had attempted to make him a deed which had been destroyed because it did not convey the land in question. *Held*, that under Rev. St. Mo. 1889, § 2420, declaring that an unrecorded deed of realty shall not be valid, except as between the parties and such as have actual notice thereof, the conveyance to H. was entitled to priority over that to B., though not first recorded.
2. VENDOR AND VENDEE—BONA FIDE PURCHASER.
   The premises in question having been purchased by one E. at a sale under a trust-deed executed by B., H. applied to G. to protect his title, and the latter thereupon procured E. to execute a quitclaim deed of the property to H. Subsequently H. mortgaged the property to his mother, who became the purchaser at a sale under the mortgage, and afterwards sold the premises to M. *Held* that, assuming that H. had notice that E. held the title for B., that fact afforded no proof that his mother had notice, and that, in the absence of proof that M. had such knowledge, it was immaterial whether H.'s mother had notice or not.

At Law.

This is an action of ejectment for the recovery of a valuable tract of land now situated within the limits of Kansas City, Jackson county, Mo. The cause having been submitted on stipulation to the court without the intervention of a jury, the court makes the following special finding of material facts:

First. George W. Bryant is as to these parties the common source of title. On the 21st day of April, 1870, Bryant was the owner in common with one H. F. Barr of the one undivided half of the land in controversy. H. F. Barr having since conveyed his interest to the wife of the defendant, that interest is not in dispute. On said 21st day of April, 1870, Bryant conveyed his said interest by deed of warranty to one W. H. Barr, which said deed was filed for record in the office of the recorder of said county on the 19th day of October, 1870.

Second. On the 23d day of July, 1870, and before the said deed from Bryant to William H. Barr was recorded, said Bryant conveyed said land by deed of warranty to John S. Homan. This deed was not acknowledged until the 8th day of October, 1870, and was delivered immediately following its acknowledgment. This deed was recorded December 13, 1870.

Third. The sale of this land to Homan was made by said William H. Barr after the deed of Barr from Bryant, Barr representing to Homan at the time that Bryant had attempted to make him a deed for this land, but that the deed delivered to him by Bryant did not contain a description of this land, and on that account he had destroyed the same, leaving the title in Bryant, and that he would have Bryant make the deed directly to him, (Homan.)

Thereupon Barr went with Homan to see Bryant, and, on Barr's representation and assurance to Bryant that the deed made to him by Bryant did not convey the land in question, and that he had destroyed the same, Bryant, in reliance thereon, Barr being nearly related by blood or marriage to him, made the deed mentioned in paragraph 2 to Homan. Homan, in reliance upon the truth of this representation and assurance of Barr, accepted the deed from Bryant, and paid the purchase price therefor. After the making and delivery of this last deed from Bryant to Homan, Barr filed the first deed from Bryant to himself for record. Homan, when he purchased, had no other notice than as above stated of the deed from Bryant to Barr.

Fourth. On the 7th day of October, 1873, William H. Barr conveyed the said land to F. M. Black, trustee, to secure the payment of an indebtedness of said Barr to M. D. Trefren and David Ramsay, which deed of trust was duly recorded on October 9, 1873. On breach of the conditions of said deed of trust the trustee duly foreclosed and sold said land under the deed of trust, at which sale John Enders became the purchaser, and received a deed therefor from the trustee, February 7, 1874, and duly recorded it on the same day. On the 8th day of May, 1874, said Enders conveyed said land by deed of quitclaim to said Homan, which deed was duly recorded May 9, 1874. On July 3, 1874, said Homan and wife conveyed said land by deed of trust to A. A. Tomlinson, trustee, to secure the payment of the sum of $1,600 to Mary E. Homan, which said deed of trust was duly recorded July 25, 1874. This deed of trust was foreclosed, and said Tomlinson, as trustee, by deed of December 8, 1877, recorded January 4, 1878, conveyed the land to said Mary E. Homan, and again, by quitclaim deed of date December 19, 1877, recorded January 4, 1878, said John S. Homan and wife conveyed to Mary E. Homan said land. And by deed of warranty of date October 27, 1885, recorded November 13, 1885, for the consideration of $7,500, said Mary E. Homan conveyed said land to Mary A. Merine, the wife of the defendant, John C. Merine.

Fifth. On January 14, 1876, this land was sold under sheriff's deed under judgment against said Barr to one Frederick Bruns, and by said Bruns conveyed April 23, 1884, to one Charles E. Kollman, who on November 11, 1885, conveyed by quitclaim to said Mary A. Merine. As the judgment on which the last-named execution sale was based was rendered in the court of a justice of the peace for a sum in excess of his jurisdiction, no further note is taken of this branch of the case.

Sixth. The plaintiffs claim title through said William H. Barr under the following state of facts found from the evidence: On January 5, 1874, one Shaeffer commenced suit by attachment against said William H. Barr in the circuit court of Jackson county, Mo., on certain indebtedness of said Barr to him then due, which suit passed to judgment April 20, 1874, under which judgment the interest of said William H. Barr in said land was sold under execution by the sheriff of said county on the 22d day of January, 1875, at which sale one George W. Miller became the purchaser of the same at the sum of $245. This deed was duly recorded March 10, 1875. Said Miller thereafter died, leaving the plaintiffs in this action as his testamentary heirs, who claim under the last will and testament of said George W. Miller.

Seventh. On February 19, 1875, said George W. Miller instituted suit in equity in the Jackson county circuit court against said Enders and others, to set aside and vacate the deed and title obtained by Enders under the sale by the trustee, F. M. Black, on the ground that he had bought the property with the means of and for the benefit of said W. H. Barr, and in fact held the title thereto in trust for said Barr. The said John S. Homan was made a party defendant to this action, who appeared and made answer thereto, setting up his title as heretofore stated, and claiming to be the *bona fide*

purchaser, and thereupon the action was dismissed as to said Homan, but was further prosecuted to final judgment against said Enders and others, in which the title of said Enders was found to be fraudulent, and the same was vested in the petitioner.

Eighth. The conveyance from Enders to Homan was brought about in this way: After Enders bought under the trustee's sale, Homan, becoming advised thereof, applied to Bryant to protect his deed of warranty against said asserted title of Enders, and thereupon Bryant paid to Enders the consideration for said quitclaim deed made by Enders to Homan, May 8, 1874. Barr was seen by Enders during the time of these negotiations, and assented to Enders' making the deed to Homan, and Enders seemed willing to do respecting the matter as Barr desired.

Ninth. The facts respecting the execution of the deed of trust by John S. Homan to Tomlinson, trustee, are as follows: Mary E. Homan, the beneficiary in said deed of trust, was the mother of John S. Homan. He got from her the sum of $1,600, for which he executed to her his note of date June 7, 1874, the same date as the execution of the deed, which note was due one year after date. Respecting the origin of this note the evidence is that John Homan got the money and used it in his mercantile business. He got the money prior to the execution of the deed. Whether on the same day or prior thereto is not stated, and whether or not it was understood and agreed when he did receive it that he was to give a mortgage on this land, or other security, is not stated. Under the foreclosure sale Mary E. Homan became the purchaser, and received the trustee's deed, and shortly thereafter John S. Homan and wife quitclaimed to said Mary E. Homan in satisfaction of said debt.

Tenth. Before Mrs. Merine took her deed from Mrs. Homan, Mrs. Homan undertook to quiet her title as to the claim of the Miller heirs, the plaintiffs. According to the best information then obtained by her, these heirs consisted of four children,—E. B. Miller, A. M. Miller, I. W. Miller, and Minerva, intermarried with one William F. Sonnenstein, residing in the state of Ohio, from whom was obtained a deed of quitclaim for the consideration of $125,—which was then supposed to embrace all the Miller heirs. There is no sufficient evidence to sustain the imputation of fraud on the part of those obtaining the deed.

Eleventh. The property in question at the time of the purchase by John S. Homan was inclosed with a fence. There were no other improvents upon it. Homan and those claiming under him have at times repaired the fence, and at one time a string of fence was built on one side of it. The only evidence of other overt acts of ownership by the Homans up to the time of the sale to Mrs. Merine is permission given to one John J. Mastin, an adjoining landowner, to use the same for pasturing stock, and who at times cut down the weeds thereon. He so continued to use the same up to the time of the purchase by Mrs. Merine. From the time of the purchase by Merine they have had open or visible possession thereof. No taxes were ever paid on this property by William H. Barr, the taxes having been paid by those claiming under Homan.

Matthews & Meriwether, for plaintiffs.

Jefferson Brumlack and *Ashley & Gilbert*, for defendant.

PHILIPS, J., (*after stating the facts as above.*) The deed from Bryant to William H. Barr, as between them, vested Bryant's title in Barr. At common law, Homan took nothing by the grant to him, as Bryant had nothing then to convey; and Barr, being prior in time, would be prior in right. But the registry act of the state interposes and plays a very important part in this contest. The statute in force at the time of

these transactions was the same as sections 2418–2420, Rev. St. Mo. 1889. Section 2418 requires that every instrument of writing conveying any real estate or affecting the same, etc., shall be recorded in the office of the recorder of the county in which such real estate is situated. Section 2419 declares that every such instrument so recorded "shall from the time of filing the same with the recorder for record impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice." Section 2420 declares that "no such instrument in writing shall be valid except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the recorder for record." These provisions have wrought radical changes in the relative rights of successive grantees under the same grantor.

The contention of plaintiffs' counsel is that the statute is to be subjected to that construction which brings it within the rule that the deed first made and first recorded must have priority. An examination of the many discussions and decisions bearing on this mooted question has satisfied my mind that it turns upon the phraseology of the statute of the particular jurisdiction. The corresponding section to that of 2420 of the Missouri statute in nearly one-third of the states provides that the unregistered conveyance shall be void against a subsequent *bona fide* purchaser "whose conveyance shall be first recorded." (California, Dakota, Idaho, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Oregon, Pennsylvania, Tennessee, Utah, Wisconsin, and Wyoming.) Under such a statute the deed first put to record takes precedence. This was the turning point in the conclusion ultimately reached by the majority in the elaborately considered case of *Fallass* v. *Pierce*, 30 Wis. 443. Chief Justice DIXON, after noting this distinguishing provision of the Wisconsin statute, says:

"Without the deed to such a subsequent purchaser first upon record, the title under the prior unregistered deed must still be preferred. Under the statutes of the states to which reference has been made this is not so. It is enough there that the subsequent purchaser for a valuable consideration and without actual notice looks upon the record at the time of purchase and finds no conveyance from his grantor then recorded. He is not required to put his deed first upon record, in order to be protected as against prior conveyances from his grantor, but only to do so in order to protect himself against subsequent *bona fide* purchasers for value from the same grantor, or in the line of recorded conveyances from him. Accordingly, in those states, the courts hold that if A. conveys to B., a *bona fide* purchaser of real estate for value, who fails to put his deed upon record until after A. conveys the same land to C., a second *bona fide* purchaser for value, and B. then puts his deed on record before C. records his, the title of C. shall nevertheless prevail as between him and B., because it is the fault of the latter that he did not immediately record his deed, and so the equities are with C. But under our statute this cannot be so, because C. must not only be a subsequent *bona fide* purchaser for value, but must also have his deed first duly recorded. Both conditions of the statute must be complied with."

Webb on Record Title, § 13, after noting the language of statutes above cited, says:

"Where the statute does not by such express terms make the rights of the subsequent purchaser depend upon priority of record, such priority, or the want of it, is immaterial; and the courts have almost uniformly held that a subsequent conveyance for valuable consideration taken without notice of a prior unrecorded one prevails over such prior instrument, whether the latter one be first recorded or not. Where, through the neglect of the first grantee to record his deed, a subsequent party has been led to part with a valuable consideration, a race for registry between the two does not afford a proper criterion by which their rights should be determined." Citing in note a large number of authorities supporting the text.

Such is clearly the view expressed by the supreme court of the United States in *Steele* v. *Spencer*, 1 Pet. 552. The statute of Ohio allowed the grantee six months after execution of deed for recording the same, and, if not so recorded, it should be void as to subsequent *bona fide* purchasers. The court say, respecting the deed first made:

"The plaintiff's deed not being recorded, the statute avoids it in terms as against all subsequent purchasers for valuable consideration without notice, whether their titles be recorded or not. If the defendants had held under a conveyance executed by Jesse Spencer in obedience to the decree, their title deed, although not recorded, would by the terms of the statute prevail against the plaintiff's prior unrecorded deed. A deed not being recorded avoids it as against subsequent, but not as against prior, purchasers."

This is also the view taken of the effect of the Missouri registry act by the state supreme court. In *Aubuchon* v. *Bender*, 44 Mo. 564, the court say:

"At common law there was no obligation to put upon record a conveyance affecting the title of land. But the duty of registration is now imposed upon the grantee, or the person to whom or for whose use the conveyance or covenant is made; and, as in all other cases where a duty is imposed, he who neglects it should suffer the consequences. The object of the requirement is to compel an exhibit of titles to facilitate transfers, but principally to guard purchasers against imposition; and hence, if the prior deed is not recorded, a subsequent buyer for good consideration without notice will be protected. This protection, always thrown around an innocent purchaser, and to which our statute also expressly entitles him, is founded on the broadest equity. He receives it not because the prior deed is invalid in itself,—the duty of recording is not enforced by any such penalty,—but because justice will not suffer a person who omits a plain duty to set up a claim against one who has been led by that omission to invest his money in what he supposed his vendor had a right to sell."

In *Maupin* v. *Emmons*, 47 Mo. 306, the same learned judge says:

"The statute invalidating the original unrecorded deed is held to operate in favor of a *bona fide* purchaser on sheriffs' as well as private sales, provided the original deed be not recorded until after the sale."

And in *Munson* v. *Ensor*, 94 Mo. 509, 7 S. W. Rep. 108, the court, *inter alia*, say:

"Hence it was held in *Fox* v. *Hall*, 74 Mo. 315, that a purchaser by quit-claim deed for value acquired the title as against a prior unrecorded deed of which he did not have actual notice."

From which it is clear that the supreme court of the state treats the subsequent purchaser as the holder of the title against the prior unre-

corded deed; and this for the obvious reason that section 2420 of the statute declares in express terms that the unrecorded deed shall be invalid as against a subsequent purchaser from the same grantor who buys without actual notice.

The only remaining question, therefore, is, did Homan have actual notice of Barr's deed when he purchased? The only notice which Homan had from Barr was that Bryant had attempted to make him a deed for the land, but the deed executed did not contain the right land, and that the same was destroyed, and then going to Bryant, the grantor, the assurance of Barr was accepted, and Bryant thereupon made a second deed to Homan. On this state of facts Barr was a mere equitable owner under Bryant. He stood in the position of a purchaser under contract, who, having performed the contract on his part, was entitled to a specific performance by the vendor. By the course he took, however, he put himself precisely in the attitude quite common in real-estate transactions,—of a purchaser under a bargain contract, who, after he becomes entitled to a deed from his vendor, sells his right to a second purchaser, and, to avoid the trouble and expense of a multiplicity of deeds, causes his vendor to execute a deed directly to the last purchaser. By such mutual understanding and arrangement all the parties thereto are concluded; the legal title would vest in the last purchaser. The only difference in point of fact between that and the case under consideration is that a deed had been made to the first purchaser, which fact was concealed by the first purchaser, by reason of whose assurances that the legal title had not passed from his vendor the vendor was induced to make a deed to the last purchaser, and the latter was persuaded to accept it, and pay to the intermediate vendor the purchase money. The registry act here interposes to accomplish the ends of equity, and declares that, as the first deed was not filed for record when the last purchaser parted with his money, the first deed shall be invalid as to him. Barr himself would be clearly estopped from asserting title as against Homan and those holding under him. "He who by his language or conduct leads another to do that which he would not otherwise have done, shall not subject such person to loss or injury, disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. * * * There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely upon." *Dickerson* v. *Colgrove*, 100 U. S. 580, 581. This principle is aptly expressed by Judge WAGNER in *Chouteau* v. *Goddin*, 39 Mo. 250:

"Where a party by his acts or words causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition."

The defense of equitable estoppel is available in the action of ejectment. *Dickerson* v. *Colgrove*, *supra*, 582.

Is plaintiffs' ancestor, the purchaser at execution sale against Barr, in

any better situation than Barr himself? If so, what becomes of the construction given to the state recording act? That statute declares Barr's deed invalid as against Homan, under whom defendant claims. As to the subsequent *bona fide* purchaser, that deed was a dead letter. If so, how can a subsequent creditor by the mere touch of an execution revitalize it? The execution creditor comes afterwards to take only what his debtor has at the time of the seizure to satisfy his debt, and the purchaser takes only what the debtor had. Long prior to the judgment and execution sale the deed to Homan had been put on record, and the prior unrecorded deed to Barr, by operation of law, was invalid as to his subsequent deed. By the same statute the recorded deed of Homan, coming from the same common grantor, Bryant, was notice to such subsequent purchaser of its contents. *Digman* v. *McCollum*, 47 Mo. 374. The recorded deed, although recorded subsequent to Bryant's deed to Barr, showed that before Barr's deed was recorded Homan had become the purchaser of this land. And the logic of the statute would seem to be that such subsequent purchaser under Barr would have to show that Homan had notice of the existence of the deed, or that Barr had the superior equity. The state supreme court in *Davis* v. *Owenby*, 14 Mo. 176, observes of the statute:

"The obvious meaning of the whole section is that filing a deed for record imparts notice to all persons who should subsequently become interested in the title, whether as purchasers or mortgagees."

Independent of the statute, there is both reason and authority for holding that estoppels *in pais*, as much so as estoppels of record, bind privies. The general rule is that the title of the purchaser is only that of the defendant under execution. *Wood* v. *Seely*, 32 N. Y. 116. In *Parker* v. *Crittenden*, 37 Conn. 152, the court say:

"The defendants claim under and through Barrows by attachment of his interest in the property, made after the plaintiffs' purchase. The plaintiffs, therefore, as privies in estate with Barrows, are bound by the same estoppel, and the defendant, being a *bona fide* purchaser, may avail himself of the estoppel."

So in *Bank* v. *Bowen*, 80 Ill. 541, it was held that where the party purchased notes secured by deed of trust of a bank whose officers were estopped from issuing a release of a prior deed of trust and payment of the debt against another bank loaning money on the faith of the validity of the prior trust-deed, such purchaser in equity occupied no better position than the bank of whom he purchased. And the supreme court, in *Dickerson* v. *Colgrove*, *supra*, seem to recognize this proposition, as the plaintiffs in that case were grantees, by several mesne conveyances from the party whose letter disclaiming title created the estoppel *in pais*. In *McBane* v. *Wilson*, 8 Fed. Rep. 734, the court says:

"Is George Wilson, the sheriff's vendee, in any better position? What rights has he superior to those of the judgment creditor upon whose execution he bought, and the defendant in the writ whose title he acquired? The title which Metzger had when the lien of Baum's judgment attached was at the best a condition alone liable to be swept away unless the recording acts were complied with."

Be this as it may, in view of the state statute respecting the registry of deeds my conclusion is that plaintiffs' ancestor, who was a mere speculator at the execution sale against Barr, did not acquire a better title and right to this land than the defendant.

In respect to the title of defendant through the deed of trust from Barr to Black, trustee, it is to be observed, first, that beyond controversy the mortgagee took as an innocent purchaser for value as against Barr and his creditors. As the subsequent seizure under attachment was only of the equity of redemption of Barr it was subject to the right of foreclosure by the mortgagee. The sale by the trustee vested the title in the purchaser as against Barr and the attaching creditor. *Funkhouser* v. *Lay*, 78 Mo. 458. The contention of plaintiff is that Enders bought the property in for the use and benefit of Barr, to which equitable interest of Barr the judgment lien of Shaeffer, the attaching creditor, of date April 20, 1874, immediately attached. As Enders, however, conveyed to John S. Homan on May 8, 1874, for a valuable consideration, although by quitclaim deed, Homan, under the Missouri recording act, took as an innocent purchaser, unless it appears he had actual knowledge of the secret trust in favor of Barr. *Munson* v. *Ensor*, 94 Mo. 504, 7 S. W. Rep. 108. The only notice John S. Homan had is to be inferred from the fact that Barr was consenting to the making of the quitclaim deed, and that Enders seemed to be willing to assent to what Barr desired in the premises. If it is to be conceded that this is a circumstance from which a court or jury might properly infer that Barr was the real party in interest, the question still remains to be answered, how is Mrs. Merine affected thereby? Did she take with notice thereof? On July 3, 1874, after he received the deed from Enders, John S. Homan mortgaged this property to Mary E. Homan, the immediate vendor of Mrs. Merine. The contention at this point by plaintiffs is that this mortgage was given to secure an antecedent debt. The only evidence of this fact is the statement by John Homan, in his deposition on cross-examination, that he thought the money he got from his mother secured by the deed of trust was advanced him before the mortgage was executed. Whether he meant by this to say that when he borrowed the money this security was agreed upon, or merely that the money was borrowed before the deed in point of time was executed, is by no means clear. But suppose this point be conceded to plaintiffs, there was nothing on the face of the record to indicate that the Tomlinson deed of trust was given to secure an antecedent debt. On the contrary, the note expressed in the face of the trust instrument bore the same date as the deed. So, when Mrs. Merine bought from Mrs. Homan, the record showed a clean transmission of whatever title or interest William H. Barr had through the trust-deed of Black on to Mary E. Homan. There is no evidence that Mrs. Merine had any notice of the imputed infirmity in the antecedent transactions such as would affect her title. Even if John Homan had notice that Enders held for Barr, there is no proof that Mary Homan had this knowledge. I cannot accept as sound law or ethics the suggestion of the learned counsel that the court ought to assume that the knowledge which

the son had the mother also had, and conclude fraud from mere suspicion. We cannot better express our view of this matter than to quote from *Funkhouser* v. *Lay*, *supra*, 462:

"Fraud, it is sometimes said, may be inferred. But this expression must not be construed to warrant the mere assumption of a fact. This inference can only be drawn legitimately from some tangible, responsible fact in proof. It is a deduction which an intelligent mind may honestly make from the incidents and circumstances surrounding the case, and which appear to be inconsistent with the good faith and rectitude of the actor. If, however, the conduct of the party, and the transaction under consideration, reasonably consist as well with integrity and fair dealing, the law refers the act to the better motive."

Whether Mrs. Merine with notice bought under Mrs. Homan, who was without notice, or whether she bought without notice under Mrs. Homan who had notice, in either event she would be protected. *Funkhouser* v. *Lay*, *supra*.

The suit of *Miller* v. *Barr and Enders* was dismissed as to John Homan, and Mary E. Homan was never made a party thereto. They are therefore not bound by any decree rendered therein. It affected no interest or right acquired prior thereto and independent thereof. *Dunklin Co.* v. *Clark*, 51 Mo. 62; *Jackman* v. *Robinson*, 64 Mo. 293; Hawes, Parties, § 26; *Mallow* v. *Hinde*, 12 Wheat. 193–199; *Hook* v. *Payne*, 14 Wall. 252–257; *Noyes* v. *Hall*, 97 U. S. 34–39. In view of the conclusion already reached, it is not deemed essential to say more of the effect of the quitclaim deed made by part of the Miller heirs, co-plaintiffs, to Homan than that I find from the evidence against plaintiffs' contention that the deed was fraudulently obtained. The only semblance of fraud in this matter is the obtaining by these heirs the money of Homan, which he believed was to quiet his title as to all these heirs. My assent cannot be given to the proposition, asserted by counsel, that by setting up the acquisition of the title of plaintiffs through the quitclaim deed the defendant is estopped from denying title in plaintiffs, or from showing title from other source. He does not sustain the relation of a tenant to plaintiffs. He does not hold his possession under contract of purchase from or by contract with plaintiffs. He had the possession independent of plaintiffs, at least under color of title from others. Even as a vendee under plaintiffs he could deny his vendor's title, and set up as many titles as he pleases. *Cummings* v. *Powell*, 97 Mo. 536, 10 S. W. Rep. 819. His effort to buy his peace, and remove any conceivable cloud from his title, upon no recognizable rule of law or justice should preclude him from supplementing the effort by proof of a superior title. In defending his possession against the attack of plaintiffs there is no legal inconsistency in saying: "I have the paramount title, and, in addition thereto, whatever title or claim you have you have quitclaimed to me." It is not deemed important to discuss the issue of the statute of limitation. My conclusion from the whole case is that the merits and the law are with the defendant. Judgment accordingly.

PRENTICE *v.* NORTHERN PAC. R. CO. *et al.*

(*Circuit Court, D. Minnesota.* July 14, 1890.)

DEED—DESCRIPTION.

A deed described the land conveyed as beginning at a certain rock, and running thence one mile east, one mile north, one mile west, and one mile south, to place of beginning; and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected his land as "a tract one mile square, the exact boundaries of which may be defined when the surveys are made." After the deed was given, the Indian's land was located and patented so as to include 640 acres not in the form of a square, no part of which lay within the boundaries named in said deed. *Held*, that the deed, being for a specific tract of land, could not be construed to convey the grantor's interest in the land actually patented to the Indian.

At Law.

This action having been brought to trial before the court without a jury, which was waived by the parties by a stipulation in writing duly filed with the clerk, the following facts are found by the court:

(1) That the treaty made and concluded on the 30th day of September, A. D. 1854, between the United States and the Chippewa Indians, of Lake Superior and the Mississippi, whereby said Indians ceded to the United States certain territory lying adjacent to the headwaters of Lake Superior, contained the following provisions, viz.:

"And being desirous to provide for some of his connections, who have rendered his people important services, it is agreed that Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct."

(2) That said treaty was ratified, pursuant to a resolution of the United States senate passed on the 10th day of January, 1855, by the president of the United States, on the 29th day of January, 1855.

(3) That the said Chief Buffalo, pursuant to said provision of said treaty, and on the day of the date thereof, to-wit, September 30, 1854, by an instrument of writing executed by him and filed in the office of the United States commissioner of Indian affairs at Washington, D. C., selected the land to be conveyed thereunder by the United States, and appointed the persons to whom it was to be conveyed, as follows, viz., after reciting the foregoing provision of the treaty:

"I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point; and I direct that patents be issued for the same according to the above-recited provision to Shaw-bwaw-skung, or Benjamin G. Armstrong, my adopted son; to Matthew May-dway-gwon, my nephew; to Joseph May-dway-gwon and Antoine May-dway-gwon, his sons,—one quarter section to each."

(4) That said Matthew, Joseph, and Antoine, under date of September 17, 1855, executed and delivered to said Armstrong an instrument assigning to him their right, title, and interest under said appointment and selection of Chief Buffalo.

(5) That said Benjamin G. Armstrong and wife, on September 11, 1856, made, executed, and delivered to the plaintiff herein a deed of conveyance.

(6) That said deed from Armstrong to plaintiff was duly recorded in the county of St. Louis, territory of Minnesota, on the 4th day of November, A. D. 1856.

(7) That the pieces or parcels of land, the title to which is involved in this action, are situated in said county of St. Louis, territory (now state) of Minnesota.

* * * * * * * *

(9) That the tract of land which Chief Buffalo had designated as his selection on the day of the treaty did not correspond with the section lines when the land came to be surveyed into sections; and, furthermore, part of it was found to be occupied and claimed by certain Indian traders under the treaty. After a lengthy correspondence and investigation in the department of the interior, the relatives of Buffalo entitled to the land reserved for them conceded the validity of the claim of these Indian traders, and in lieu of the lands thus held by traders received other lands adjacent to that selected by Buffalo to make up the quantity of 640 acres, but not in the form of a parallelogram, though maintaining a continuous connection.

* * * * * * * *

(11) That the United States government surveys of the lands ceded by said treaty of September 30, 1854, to the United States had not been made at the date of the said deed from Armstrong to plaintiff, and were not made until the year following the date thereof.

(12) That said Armstrong and wife, by warranty deed duly executed and recorded, dated October 22, 1859, conveyed an undivided half of the lands conveyed to him, and the other appointees of Chief Buffalo aforesaid, by the United States, by said patent of October 23, 1858, to Daniel S. Cash and James H. Kelly.

(13) That after said patents were issued to said appointees, as aforesaid, the said Matthew, Joseph, and Antoine, on March 13, 1859, executed deeds of conveyance of the land which had been so patented to them respectively to the said Armstrong, which deeds were duly recorded in said St. Louis county, May 17, 1859; and that the said Armstrong and wife, on the 31st day of August, 1864, for a valuable consideration, executed and delivered their deed of conveyance of an undivided half of the land so patented to him and the said Matthew, Joseph, and Antoine to John M. Gilman, which conveyance was duly recorded in said St. Louis county, September 12, 1864. That said Gilman took said conveyance without any actual notice of said deed from said Armstrong to the plaintiff of September 11, 1856, or that plaintiff claimed an interest in the land so conveyed to him, said Gilman.

(14) That the defendants herein claim title to the pieces or parcels of land in controversy as grantees of said Gilman, and under and through said deed to said Gilman of August 31, 1864.

* * * * * * * *

(16) The court further finds that the large stone or rock at the head of St. Louis river bay, nearly adjoining Minnesota point, described in the deed from Armstrong to Prentice in the fifth finding of fact, the beginning of the boundary of the tract conveyed, is well identified, and was generally known to the few people familiar with the place, and is recognizable now. And a mile square measured from that point, as called for in the deed, would wholly depart from the shore of St. Louis bay, and would cover about one-half or three-fifths land, and the remainder the water of Lake Superior.

(17) That the land selected by Buffalo Chief lay upon the shore of St. Louis bay, immediately adjoining Minnesota point; and this selection is followed as near as it could be by the patents of the United States, issued to satisfy that reservation, considering the elimination from the mile square of the lands held by the traders, and the vagueness of Buffalo's description, and the necessity of conforming the final grant to the surveys of the United States.

(18) If the lines of the course called for as east and west, in the deed of Armstrong to Prentice, under which the plaintiff asserts his title, were exactly reversed, the description in that deed would include a large part of the land actually selected by Buffalo Chief, and also included in the patents from the United States; but it would not include the land sued for in this complaint.

(19) That the said instrument executed by the Chief Buffalo dated September 30th, 1854, was the only selection or appointment ever made by Buffalo Chief under the sixth clause of the second article of the said treaty.

* * * * * * * *

(21) That at the date of said deed, September 11, 1856, from Armstrong to Prentice, said Armstrong did not have any interest in land in said St. Louis county, Minnesota Territory, except what he was entitled to under the Buffalo selection and appointment referred to in the third paragraph hereof, and under the assignment from the other appointees of Buffalo.

And the court found the following conclusions of law thereupon:

(1) That the appointment of persons to whom the United States were to convey the section of land reserved by the said provision of said treaty, made by the said Chief Buffalo on the 30th day of September, 1854, was a valid and sufficient appointment under said provision, and, upon the ratification of said treaty, vested in the said Benjamin G. Armstrong, and the other appointees named, such an interest as the treaty gave to the land so reserved.

(2) That the patent of the United States to Armstrong, and his acceptance of it, is a valid execution of the treaty on that subject.

(3) That the deed from said Armstrong to plaintiff of date of September 11, 1856, is in its execution, acknowledgment, and recording a valid and sufficient deed, and its record is constructive notice of its contents.

(4) That the description in the deed of said Armstrong to plaintiff of September 11, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been entitled under said treaty than the tract described therein, and that said deed is ineffectual as a conveyance to plaintiff of any interest or title, except such as said Armstrong had in or to the land therein described, and that plaintiff thereunder took no title to the land for the possession of which this action is brought.

(5) That the quitclaim deed from said Armstrong to said John M. Gilman of August 31, 1864, conveyed to the said Gilman such interest, and no more, as said Armstrong had in the land therein described at the date of said deed.

(6) That the plaintiff is not entitled to recover in this action, and judgment is ordered for the defendants for their costs and disbursements.

Root & Clarke, *Dillon & Swayne*, and *Kitchel*, *Cohen & Shaw*, for plaintiff.

Cash & Williams, *John C. Bullitt, Jr.*, *Frank B. Kellogg*, and *Wm. H. Bliss*, for defendants.

MILLER, Justice. Although this action of ejectment brought by Frederick Prentice is against other defendants, and his claim is for a different piece of land, the title under which he and the defendants claim was the subject of consideration in a former suit in this court, which was reported as *Prentice* v. *Stearns*, 20 Fed. Rep. 819. That case went to the supreme court of the United States, where the judgment of this court was affirmed, and is reported in 113 U. S. 435, 5 Sup. Ct. Rep. 547. There was in that case a very elaborate finding of facts by this court, which is found at length in the report of the case in 113 U. S. and 5 Sup. Ct. Rep. As the suit before us is not between the same parties as the former suit, what was decided in that case in the supreme court is only binding in the consideration of the present case, as far as it establishes the law applicable to such case. As the case is submitted to us without the intervention of a jury, we have made a new finding of fact, in some respects differing from that which we made in the former case. These differences may become material in the formation of the judgment on the title.

The principal question before us in the former case, which was decided against the plaintiff, is reargued before us at this time with much earnestness and fullness. We held at that time that the deed from Armstrong to Prentice, under which alone plaintiff can assert a title to the land in controversy, was an instrument designed to convey a defined tract or parcel of land, and was not, as contended for by counsel for plaintiff, intended to convey any possible interest which existed in Armstrong under the treaty with the Chippewas, referred to in the findings of fact, and under the selection of Buffalo Chief, according to the provision of that treaty, and the appointment by Buffalo Chief that the lands selected by him should by the United States be conveyed to Armstrong and three other parties, relatives of Buffalo. That principle, as this court decided it, was affirmed by the supreme court of the United

States. After a full reconsideration of the subject, in the light of such new facts as the counsel for the plaintiff supposed they have produced on the present hearing, we remain of the opinion we were on the former trial. The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case is now identified, and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described. And, if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that. It is now found as a fact that this boundary would include a surface from one-half to three-fourths of which is land and the remainder is water of Lake Superior. For that reason, and for others which may be hereafter considered, counsel for plaintiff reject totally this part of the description of the land found in the conveyance, and proceed to consider the remaining part, which says:

"Being the land set off to the Indian Chief Buffalo at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents."

If we could reject the first description as incorrect and erroneous, and come to the latter part of it, we are constrained to hold that this alone is not sufficiently certain to convey any definite tract of land one mile square, or nearly so. No person taking the treaty and the selection of Buffalo, and all that was known about that selection that was to be found in the records of the government documents upon that subject, could proceed to survey a mile square, or a section of 640 acres in a square form, so as to comply with the terms of the deed. Nevertheless it is made quite evident, both by the first clause of the description, and by the reference to the selection made by Buffalo, and to the recorded documents with the government, that the grantor in that deed supposed that he was describing a specific piece of land, and that both the description by metes and bounds and the description with reference to the Buffalo selection were the same, and were identical. If this deed is void because that description is either erroneous, as is alleged in the first clause, or is so uncertain, as regards the second clause, that it cannot be identified or found out or surveyed, then the deed is simply a void instrument. To avoid this difficulty, counsel insists that the object of the grantor and the grantee in this deed was another and a different object than the sale and conveyance of a specific and definite piece of land. They say that the reference to the land set off to the Indian Chief Buffalo at the treaty of 1854 meant, not any definite piece of land, but any land which might come to Buffalo or to his appointees, of whom Armstrong is one, by the future proceedings of the government of the United States

in that case; and that, no matter where such land was found, provided it was within the limits of the land granted by the Chippewa treaty, then the deed from Armstrong to Prentice was intended to convey such after-acquired interests when it was patented to the parties by the United States. We do not see anything in the whole deed or transaction between Armstrong and Prentice that points to or indicates any such construction of it. Both clauses of the description are definite as to the land conveyed, and treat it as a piece of land well described, well known, and well defined. Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now as a matter of fact find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the south-west corner of which commenced on that rock. He would not suppose that he had bought something that might be substituted in lieu of that mile square by future proceedings of the government of the United States. And so, with regard to the other description, Buffalo had made his selection, had described the land which he designed to go by that treaty, not to him, but to his relatives, whose names are given, and it was an undivided half of this land thus selected by the Buffalo Chief, and not other land or different land which might come to Armstrong, that he conveyed and intended to convey to Prentice.

Much stress is laid upon cases found in the supreme court of the United States, referred to in the case of *Prentice* v. *Stearns*, already decided. Between the cases of *Doe* v. *Wilson* and *Crews* v. *Burcham* and this a broad difference exists. The lands reserved by treaty in those cases to the parties who conveyed their interests to others never had been described, never had been selected, and it was only known that they would be entitled to a certain amount of land afterwards to be selected by the president under that treaty. In the case of *Doe* v. *Wilson*, 23 How. 457, the language of the court is that the reservation created an equitable interest in the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land, and the issue of the patent, operated to vest the title in his grantee. In that case Pet-chi-co could not have conveyed anything more specific than his general right to such congressional subdivision of land as the president might afterwards allot to him. In conveying his interest he conveyed the equitable interest which he had in such allotment when it should be made. Such was also the case of *Crews* v. *Burcham*, 1 Black, 352. The deed there recites a reservation to the grantors of a half section under the treaty, which is to be located by the president after the land was surveyed, and then for a valuable consideration the grantor conveys all his right. In that case no description of land could be given, because none was supposed to exist; the president had yet to select and identify it. But in the case before us, not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could

be conveyed specifically, and which Armstrong undertook to convey specifically. It is not necessary that we resort to the supposition that Armstrong was talking about some vague and uncertain right,—uncertain, at least, as to locality, and as to its relation to the surveys of the United States,—which he was intending to convey to Prentice, instead of the definite land which he described or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two distinct descriptive clauses, neither of which had that idea in it, one of which is rejected absolutely by plaintiff's counsel as wholly a mistake, and the other is too vague in its language to convey even what plaintiff claimed for it. We are not able, therefore, to hold with counsel for plaintiff that, if this conveyance does not carry the title to any lands which can be ascertained by that description in the deed, resort can be had to the alternative, that the deed was intended to convey any land that might ultimately come to Armstrong under the treaty, and under the selection, and under the assignment to Buffalo. There is a view of this subject which has given us considerable embarrassment. If the east and west courses of the first clause of the description in the Armstrong deed to Prentice were exactly reversed, the land described in it would be found on St. Louis bay, somewhere along the shores of that bay, adjacent to and above Minnesota point, and would include much of the land which was patented by the United States to Armstrong and his associates in satisfaction of the treaty grant to Buffalo; and we should find ourselves called upon to decide whether, under all the circumstances, we would not be compelled to regard these two east and west lines as mistakes, and reverse them in seeking for the land, because in that case we should certainly fall upon some of the land which Buffalo intended to select, and which the government of the United States has patented in satisfaction of that selection. But we are not called upon in this case to decide upon that subject, because all the land sued for in this case lies south of the southern section line of such a survey, and is excluded from it. Judgment for defendants.

HOWARD *v.* BATES COUNTY.

(*Circuit Court, W. D. Missouri, W. D.* September 1, 1890.)

CIRCUIT COURTS—JURISDICTIONAL AMOUNT—INTEREST.

In an action on county bonds and the interest coupons thereto attached, the coupons constitute "interest" within Act Cong. March 3, 1887, as amended August 13, 1888, providing that the United States circuit courts shall have jurisdiction in certain cases where the amount in dispute exceeds $2,000 exclusive of "interest" and costs.

At Law. Demurrer to petition.

T. K. Skinker, for plaintiff.
Gates & Wallace and *John F. Smith*, for defendant.

PHILIPS, J. The petition counts on two bonds of $1,000 each, past due, issued by the defendant county on behalf of Mount Pleasant township in said county, in part payment of a subscription by said township to the capital stock of the Lexington, Chillicothe & Gulf Railroad Company. The petition alleges that said bonds provided for interest from the 18th day of January, 1871, at the rate of 10 per cent. per annum, said interest to be payable annually on the presentation and delivery at the designated bank of the coupons to said bonds attached; "that attached to each of said bonds were coupons for interest, to accrue as aforesaid, by each of which said coupons the said county acknowledged to owe and promised to pay to bearer the sum of $100 on the 18th day of January of the year named in said coupon." The petition alleges that plaintiff is the holder and owner of said two bonds and the coupons thereto attached, and prays judgment thereon. To this petition the defendant demurs, on the ground that this court has not jurisdiction of the subject-matter of the action for the reason that it appears from the petition that the matter in dispute does not exceed, exclusive of interest and costs, the sum of $2,000. By the act of congress of March 3, 1887, amended August 13, 1888, to give this court jurisdiction, the subject-matter in dispute must exceed, "exclusive of interest and costs, the sum or value of two thousand dollars." As the principal of the bonds amounts to only $2,000, it is apparent that to give the court jurisdiction the amount of the interest coupons must be added to the principal of the bonds. The question presented is, is there anything in the character of the coupons to except them from the designation of "interest" as employed in the statute? "Interest is compensation for the use of money for its detention." *Borders* v. *Barber*, 81 Mo. 646. "It is the compensation which is paid by the borrower of money to the lender for its use, and generally by the debtor to his creditor in recompense for his detention of the debt." Bouvier. Without some special reason appearing to the contrary, we must assume that the legislature employed the term "interest" in its usual acceptation. The petition declares that bonds—the principal debt—were to bear interest at the rate of 10 per cent. per annum. Instead of being expressed in the ordinary way in the face of the bond or note, the interest here is in the form of coupons attached to the bond. No question, presumably, would be made that, if the bond had contained the usual recitation, "with interest at the rate of ten per cent., payable annually," etc., the interest could be added to the principal of the debt in order to bring the matter in dispute above $2,000. In that case jurisdiction would arise upon the principal sum of the bond or note. Is it any less interest because it takes the form of a coupon? "The term 'coupon' is derived from the French,—'*couper*,' to cut; and it is defined by Worcester to signify one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made; so called because it is cut off when it is pre-

sented for payment." 2 Daniel, Neg. Inst. § 1489. And in the preceding section this same author says: "The contract between the payor and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest without presenting the bond by separating and presenting the proper coupon." So in *Everetsen* v. *Bank*, 4 Hun, 692, it is said: "Coupons are substantially a minute repetition of what is contained in some concise terms in the bond." It is in recognition of the idea that coupons are the incident to the principal debt, and still adhere to it as interest, that the court holds the same statute of limitation applies to the coupon as to the bond itself. In *City* v. *Lamson*, 9 Wall. 483, Mr. Justice NELSON said:

"The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature; and the bond, being of a higher security than a simple contract debt, is not barred by lapse of time short of twenty years; and, as we have seen, this contemporaneous coupon does not operate as an extinguishment of the interest, unless there has been an express agreement to that effect. These coupons are substantially but copies from the body of the bond, in respect to the interest, and, as is well known, are given to the holder of the bond for the purpose—*First*, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and, *second*, to enable the holder to realize the interest due, or to become due, by negotiating the coupons to the bearer in business transactions, on whom the duty of collecting them devolves. * * * There was but one contract, and that evidenced by the bond, which covenanted to pay the bearer five hundred dollars in twenty years, with semi-annual interest at the rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal. The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due."

While, therefore, to meet the constantly widening demands of commerce and municipal development, such coupons perform new and important functions in commercial transactions, they are in their legal essence no less interest, the product of the use for money borrowed, than if incorporated alone in the body of the bond itself.

So far from discovering anything connected with the history of the act of March 3, 1887, indicating that congress did not employ the word "interest" as a generic term in its most comprehensive sense, the design of the judiciary act in question, in contradistinction of its predecessors, is to restrict the jurisdiction of the federal courts. In Dillon's Removal of Causes, (5th Ed.) § 94, p. 104, he says:

"Under the act of 1875 it was held that it was sufficient if the amount in dispute exceeded five hundred dollars at the time when the right of removal accrued and was applied for, and that interest—when the right thereto existed and was claimed—might be regarded in determining the amount or value in controversy. To remedy this the act of 1887 specifically provides that the amount in dispute must exceed two thousand dollars 'exclusive of interest and costs.' So that interest can no longer be computed in making up the necessary amount."

It is the duty of courts, in applying such a statute, even where the language is inexplicit, to give it such construction as will effectuate the legislative will.

The fact that the coupon after maturity may or may not bear interest, or the further fact that the coupon may be cut from the bond, and, after maturity, be sued upon separately as a negotiable instrument, cannot affect its character as interest when sued upon in connection with the bond to which it is attached. In the instance of a simple promissory note providing for annual payments of interest an action will lie for the recovery of each annual accrued interest, independent of the right to sue for the principal debt. *Stoner* v. *Evans*, 38 Mo. 461. But if the holder of such a note should not sue thereon until the maturity of the principal debt, there could be heard no debate on the proposition that under the federal statute in question the jurisdiction of the court should not be determined by the amount of the principal debt. It is a *non sequitur*, as contended by the learned counsel for plaintiff, that if this demurrer be sustained it results "that no decision on the validity of municipal bonds could ever be had in a federal court until the bonds themselves had matured; and in many cases a large part of the coupons would in the mean time be barred by limitation." The position maintained upon the opinion in *City* v. *Lamson*, *supra*, that the coupons "are substantially but copies from the body of the bond in respect to the interest,"—that there is "but one contract * * * evidenced by the bond,"—necessarily contains the further proposition that, in an action concerning the validity of the coupon, the validity of the bond itself is involved. And, of consequence, an adjudication on the coupon would conclude any controversy as to the validity or invalidity of the bond, in an action between the same parties on the same issues of fact. *Cromwell* v. *County of Sac*, 94 U. S. 359. Nothing said or decided here has any reference to the right to supplement the principal amount of the bond with coupons owned by the suitor representing interest on some other bond in order to give jurisdiction to the federal courts. It follows that the demurrer is sustained.

STANDARD SUGAR REFINERY *v.* CASTANO *et al.*

(*Circuit Court, D. Massachusetts.* August 26, 1890.)

SALE—CONSTRUCTION OF CONTRACT.

A contract for the sale of a cargo of from 700 to 800 tons of sugar, to be shipped from a certain port, is fulfilled by the delivery of only 700 tons, though shipped from said port as part of a cargo of 841 tons.

At Law.

From the agreed statement of facts, it appears that the plaintiff is a corporation engaged in the business of refining sugar at Boston, and that

the defendants are merchants carrying on business at Cienfuegos, in the island of Cuba, under the name of Castano & Intriago. On March 28, 1889, a contract was made at Boston, on behalf of the defendants, by their agent, duly authorized, for the sale to the plaintiff of a cargo of sugar, a copy of which contract here follows:

"BOSTON, March 28, 1889.

"Sold for account of Messrs. Castano & Intriago, to Standard Sugar Refinery, cargo 700–800 tons of Centrifugal sugar, April clearance by sail from Cienfuegos for Boston, at 4⅛ cts. per lb., cost and freight basis, 96 test, adding 1-32 ct. per lb. per degree for each degree above, or deducting 1-20 ct. per lb. per degree for each degree below 96 test, fractions in proportion. Invoice weight, marine insurance, to be provided by purchasers. Payment by three-days sight drafts against documents, to be sampled on landing, as usual, by buyer's and seller's samples, and 'the average of two Boston chemists' tests, these samples to be the basis of settlement. Shipment by first-class vessel.

"JAMES H. SHAPLEIGH & Co., Brokers, 32 Central Street."

The defendants, upon being advised at Cienfuegos of the making of this contract, proceeded to make inquiry for a vessel suitable for the shipment of the sugars sold. There was at the time no disengaged vessel in port, and he was informed that vessels were very difficult to obtain at the Windward islands, and, not finding upon this inquiry a suitable vessel of a capacity of between 700 and 800 tons of sugar, he, on April 2, 1889, rechartered from one Fred de Mazarudo, of Cienfuegos, the brigantine Motley, which was of a capacity greater than 800 tons. Soon after the making of the contract, the price of sugar began to rise. The defendant put on board of the Motley 5,979 bags of sugar, weighing 1,884,121 pounds net, or over 841 tons of 2,240 pounds, the gross weight of which exceeded 849 tons of 2,240 pounds; and on the 26th day of April, 1889, took from the master a bill of lading, in which Messrs. Perkins & Welsh, a firm of commission merchants doing business in New York, his agents in the United States, were named as consignees, at Boston, of said sugar. In the letter of May 7, 1889, from Perkins & Welsh to the plaintiff, they say that, owing to the scarcity of tonnage, it was found impossible to secure a vessel conveying between 700 and 800 tons, and they tender 700 tons at the contract price in fulfillment of the contract. This offer was declined by the plaintiff, and considerable correspondence passed between the parties. Subsequently Mr. Perkins came to Boston, and there received the cargo of the Motley. Interviews took place between him and the representatives of the plaintiff, but no settlement of the matter was reached between them; Mr. Perkins, in accordance with the defendants' instructions, insisting upon his tender of 700 tons of the sugar at the contract price, in full settlement of the defendants' liability under the contract of March 28th, and the plaintiff declining so to receive it. It was finally arranged between them that the plaintiff should accept the 700 tons offered, without prejudice to its right, if any, to demand the delivery of the remainder of the cargo, or any part of it, at the price named in said contract, and said 700 tons were so received and paid for by the plaintiff; and there-

upon the plaintiff brought this action. The remainder of the cargo, amounting to 316,122 pounds, was sold by Perkins & Welsh, acting for the defendants, to a third party, at 5 cents per pound, which was the market price of the sugar in Boston at the time the plaintiff claims it was entitled to receive the same.

Benjamin Wadleigh, for plaintiff.

Melville M. Weston, for defendants.

COLT, J., (*after stating the facts as above.*) The only question in this case is whether the plaintiff is entitled to recover any damages for breach of the contract which was made. The contract called for a cargo of from 700 to 800 tons of sugar. It appears that 700 tons of sugar were delivered to the plaintiff at the contract price. If the defendants had chartered a smaller vessel, and delivered a cargo of 700 tons to the plaintiff, there can be no doubt but that they had fulfilled their contract. Are the defendants obliged, under the circumstances, to do more than this? If the price of sugar had fallen instead of advanced, the plaintiff might have declined to receive any part of the cargo, on the principle that a cargo means the entire load of the ship which carries it, and that a contract for a cargo of from 700 to 800 tons is not performed if more or less than that quantity is delivered. But, the price of sugar having advanced, does this circumstance permit the plaintiff to call upon the defendants for 800 tons of sugar at the contract price? I am of opinion, as the defendants might have performed their contract by shipping a cargo of 700 tons, that in assessing damages for a breach of the contract they may select that alternative which is the least burdensome to themselves. Let judgment be entered for the defendants.

STUART v. BARNES.

(*Circuit Court, E. D. Pennsylvania.* April 4, 1890.)

1. INTERNAL REVENUE—DISTILLED SPIRITS—EXCESSIVE TAX—RECOVERY.
   Spirits were manufactured and placed in bond prior to July 20, 1868. Upon withdrawal, on July 26, 1869, plaintiff was required to pay taxes on 13.86 gallons more than the number of proof gallons, through the reckoning by the collector of each fraction of a gallon left over in each package, after the number of whole gallons therein had been counted, as a whole gallon. *Held,* in view of Act July 20, 1868, (15 St. 125,) plaintiff could not recover the amount of the taxes collected on these extra gallons.
2. SAME—ALLOWANCE BY ACT OF CONGRESS—INTEREST.
   An amount awarded by act of congress to reimburse a claimant for excess of taxes paid does not, unless especially so stated, give claimant a right to recover interest from the time of the illegal exaction.
3. SAME—LIMITATIONS.
   A suit was brought more than 18 years afterwards to recover excess of tax paid through the collector's rating certain fractional parts of gallons of spirits as whole gallons. Prior to suit brought, plaintiff had made a claim for tax charged on spirits lost by evaporation while in the warehouse, but not for this alleged excess. *Held,* plaintiff had not complied with provisions of Rev. St. §§ 3226–3228, and his claim was barred.

4. SAME—EFFECT OF PAYMENT UNDER ACT OF CONGRESS.
Amounts paid through Act Cong. July 26, 1886, were not payments on account, but were in satisfaction of the claims presented.

At Law.

This was a suit brought for the recovery of $250.40, with interest from June 26, 1869, alleged to have been illegally collected by the defendant's testator, who had been during his life-time a collector of internal revenue for the eastern district of Pennsylvania. It appeared upon the trial that the plaintiff was a dealer in distilled spirits, some of which, in the United States bonded warehouse, were owned by him prior to April 14, 1869, and were withdrawn for sale and consumption by him on June 26, 1869. They had been manufactured and placed in bond prior to July 20, 1868, and upon withdrawal the plaintiff was required to pay a tax upon an amount of spirits in excess of the amount withdrawn as shown by actual gauge at the time of the withdrawal. The number of packages withdrawn was 460, as it was proved upon the trial, and the whole quantity of spirits withdrawn was 1,819.14 proof gallons, or 1,833 package or taxable gallons. The sum of 62 7-30 cents per gallon, reckoning each fraction of a gallon in each package as a whole gallon, was levied; and the total amount of tax exacted and collected was $1,382.51, which amount was made up of the following items:

Of actual spirits withdrawn, 1,819.14 gallons, at 62 7-30 cents,	$1,132 11
On increased fractions computed as wholes, 13.86 gallons, at 62 7-30 cents,	8 62
On spirits alleged to have been lost in United States warehouse, 388.54 gallons, at 62 7-30 cents,	241 78
Total,	$1,382 51

It appeared in evidence that the original claim for the alleged illegal collection was made August 3, 1871, for $241.78; and upon October 3, 1871, it was returned to the collector of internal revenue for this district at the request of the plaintiff, and an amended claim for $241.78 was thereupon filed upon March 20, 1878, which upon February 24, 1883, was rejected, and the collector notified. Subsequently, upon April 30, 1883, at the request of the plaintiff's attorney, the claim was reopened, and upon December, 1884, again rejected. Upon March 18, 1885, however, it was again reopened, and upon April 28, 1886, again rejected. Upon the trial, also, the act of congress dated July 26, 1886, (24 St. at Large, c. 783,) was put in evidence, showing that the plaintiff's claim for $241.78 was favorably considered, and a receipt by his attorney for that amount was also proved, dated August 17, 1886, and that this suit was brought April 25, 1887. It appeared, also, that the claim filed March 20, 1878, for $241.78, was upon form known as "Series 6, No. 14," for taxes improperly paid, and set out the facts hereinbefore indicated, and claimed that the tax was illegal to the amount stated because the plaintiff had been taxed for a quantity which was not actually withdrawn, but which was lost by evaporation or leakage while in the warehouse. It was shown, also, that this was the only claim presented by

the plaintiff to the internal revenue department in pursuance of the provisions of Rev. St. §§ 3226–3228; and upon the trial a special plea was filed on behalf of the defendant, that, to entitle the above plaintiff to maintain the above suit, appeal was not duly made to the commissioner of internal revenue according to law, and that it was not duly brought within the period of time allowed thereby.

On behalf of the plaintiff the following points were submitted:

"(1) That the spirits withdrawn by the plaintiff June 26, 1868, were manufactured and placed in the United States bonded warehouse prior to July 20, 1868, and plaintiff was only liable to pay a tax on the number of gallons of spirits then actually withdrawn by him from bonded warehouse, to-wit, 1,819.14 proof gallons, on which the tax was $1,312.11, and that defendant's testator unlawfully exacted in excess thereof the sum of $250.40 as a tax on spirits which had originally been bonded, but which had disappeared by leakage, evaporation, or otherwise." Affirmed.

"(2) That at common law the plaintiff became forthwith entitled to bring an action against the defendant's testator in his individual capacity, and not as a United States collector of internal revenue, which right was suspended by the act of congress until plaintiff had appealed from the illegal tax to the commissioner of internal revenue, and his appeal was finally rejected by the commissioner of internal revenue April 28, 1886." Refused.

"(3) That, upon the final rejection of the plaintiff's claim by the commissioner of internal revenue, the plaintiff's right of action against the defendant's testator in his individual capacity revived, and his action must be commenced within one year thereafter, and this action was brought within the statutory time." Refused.

"(4) That the measure of the liability of the defendant's testator is eth amount of the tax illegally exacted by him from the plaintiff, to-wit, $240.50, with interest at six per centum from June 26, 1869, to the date of the verdict, subject to a credit of $241.78." Refused.

"(5) That the sum of $241.78 paid plaintiff on the 17th day of August, A. D. 1886, was not a payment of his claim made by the appeal to the commissioner of internal revenue under the acts aforesaid, and that the said claim had previously been rejected, and was not pending in the treasury department at that time. The same was a voluntary payment by the United States, without any conditions, of a part of a sum of money then due to the plaintiff, not from the United States, or in recognition of the plaintiff's rejected claim, but from the defendant's testator in his individual capacity. This sum was paid and received expressly on account." Refused.

"(6) The plaintiff may and has elected to apply this sum as a payment on account of the sum of $507.83, to-wit, $250.40, the excess of tax, and $257.43, interest thereon from June 26, 1869, to August 17, 1886, which was upon that day due to plaintiff by defendant's testator, and the plaintiff is entitled to a verdict for the balance then due, to-wit, $266.05, with interest thereon to date." Refused.

"(7) The present action is not against the United States, nor is it an action against the defendant's testator in his capacity of a United States collector of internal revenue; but the same is an action against him in his individual capacity, and is to be governed by the same rules as other actions between private citizens." Refused.

"(8) That the plaintiff's claim against the United States was not reopened and allowed after April 28, 1886." Affirmed.

"(9) That the commissioner of internal revenue had no judicial functions to perform under the private act of July 26, 1886, and his duty thereunder

was purely ministerial, and was limited to ascertaining what excessive tax had been exacted from the plaintiff; and this inquiry, and the payment of $241.78 to the plaintiff, were solely by virtue of the provisions of the said private act of congress." Affirmed.

On behalf of the defendant the following points were submitted:

"(1) From the plaintiff's claim, as set out in the bill of particulars, of $250.40, you must deduct the amount of $241.78 paid him upon August 17, 1886, under the act of July 26, 1886, (24 St. c. 783;) and in this suit he cannot recover any interest whatever upon the said amount of $241.78.

"(2) The act of July 26, 1886, under which the payment of $241.78 was made to the plaintiff, states that it was a refund of taxes exacted and paid on distilled spirits in excess of the quantity withdrawn from the warehouse, and the act did not provide for the payment of interest; and your verdict in this case should be for the defendant.

"(3) The plaintiff cannot recover an amount of taxes alleged by him to have been illegally assessed by counting fractions of gallons as whole gallons. The act of congress of July 20, 1868, (15 St. 125,) provides that a fractional part of a gallon in excess of the number of gallons in a cask or package should be taxed as a gallon; and your verdict upon that part of the plaintiff's claim in this suit should be for the defendant.

"(4) The plaintiff failed to present his claim to the commissioner of internal revenue for refunding the alleged excess of taxes upon fractions of gallons in the manner, and within the period of time, required by law, and therefore he cannot recover in this suit.

"(5) The claim presented by the plaintiff in this suit was included in the payment made to him under the provisions of the act of July 26, 1886, (24 St. c. 783,) and therefore he cannot recover; and your verdict should be for the defendant.

"(6) Your verdict should be for the defendant."

J. W. M. Newlin, for plaintiff.

William Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

McKENNAN, J., (*charging jury.*) Although I do not give you any binding instructions to that effect, yet, in the judgment of the court, under all the evidence in the case, the defendant here is entitled to a verdict. As the case is presented to you, in the judgment of the court, you could only find a verdict properly in favor of the defendant.

The jury thereupon rendered a verdict for the defendant.

D'ESTRINOZ v. GERKER, Collector.

(Circuit Court, E. D. Pennsylvania. April 8, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—MANUFACTURED TOBACCO.

A cigar-shaped bundle of tobacco of an extremely large size was classified as manufactured tobacco. It was in evidence that it was used as an ornament in cigar dealers' windows, but that it could be smoked as a cigar. *Held*, that the fact of its capability of being smoked does not altogether determine its character, and, if the principal utility of the article is for some other purpose, the article is to be classed as manufactured tobacco, if for the ordinary purposes of a cigar, as such.

At Law.

This is a suit brought by Francisco R. D'Estrinoz to recover the sum of $525.35, alleged to have been illegally exacted by the defendant as a tax upon 6,565⅞ pounds of tobacco, at eight cents a pound, during the year 1886. It was shown that the plaintiff was not a manufacturer of tobacco, and did not have a license therefor, but was a manufacturer of cigars. The tax was levied at the rate of eight cents a pound as upon manufactured tobacco, under the provisions of sections 3362 and 3371, Rev. St., as amended. It was also shown on behalf of the plaintiff that the article was known as a "Jumbo" cigar, and bought, sold, and used in trade under that name. It appeared that it could be smoked as other cigars of smaller size, as the tobacco was laid without twist; that the grade was inferior to that known as manufactured tobacco; and that they were not sold as such, but generally for the purpose of ornament or as a novelty. Testimony was produced on the part of the defendant that the highest quantity of tobacco used in the manufacture of the ordinary cigar, as shown from the reports of the internal revenue department, is less than twenty-five pounds of tobacco to the thousand, and that the highest quantity of tobacco used was from 35 to 55 pounds per thousand, and that the quantity of tobacco used in the article in question was much higher.

John A. Ward, for plaintiff.

Wm. Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

MCKENNAN, J., (*charging jury.*) There is but a single question in this case, and it is not a very broad one, and, as you will determine the one question of fact involved in the case, the result of the cause will be determined by you. The plaintiff here is a manufacturer of cigars, and obtained a license from the government to deal in cigars. He was charged by the collector of the district a certain sum of money on cigars manufactured by him, at the rate of eight cents per pound upon the certain number of pounds contained in an article which the collector classifies as manufactured tobacco, and which were claimed by the plaintiff to be cigars, within the meaning of that term. The question is, were they cigars, as claimed by the plaintiff? If they were, then the tax was erroneously assessed, and the plaintiff is entitled to re-

cover the amount of his claim. By the act of congress, a tax on all cigars made of tobacco, or any substitute therefor, of three dollars per thousand, is charged. You are to determine whether the articles upon which this tax was charged were "cigars," within the meaning of the term employed in the act of congress. That is the only question for you.

You have seen the article before you; you have heard the evidence of a number of witnesses as to what that article is. Is it a "cigar," within the meaning of the act of congress, or is it tobacco in some other form? That it is manufactured and subjected to a process of manufacture is evident. It is tobacco used for the purpose of putting the article in the form in which it is presented before you. Is it a "cigar," within the meaning of the act of congress? because, if it is, then the collector was in error in classifying it as something else. The ordinary rule is that words employed in the act of congress are employed according to their usual and accepted meaning, unless they have some special trade designation,—some special definition by the trade in which they are used. That is hardly the case here, because it appears that in the trade the word is used in the sense in which it must have been used all over. We all know what cigars are, and it does not require any great astuteness or any great knowledge to enable one to determine what a cigar is when he sees it. It is a bunch of tobacco rolled together and put into shape for smoking, and intended for that use. We all know. It is hardly necessary to produce witnesses to give any definition of what a "cigar" is, because it is a matter of common and universal knowledge, for the reason that the article is in common and universal use. You have the testimony of a number of witnesses on the part of the plaintiff, all of which I believe are engaged in the manufacture and sale of tobacco in some form or another, and they all say that this article is called a "cigar" in the trade. Whether it has any peculiar or exceptional meaning does not appear in the evidence. It seems to have been spoken of in the trade, as spoken of by everybody else, as a bunch of tobacco rolled up, and adapted for use and used for the purpose of smoking. That it may be smoked does not altogether determine its character. It may have some adaptibility for such use, but it may or may not be principally used for that purpose. If that is not the principal use of it, but if it is used for some other purpose, it is not to be taken as a cigar meant by the act of congress, and you will be guided somewhat by your own judgment as to the category in which this article is to be placed by your examination of it.

It appears in evidence here that this article was not made at all until some time after the passage of the act. Presumably, therefore, the term was used in the sense in which it was understood at the time of the passage of the act of congress. It applied only to such articles as were commonly known as "cigars." Besides that, it appears from the evidence of the revenue officer, Mr. Truell, that, taking all the cigars manufactured in the United States to which the term was used, which the department was to consider, not exceeding about 30 pounds of tobacco was em-

ployed in the manufacture of the articles which were known and called as cigars. Cigars in which three pounds of tobacco made a thousand, were known and considered throughout the whole trade in the United States as cigars, and presumably, therefore, as cigars referred to in the act of congress, and so designated. It appears, further, that this article is not in common used for the purpose of smoking; its use may be regarded as an exceptional use.

Taking this evidence, and all the other evidence in the case, the witnesses on both sides, and guided to some extent by your own judgment and by your knowledge of what a cigar is, it is for you to determine whether this is a cigar which congress intended to classify as such, and imposed a duty of three dollars a thousand upon. That is the simple narrow question. If you find, under all the evidence, that this is a cigar, then the plaintiff is entitled to recover the amount which he claims, four hundred and sixty odd dollars. If you find it is not, then your verdict must be for the defendant. It is apparently a very small question,—certainly a very narrow one,—and, as you will determine the classification in this way, you will decide this case. If it is not a cigar, then it seems to me that it must be classed as manufactured tobacco in some form, and within the meaning of another clause.

The plaintiff presents the following points:

"(1) If the jury find that the 'Jumbo Cigars' were really cigars manufactured, sold, and consumed as such, then your verdict must be for the plaintiff."

I affirm that point.

"(2) If the jury find that the ordinary and common use of the 'Jumbo Cigars,' as tobacco, was as a cigar, to be smoked from the mouth, your verdict must be for the plaintiff."

I affirm that point.

"(3) If the jury find that the plaintiff committed no fraud upon the government of the United States in the manufacture and sale of the 'Jumbo Cigars,' your verdict must be for the plaintiff."

There is no such point involved in this case, and I therefore disaffirm it. There is no reason to believe that the plaintiff did not think, as he defines it, this article was a cigar, and therefore it was taxable only under the clause which applies to cigars; but it is immaterial, and therefore I refuse the point.

"(4) Your verdict must be for the plaintiff."

I disaffirm that point.

The defendant presents the following points:

"(1) If you believe that the rolls of tobacco commonly called 'Jumbo Cigars' are not bought, sold, and used for the purpose of smoking the tobacco, then they are not cigars, within the meaning of the internal revenue act of March 3, 1883, and the plaintiff is entitled to recover."

In addition to what I have already said, I may say that they may be adapted to smoking; they may be put in such form that a person may put one of them in his mouth and smoke it; but, if that is not the prin-

cipal use to which they are devoted, that would not change any understanding and designation of them; they would still be something else than cigars, and subject to a tax under another clause of the act.

"(2) If you believe that the rolls of tobacco, commonly called 'Jumbo Cigars,' are made of smoking tobacco of any description, and are composed of tobacco reduced into a condition to be consumed, then they are manufactured tobacco, within the meaning of section 4 of the act of March 3, 1883, and the tax is eight cents per pound, and the plaintiff is not entitled to recover."

I am inclined to think that that is the proper classification. If they are not cigars, they are manufactured tobacco, according to the act of congress, reduced in a condition to be consumed, and are therefore subject to taxation under another clause.

"(3) Your verdict in this case should be for the defendant."

I disaffirm that point. This whole question is the single and simple question, is this a cigar, within the meaning of the act of congress as it was used by congress framing this law? If they are, the plaintiff is entitled to your verdict for $436.03; if they are not, then he is entitled to recover back only the amount which was paid by mistake under the assessment of the tax, $161.78. Take a box of these things out with you, look at them, and exercise, to some extent, your own judgment as to what they are.

JESSUP & MOORE PAPER CO. *v.* CADWALADER, Collector.

(*Circuit Court, E. D. Pennsylvania.* April 2, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—OLD RUBBER SHOES.

If the commercial value of old rubber shoes is due solely to the rubber which they contain, and not to the preparation or manufacture which they had undergone, they are exempt from duty as crude rubber.

At Law.

This was a suit brought by the Jessup & Moore Paper Company to recover certain customs duties alleged to have been unlawfully exacted in an importation of old India-rubber shoes, entered by the importers as scrap rubber. A duty was estimated as upon manufactures of India rubber at 25 per cent. *ad valorem*, and protest made that the merchandise was entitled to free entry under Tariff Index, (New,) par. 724, and section 2499, Rev. St., inasmuch as it was in a condition suitable only to be remanufactured, and therefore similar in material, quality, and texture and use to crude rubber, and unenumerated. It was shown on behalf of the plaintiff that the rubber, which was one of the constituent parts of the article in question, was by chemical process reclaimed, and that the product assimilated in material, characteristics, and uses to crude rubber. The article as imported was first ground into a powder, and then put into a vulcanizer and subjected to a high temperature to drive off the sulphur used in the original vulcanization, and then

sheeted out and manipulated like crude rubber, and when reclaimed was worth more than some qualities of pure rubber. The verdict was directed in favor of the plaintiff, subject to a point reserved, and subsequently the defendant moved for judgment *non obstante veredicto*, but the motion was refused, and judgment entered in favor of the plaintiff.

James Collins Jones and *Edward L. Perkins*, for plaintiff.

William Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

McKENNAN, J., (*charging jury.*) The plaintiffs have presented the following points: (1) "Articles composed of India rubber, within the meaning of the existing tariff laws, (section 2502, Rev. St., schedule N,) are articles prepared or manufactured from India-rubber, of which the preparation or manufacture constitutes some portion of their commercial value. If, therefore, you find that the commercial value possessed by the old rubber shoes, upon which the plaintiffs in this case allege that the duty in this instance was improperly imposed, was due solely to the rubber they contained, and not to the preparation or manufacture which they had undergone, they were not 'articles composed of rubber,' within the meaning of the tariff law, as at present in force." This I affirm. (2) "If you find that the 'old rubber shoes' in question in this suit were not composed of India-rubber, within the meaning of the tariff law, and if you find that said 'old rubber shoes' were similar in material, quality, texture, and the use to which they can be applied, to crude rubber, your verdict must be for the plaintiffs." This point is affirmed. (3) "Under all the evidence your verdict must be for the plaintiffs." This point is affirmed.

The defendant has presented the following points: (1) "If you believe that the importation in suit is composed of India-rubber, not specially enumerated or provided for in the act of March 3, 1883, your verdict should be for the defendant." Refused. (2) "If you believe that the importation in suit bears a similitude in material, quality, texture, or the use to which it may be applied, to an article composed of India-rubber, then your verdict should be for the defendant." Refused. (3) "Even if the importation in suit be used for the purpose of reclaiming, by chemical process, the rubber contained therein, yet, if the product is inferior in material, quality, and texture to crude rubber, then it is not such a similitude to crude rubber as it is necessary, under section 2499, for the plaintiff to prove to entitle him to recover, and your verdict should be for the defendant." Refused. (4) "Your verdict in this case should be for the defendant." Refused.

If the plaintiffs' first point is sound, they are entitled to recover. I will instruct the jury *pro forma*, for the purpose of enabling them to find a verdict, that the law is correct, as stated in their first point, and that the plaintiffs are entitled to recover, but reserving the right to enter a verdict for the defendant if it should be found that the law is not correctly stated in that point. This action turns altogether upon a question of law on the constructions which are given to the act of congress, and, as

we wish to give further time to the consideration of this question, and to have argument before the full bench upon the subject, I instruct you that the law, as stated in the plaintiffs' first point, is a correct statement of the law, and in that view under the facts here, the plaintiffs are entitled to a verdict for the amount of duty exacted in excess of what should have been charged. This will be subject to consideration by the court hereafter, and the court reserves the right to enter a verdict for the defendant in case it should be satisfied that the law is not as stated in this point.

SCHULTZ v. CADWALADER, Collector.

(Circuit Court, E. D. Pennsylvania. April 14, 1890.)

1. CUSTOMS DUTIES—CLASSIFICATION—SULPHATE OF POTASH.
   Whether an importation of sulphate of potash is to be used expressly for manure or not, determines whether it is free, or subject to 20 per cent. duty.
2. SAME—FERTILIZERS.
   All imported substances, whether especially provided for *eo nomine*, or covered by any language descriptive of their origin or qualities, which subserve the purpose of enriching the soil, are free, under paragraph 505 of the free-list.
3. SAME—CONSTRUCTION OF LAWS.
   In relation to each other, paragraph 70 of Schedule A, Act 1883, is general, and paragraph 505 is specific, as differentiating from the larger class of articles, denominated "sulphate of potash,) "the smaller portion, "expressly used as manure."

At Law.

This suit arose with reference to Schedule A, par. 70, Tariff Index, (New,) of the tariff act of 1883, whereby a duty of 20 per cent. *ad valorem* is imposed upon sulphate of potash, while, in the free-list, guano, manure, and all substances expressly used for manure, are free from duty under paragraph 505, Id., and was brought by Henry R. Schultz to recover certain customs duties alleged to have been unlawfully exacted upon an importation of so-called "manure salt" per ship Cuba, entered May 4, 1888. It was contended by the government that it was sulphate of potash, and liable to a duty of 20 per cent. *ad valorem*. The testimony produced upon the trial showed that the article was in fact bought, sold, and used in trade under that name, but that the importation in suit was sold to a manufacturer of fertilizers; and the verdict was in favor of the plaintiff.

Edward L. Perkins and *James Collins Jones*, for plaintiff.

William Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

MCKENNAN, J., (*charging jury.*) This suit is brought to recover duties exacted upon an importation of goods, as is alleged, without authority in law. A cargo of sulphate of potash was discharged at this port, and duties assessed upon it, and paid to the collector, without any authority, as is claimed, on his part to exact the duties so paid. A similar case was before the circuit court of the United States in the

district of New York. *Heller v. Magone*, 38 Fed. Rep. 908. The portion of the tariff act which is in controversy here was before that court, and that case was determined by the court under circumstances which made it strikingly similar to the case now before you; and, as there ought to be uniformity of decisions, of course, on questions, especially under the tariff law, and as it is just and right, so far as possible, they ought to be decided the same way. I am disposed, therefore, to adopt the view of the judge who tried the case in New York, in order that a similar result shall be reached in this case, if the facts in the case render such decision proper and right.

I do not know the quantity of goods in the present suit, but it is stated on papers submitted to you. The collector, determining that the cargo fell within a certain section of the act of congress, assessed the duty of 20 per cent., whereas, on the part of the importer, it is claimed that, under another section of the tariff law, they were not subject to any duty at all; they were free. That this article is sulphate of potash is beyond all question. It is so designated by the witnesses on both sides, and is so regarded in the trade. Whether, then, the duties claimed were chargeable under that portion of the tariff act which imposed a duty of 20 per cent., or whether they are free, is the question to be determined in this case. By paragraph 70 of the tariff act, Schedule A, 20 per cent. duty *ad valorem* is imposed upon sulphate of potash; and, in the free-list, guano, manures, and all substances expressly used for manure, are free from duty. So that whether this article comes within the scope of either of these sections is the question for you to determine. That this article is sulphate of potash is beyond all question; and under ordinary circumstances, therefore, a duty of 20 per cent. would be chargeable. Whether it is relieved or not from any duty is to be determined by the construction of paragraph 505, Tariff Act, which relieves guano, manure, and all substances expressly used for manure, free from duty. I do not regard the two sections as irreconcilably inconsistent. In the first place, sulphate of potash is subject to a duty of 20 per cent.; and, in the next place, sulphate of patash used for manure or as a fertilizer is free from duty. So that it may be regarded as properly understood by this act of congress that, while sulphate of potash is subject to a duty of 20 per cent., yet, if it is used for the purposes of manure, it is free from duty. (It depends therefore, upon the use to which the article is to be applied whether it is subject to duty, or falls within the purview of the free-list.) Exception for defendant.

As I have already said, all the witnesses on both sides speak of an article of sulphate of potash, which is subject to a duty of 20 per cent., (and it is to be determined now whether the use to which this article is applicable, or for which it is to be expressly used, takes it out of the operation of the portion of the act which subjects it to a duty of 20 per cent.) Exception for defendant. In the case in New York the article was sulphate of potash, upon which duty was imposed; but, as it was held by the judge to have been proved by the evidence that it

was to be expressly used for manure, it was held by him it was not subject to the duty imposed in the body of the act.

As I said before, this article was imported as sulphate of potash, and was therefore apparently subject to a duty of 20 per cent.; but for what purpose was it used? What is the meaning of that portion of the tariff act which relieves from duty all substances used for manure? I do not see what other construction can be given to the act of congress than this: that dutiable articles, if they are intended for use, or are imported for the purpose of being used, in manure, are relieved from the duty of 20 per cent. In the language of Judge LACOMBE, who tried the case in New York:

"The clause here, paragraph 505 in the free list, reading 'guano, manures, and all substances expressly used for manure,' very clearly expresses, and there seems no doubt that, by the use of this phrase, congress has plainly said, that all imported substances, whether especially provided for *eo nomine*, or covered by any general language descriptive of their origin or qualities, which subserve the purpose of enriching the soil, and thus increasing the crops to be raised upon it, should be free. That is the plain meaning of the paragraph as it stands. I think we should err, if, from some strained and over-elaborate examination of a great many other paragraphs in the act, we should seek to spell out some understanding or conception of what we might possibly infer was the intent of congress. We are entitled to take their intent as expressed by the plain language they have used. It is very true that the use of the word 'expressly' may make this paragraph difficult of application in very many cases, in fact in all cases, so far as the collector is concerned; but it gives us no trouble in this particular action, because there is abundant evidence here to warrant the holding that these particular importations were expressly used for manure. They have been traced from their importer into the hands of individuals whose sole business is the preparation of 'fertilizers' which word is a mere synonym for 'manure;' and, should the jury draw from the testimony any other inference than that the articles were expressly used for manure, I should be inclined to set aside the verdict. Therefore, I think it is unnecessary to send the question to them. The defendant refers to the well-settled rule of interpretation that a specific designation will prevail over a general one; but the clause which he contends to be a general one (paragraph 505, *supra*,) is in reality more specific than the paragraph under which he insists these imports should be classed, (paragraph 70, 'Sulphate of Potash,') because, from the general class of articles properly classified as sulphate of potash, it differentiates that smaller portion which are 'expressly used for manure.'"

So here, while the article which is the subject of importation is generically sulphate of potash, its dutiable character is to be determined by the use for which it was imported, or to which it is applied. It undoubtedly subjects the classification and dutiability of articles falling within the general scope of the act by the collector; but the question is whether, under the act of congress, the article is subject to duty or not, and that is to be determined by the purpose for which it is used or to be used. Was it for manure? (If so, under the view Judge LACOMBE takes of the law, it is not subject to duty, and in that decision I am inclined to concur.) Exception for defendant.

You have then here this article, which is described as sulphate of

potash, shown by the testimony to have been imported by a person who is engaged in the manufacture of fertilizers, of which the sulphate of potash is the principal constituent. It was therefore intended, so far as he was concerned, to be used as manure, and we must so conclude. It then passed by sale by him to a person who was engaged in the manufacture of fertilizers, and was used in the preparation of that article of merchandise. If that be so, then you will be justified in finding that this sulphate of potash was, within the meaning of the act of congress, expressly used for manure; and, if so, it was not subject to any duty. If you are satisfied upon that subject, then you would be justified in finding, and you would be bound to find, that the collector was in error in imposing any duty whatever upon this article. However difficult it might have been for him to ascertain that fact, yet it would seem to be necessary to the effectuation of the attempt of congress in relieving such articles from duty altogether to inquire into the use to which this article was applied after it passed into the hands of the manufacturer. (I therefore instruct you, if you find that this article was used in the manufacture of manure, or was used as manure, that it is not subject to a duty, and your verdict should be for the plaintiff.) Exception for defendant.

The plaintiff and defendant have both submitted to me certain points upon which they ask me to instruct you; but, taking the view that was taken by the judge of the circuit court of the United States at New York, and desiring that there should be uniformity of opinion upon the construction of the act of congress as far as possible, I instruct you as I have done, and decline to instruct you as asked by the counsel for the plaintiff or defendant. If you find as I have stated, then your simple duty is to ascertain the amount of duties paid by the plaintiff here, and find a verdict in his favor for the amount so paid. Of course, I mean this importation, which is the subject before you.

PLAINTIFF'S POINTS.

"(1) If you find that the article constituting the subject of this suit is not commercially known as 'sulphate of potash,' and that it is expressly used for 'manure,' your verdict must be for the plaintiff.

"(2) Even if you find that the article in question is sometimes known commercially as 'sulphate of potash,' if you also find that there are other varieties of sulphate of potash used for purposes other than as manure, and that the article in question is used expressly for manure, then your verdict must be for the plaintiff.

"(2½) If, upon all the facts in this case, there exists in your minds a doubt, your verdict must be for the plaintiff, as duties are never to be imposed on the citizen upon vague or doubtful interpretations.

"(3) Under all the evidence in this case, your verdict must be for the plaintiff."

DEFENDANT'S POINTS.

"(1) It having been shown that the article in suit is bought, sold, and used in trade as sulphate of potash, it is provided for in the tariff act of 1883 under that name; and your verdict should be for the defendant."

Refused. Exception for defendant.

"(2) The article in suit is not provided for in the provisions of the tariff act of paragraph 505, Tariff Index, (New,) of the free-list, 'all substances used for manure,' inasmuch as the evidence shows that the substance in suit is not so used, 'in the manufacture of manure or fertilizers only;' and your verdict should be for the defendant."

Refused. Exception for defendant.

"(3) The article in suit is sulphate of potash, and the tariff thereon is provided for, for that article specifically, and will not be assessed under the more general expression contained in paragraph 505, Id., 'all substances used for manure,' and your verdict should be for the defendant."

Refused. Exception for defendant.

"(4) Your verdict in this case should be for the defendant."

Refused. Exception for defendant.

The jury rendered a verdict in favor of plaintiff.

BAILEY *et al. v.* CADWALADER, Collector.

(*Circuit Court, E. D. Pennsylvania.* April 1, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—TRADE-NAME—BOMBAY HEMP.

An article known in the trade as "East India Bombay hemp," invoiced and entered as such in the custom-house, will be held dutiable as hemp; and testimony that it is in effect a species of Sisal-grass will not cause it to be dutiable at the rate of that article.

At Law.

This suit arose concerning the classification of East India Bombay hemp, under Tariff Index, (New,) par. 331, and was brought by John T. Bailey to recover certain customs duties alleged to have been improperly exacted in an importation which was invoiced as East India Bombay hemp, whereon a duty at $25 per ton was assessed under paragraph 331, Id., relating to hemp, manilla, and other like substances for hemp, not specially enumerated or provided for. Protest and appeal was made that it was not the hemp of commerce, nor commercially known as such, and that it should be entered at $15 per ton as a vegetable substance not specially enumerated or provided for in paragraph 333, Id. Upon the trial it was shown from the papers upon file in the collector's office that it was designated as hemp upon the bill of lading, invoice, and entry; but the testimony of the plaintiff tended to show that it could not be used as hemp, and that it was not in fact that article, and did not grow in the same way, and could not be used as a substitute. It appeared, however, that it was bought, sold, and used in trade under that commercial designation, but the testimony of the plaintiff tended to show that it was in fact a species of Sisal-grass. The verdict was in favor of the defendant.

Henry T. Kingston, for plaintiff.

William Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

McKENNAN, J., (*charging jury.*) This suit is brought by the importer of an article, a sample of which you have had before you, to recover what is claimed by him to have been an excess of duties charged by the custom-house of Philadelphia on that article, upon the hypothesis that a duty was imposed upon this article of $25 a ton as hemp, whereas it should have been charged with a duty only of $15 a ton under another clause of the act of congress. The duty was paid under protest, and the plaintiff here has qualified himself to bring this suit to recover this exaction by the custom-house if the duty was erroneously assessed. The whole question turns upon the identity of the subject-matter of this importation. Is it hemp within the meaning of the act of congress, or does it fall within the description of another clause of the act of congress? If it is hemp, the duty is properly assessed. If it is not hemp, the duty is erroneously assessed by the government. The term employed in the act of congress is "hemp," and therefore it is employed in the sense in which that term is generally understood in commerce and trade, and no other test is furnished of the meaning of the term. It might be congress defined this term with reference to something else. In the mere commercial designation of the term they might have defined it with reference to the issue to which the article is employed; but no such test is indicated by the act of congress. It is used here simply as hemp, termed "hemp," and therefore it means what is understood to be hemp in the sense in which the article is denominated in commerce. It does not make any difference what the quality of the article is. If it is hemp generically, it means hemp as used in the act of congress, and is subject to the duty imposed upon it under that designation. You have had before you a number of samples of substances which are called "hemp," and they vary in quality, value, and in the uses to which they are employed, but they are all species of hemp, as the term is employed here. Except when they are specifically referred to in the act of congress, all species of hemp are subject to the duty imposed upon hemp under its general designation. All of the witnesses on the part of the plaintiff describe this article as hemp without exception, I believe. That is a matter you will remember. They all describe it as hemp, and the proof is that it is known in commerce as "East India Bombay hemp;" that is, hemp grown in Bombay in the East Indies; hemp, with reference to the place at which it is produced. If it is so, it is within the category of hemp, and is subject to the duty imposed by the act of congress upon that article. That is the only inquiry for you to make and determine. Is this article hemp, as known by the name which it is called? If it is, the duty was properly assessed at $25 a ton.

The plaintiff asked me to instruct you as follows: (1) "That if the jury find the subject of importation is a vegetable substance; that unless they find it to be hemp,—the plaintiff is entitled to recover." That point I affirm, with the qualification that if the article in question is known

and designated commercially as "East India Bombay hemp," and is a species of hemp, it is within that clause of the act of congress which imposes the duty of $25. (2) "That unless the jury find the subject of the importation to be hemp, manilla, or other like substitute for hemp, not specially enumerated or provided for, the plaintiff is entitled to recover." I affirm that point. (3) "That if the jury find the subject of the importation to be a vegetable substance, and not specially enumerated or provided for in the act of congress, the plaintiff is entitled to recover." I affirm that point.

I am requested by the defendants to charge you as follows: (1) "If you believe that the article imported is hemp, or a like substitute for hemp, not specially enumerated or provided for in this act, your verdict should be for the defendant." I affirm that point. (2) "If you believe that the article imported is not sunn, Sisal-grass, nor a vegetable substance, not specially enumerated or provided for in the tariff act, your verdict should be for the defendant." I affirm that point. So that the only question for you to determine is, what is the article? How is it known in commerce? Is it a species of hemp, and is it known as descriptive of hemp,—East India Bombay hemp? If it is, the defendant is entitled to a verdict. Though the question is for you, the testimony seems to be all in one direction. All the witnesses say that this article is a species of hemp, and that it is known and designated generally. It is called "East India Bombay hemp." That is a species of hemp which is grown in Bombay, in the East Indies. If it be so, then the duty was properly assessed at $25 a ton. It may be that it may not have been a very reasonable provision to assess a duty of $25 a ton upon an article which is inferior in quality to other species of hemp on which a duty of $15 only is assessed. That is a matter entirely for congress. We are to find what congress meant by its enactment, and to administer the law accordingly, and they have said that upon all species of hemp the duty shall be $25, except such as are excepted here, and this is not one of them. Jute, sunn, and Sisal-grass are species of hemp to which a special provision applies, but this East India Bombay hemp is not one of the articles to which the application of the term "hemp" is qualified in any way; so that, as the act of congress is to be construed, all substances which fall under the category of hemp, whatever the quality may be, except jute, sunn, and Sisal-grass, are to be subject to a duty of $25. That being so, the government officers properly subjected this article, which is the subject of this controversy, to a duty of $25 a ton. The plaintiff himself entered this as hemp, and there does not seem to have been any controversy on either side as to the proper designation of it put upon the invoices, and it was so taken by the government officers. The jury rendered a verdict for the defendant.

LAIDLAW v. ABRAHAM, Collector.

(Circuit Court, D. Oregon. August 18, 1890.)

1. TONNAGE DUTIES—ACTION TO RECOVER.
The Act of July 5, 1884, (23 St. 118,) which makes the decision of the commissioner of navigation on the question of refunding a tonnage tax erroneously imposed "final," does not take away the right of action from the person who paid said tax, but the purpose and effect of the act is that such decision shall be "final" in the department, so that the secretary of the treasury shall not be burdened with the duty of reviewing it.

2. SAME—PLEADING.
An allegation that a collector "exacted" certain tonnage duties is equivalent to saying they were "ascertained and liquidated" by him, as provided in section 2931, Rev. St.; and an allegation that the grounds of the objection to the collector's decision exacting such duties were specified in the notice to him "clearly and distinctly" is equivalent to saying they were "distinctly and specifically" set forth therein, as required in said section.

3. SAME—COASTWISE TRADE—FOREIGN VESSEL.
A vessel belonging in whole or in part to an alien may, under section 4347, Rev. St., pass from one district of the United States to another, with cargo brought from a foreign port, and not "unladen," without thereby becoming liable to a tonnage tax under section 4219, Rev. St.; and merchandise is not "unladen" or "taken" within the meaning of these terms, as used in these sections, unless there is an actual, physical removal of the same from or to the vessel.

(Syllabus by the Court.)

At Law. On demurrer to the second amended complaint.

Mr. John C. Flanders, for plaintiff.

Mr. Franklin P. Mays, for defendant.

DEADY, J. The plaintiff, James Laidlaw, doing business as "James Laidlaw & Co.," brings this action against Hyman Abraham, collector of customs at the port of Portland, in the district of Wallamet, to recover the sum of $793.50, alleged to have been wrongfully exacted by the defendant from the British ship Largo Law, as a tonnage tax.

It appears from the second amended complaint that the Largo Law, on October 5, 1889, entered the port of San Diego, Cal., in the customs district of that name, with a cargo from London, England, consisting partly of cement, which was invoiced and destined for and discharged at said port, except 3,360 barrels of the cement, which were invoiced and destined for Portland, Or., or San Francisco, Cal. That the duty on the whole cargo was paid in good faith to the collector at the port of San Diego, who indorsed on the manifest a statement thereof, and cleared the vessel for Portland, with the cement on board, first taking a bond from the agent of the vessel, conditioned for the delivery of the cement at Portland, where it was unladen for the first time since leaving London.

On arriving here the defendant refused to allow the vessel to enter at the port, and "exacted" from the consignee thereof a tonnage tax of 50 cents a ton on her registered tonnage, amounting to $793.50, which sum the plaintiff, as such consignee, paid to the defendant under protest.

The Largo Law did not take on any cargo at San Diego, or elsewhere in the United States, for delivery at Portland or elsewhere.

That on November 7th, and within 10 days from the "exaction" of said tax, plaintiff gave notice in writing to the defendant of his dissatisfaction with said decision, specifying therein clearly and distinctly the grounds of his objection thereto, and of his intention to appeal to the secretary of the treasury therefrom; and within 30 days from the "exaction" of said tax and the date of said decision the plaintiff took such appeal, which was dismissed on March 11, 1890, when this action was commenced within 90 days thereafter.

The district attorney filed a general demurrer to the complaint, to the effect that it does not state a cause of action, and the court is without jurisdiction.

On the hearing, the point was made that the allegation in the complaint that the notice to the collector was given within 10 days from the "exaction" of the duties is not the equivalent of the language of the statute, (section 2931, Rev. St.,) which provides that it must be given within 10 days from the "ascertainment and liquidation" of the same.

The "exaction" of this tax consists in ascertaining the amount of it and demanding and receiving the same, which necessarily implies the payment thereof.

The "ascertainment and liquidation" of the tax implies the same thing. The term "liquidation," as used in the statute and in the law generally, signifies "to clear up; as, by settlement and payment." Worcest. Dict. "Liquidation."

Another point of the same character was made, to the effect that it is not alleged in the complaint, in the language of the statute, (section 2931, Rev. St.,) that the grounds of the objection to the collector's decision were "distinctly and specifically" set forth in the notice to him, but only that they were "specified therein clearly and distinctly."

Though it is generally better to follow the language of the statute in such cases, the words used are sufficient for the purpose.

Section 3011, Rev. St., gives any person an action to recover money paid to any collector "as duties," not authorized by law, for the purpose of obtaining "possession of merchandise imported for him," provided a protest and appeal have been had as prescribed in section 2931.

In *Re Laidlaw*, 42 Fed. Rep. 401, the question whether the Largo Law was liable to the payment of a tonnage tax or duty, on this occasion, was carefully considered by me. The inquiry involved the consideration and construction of sections 2779, 4219, 4347, Rev. St., and the conclusion reached was stated as follows:

"Taking this legislation as a whole, it appears to me that the duties paid at San Diego on the cement destined to Portland were improperly paid, and that the collector should have required the payment of the duties thereon at this port, and that the vessel was not liable for the tonnage tax imposed on it."

Section 4347 permits merchandise brought from a foreign port in a vessel belonging in whole or part to a foreigner, and not "unladen," to

be transported therein from one port of the United States to another; and section 4219 provides:

"Upon every vessel not of the United States, which shall be entered in one district from another district, having on board * * * merchandise taken in one district, to be delivered in another district, duties shall be paid at the rate of fifty cents per ton."

The mere fact that the duty on this cement was paid or attempted to be paid at San Diego, as a matter of convenience or otherwise, did not amount to an unlading of it there; and, unless it was unladen as a matter of fact, it could not have been taken on there within the purview of section 4219. The "unlading" and "taking" mentioned in the statute is real, physical unlading and taking, and not a constructive or fictitious one.

The only other point made in support of the demurrer is that the decision on the appeal to the secretary was, under the Act of July 5, 1884, (23 St. 118,) in fact made by the commissioner of navigation, and is by said act made final, and is therefore a bar to this action.

This act is entitled "An act to constitute a bureau of navigation in the treasury department." The commissioner created by it is charged, "under the direction of the secretary of the treasury" with many duties concerning "the commercial, marine, and merchant seamen of the United States;" and, by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2931, 3011, Rev. St., as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department.

But, on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to side track into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors.

The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is "final" in the department, as it would not be but for this provision of the statute.

This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away.

The appeal to the department has simply been decided by the commissioner, rather than the secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once.

And, even if it were plain that congress in the passage of this act intended to deprive the plaintiff of all redress in the courts, might he not in good reason claim that the act is so far unconstitutional and void, as being contrary to the fifth amendment, which declares that no person shall be deprived of his "property without due process of law?"

The demurrer is overruled.

McCALL *v.* ELLINGER *et al.*

(Circuit Court, N. D. Illinois. July 22, 1890.)

1. PATENTS FOR INVENTIONS—NOVELTY.
Letters patent No. 233,425, issued October 19, 1880, to John A. McCall, for a "flambeau" consisting of an oil-pot with a wick tube extending up from it, and beneath the oil-pot a chamber containing powder to be blown into the flame through a tube with a valve at its upper end, are void for want of novelty.

2. SAME—INFRINGEMENT.
Said patent is not infringed by a flambeau containing a valve in the powder tube, instead of in the tube through which the operator blows.

In Equity.

M. R. Powers, for complainant.

Poole & Brown, for defendant Cragin Manufacturing Company.

Hofheimer & Zeisler, for defendant Ellinger.

BLODGETT, J. The bill in this case charges the infringement by defendants of letters patent No. 233,425, granted October 19, 1880, to the complainant, John A. McCall, for a "flambeau," and seeks an injunction and accounting. The suit was disposed of by stipulation between the parties as to the defendant Ellinger several months since, and has been brought to hearing on pleadings and proofs only as to the defendant the Cragin Manufacturing Company. The device covered by the patent is a flambeau, or torch, to be used in processions, and on other occasions when light and exhibitions of fire-works are desired, and consists, briefly, in an oil-pot, with a wick-tube projecting upwardly therefrom, and underneath the oil-pot a receptacle for the introduction of powder, usually lycopodium, to be blown through a tube, projecting upwardly through the oil-pot so as to bring the powder in contact with the flame, and produce an increased flame and colored light. Infringement is charged only as to the first claim, which is:

"(1) A flambeau, or torch, composed of the casing inclosing an oil-chamber at its upper end, and a powder-chamber below at its lower end, the central tube disposed with its lower end near to the lower end of the powder-chamber, and with its upper end extended through the oil-chamber, and having

its open mouth arranged between and about on the same plane with the mouths of the wick-tubes, the blow-pipe furnished with a mouth-piece on its lower end, and having its upper end carried into the powder-chamber and connected with the central tube, and the valve seated in the upper end of the blow-pipe, substantially as and for the purposes set forth."

The defenses relied upon are: (1) That the patent is void for want of novelty; (2) that defendant does not infringe. It appears abundantly from the proof introduced in the case that this patentee was by no means the first in this field of invention. Many devices seem to have been patented in this country and elsewhere having substantially the same objects as sought by the patent now in question. The claim under consideration is a combination claim, and is for (1) a casing inclosing an oil-pot with a powder-chamber below the oil-pot; (2) a central tube passing downward through the oil-pot into the lower portion of the powder-chamber, so arranged that the powder, when expelled from the powder-chamber through the tube, will be delivered into the flame produced by the burning wick; (3) a blow-pipe furnished with a mouth-piece on its lower end, and having its upper end carried into a powder-chamber, and connected with the central powder-tube, so that the blast of air through the blow-pipe will expel a portion of the powder through the powder-pipe into contact with the flame; (4) a valve seated in the upper end of the blow-pipe. In the English patent to Colomb & Bolton, of September 24, 1867, a torch, or flambeau, is shown, having an oil-pot, not mounted exactly upon or over the powder-chamber, but the oil-pot is attached to one side and reaches partly over the top of the powder-chamber. There is also a pipe extending downward from the oil-pot into the powder-chamber, and a blow-pipe extending upward through the staff or handle of the torch into the powder-chamber, which is provided to be supplied with air by small bellows attached to the staff or handle of the torch. I find in this patent, therefore, substantially all the elements of the complainant's patent,—a powder-chamber; an oil-pot mounted upon one side or near the shoulder, as it might be said, of the powder-chamber, with a wick extending upward from the oil-pot, centrally over the powder-chamber; a powder-pipe extending upward from the powder-chamber so as to deliver the powder at the base of the burning wick; a blow-pipe extending into the powder-chamber so arranged that a blast of air shall expel the powder in the powder-chamber through the powder-pipe into the flame, and with a valve in the blow-pipe. It is true, as I have already said, that the oil-pot is not exactly mounted on the top of the powder-chamber, but it is above the powder-chamber, or rather above one side of the powder-chamber, and it would require only mechanical skill to cover the entire upper part of the powder-chamber with the oil-pot, if that were deemed desirable, rather than to cover only a portion with the same. So, too, the air to be forced into the powder-chamber to expel the powder into the flame, is supplied by a bellows instead of the lungs of the operator; but these are only immaterial changes, and do not affect the principle upon which the English device operates, and, in the light of this patent

alone, I do not see how any claim for novelty can be maintained in favor of the complainant's patent. The proof also shows the American patent of April 11, 1876, to George W. Aldrich and Emil Laas, which shows a powder-box with an oil-pot surrounding the powder-box. Several other devices are also shown; notably, the Shaler patent of August 1, 1876, where the oil-chamber is located above the powder-chamber.

But, if there were room for doubt in regard to the want of novelty in the complainant's device in view of the English patent to which I have referred, I think there can be no doubt that defendant's device does not infringe this first claim of the complainant's patent, or either of the claims. The defendant has, to some extent, manufactured flambeaux, or torches, made in accordance with a patent granted August 26, 1884, to W. M. Bristol, in which the oil-pot surrounds the upper portion of the powder-chamber. There is in the defendants' device a blow-pipe extending upward through the handle of the torch into the powder-chamber, by means of which a blast of air can be driven from the lungs of the operator, through the powder-tube, to the base of the burning wick, but there is no valve in the blow-pipe of the defendant's torch; the valve in the defendant's device being located in the powder-pipe instead of the blow-pipe, a change in the arrangement, which, according to the testimony in the case, is substantial in its character, and produces a much safer and more reliable torch. The complainant, it seems to me, is by the first claim of the patent limited to a torch in which the valve shall be found in the blow-pipe, instead of the powder-pipe, and hence, I think, the defense of non-infringement is well taken in the case. For these reasons the bill will be dismissed for want of equity.

MARKS ADJUSTABLE FOLDING CHAIR CO., Limited, *v.* WILSON *et al.*

(Circuit Court, S. D. New York. July 22, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENTS—INVALID CHAIRS.
   Claim 1 of letters patent No. 173,071, issued February 1, 1876, to C. V. Sheldon for improvements in invalid chairs, is necessarily limited by the specifications to a chair in which the pawls, *a*, are located near the center of gravity of arms, E, and in which the bar, S, is below the point of suspension of the pawls; and said patent is not infringed by the Bohsert chair, in which the ends of the rod engage racks below the seat, and the pawls, *a*, above the rod, S, are omitted.
2. SAME—PRIOR STATE OF THE ART.
   Claim 2, which is for the pawl plate, K, on the foot-rest, I, in combination with ratchet bars, L, attached to the chair legs, is not, in view of the limited interpretation required by the prior state of the art, infringed by the Bohsert chair.
3. SAME—COSTS.
   Where complainant fails upon the main issues, and succeeds only upon an issue of trivial importance, costs will not be allowed.

In Equity.

This suit is brought by the Marks Adjustable Folding Chair Company, Limited, for an alleged infringement by John M. Wilson and Andrew M.

Wilson of the first and second claims of United States letters patent No. 173,071, granted February 1, 1876, to Cevedra B. Sheldon, for an improvement in invalid chairs and lounges. The patent recites:

"My invention relates to that class of easy chairs which have an adjustable foot-rest arranged to be raised upon its pivots to a horizontal position, and a back to fall down on a level with the seat, to form a bed or lounge, * * * and the invention consists of an improved contrivance of the adjusting back support, and also improved contrivance of the adjusting foot support."

The first and second claims of the patent in issue herein are as follows:

"(1) The arms, E, pivoted to the front standard, C, and having pawls, *a*, upon their inner sides, in combination with the ratchet bars, F, placed below the upper edge of the seat bars and the connecting rods, S, beneath the seat, rigidly attached to the pendent extremities of the arms, substantially as set forth. (2) The pawl plate, K, on the foot-rest braces, I, in combination with ratchet bars, L, attached to the chair legs, substantially as specified."

Concerning the first claim the patent states:

"My improvement of this part of the chair consists of the ratchet bars, F, attached to the sides of the seat frame, in combination with the arms, E, rigidly attached to and connected by a rod, S, passing beneath the seat, the said arms carrying upon their inner sides pawls, *a*, which engage with the ratchet-bars.

"The arms, E, are pivoted to the standards, C, so as to allow the pawls, *a*, to rest from their own gravity, and that of the hanging-rod, S, naturally upon the ratchets, for holding the back up. * * * The arms, E, extend some distance below the seat, and thereby bring the pawls near the center of gravity of the said arms, thus diminishing the chances of accidental displacement.

"The bar, S, connecting the arms, holds the pawls in proper lateral position, makes them both operate simultaneously, and its weight, being below the point of suspension, gives steadiness to the devices, and insures the automatic engagement of the pawls with the ratchet."

And concerning the second claim the patent recites:

"G is the foot-rest frame, which is pivoted to the chair-seat in the ordinary way at H, and has legs, I, to hold it up for a bed, and also to hold it at different inclinations for a foot-rest to the chair. Commonly, these legs have had a series of notches in the under side to catch on the cross-bar, J, to hold the rest up more or less; but the arrangement is unsatisfactory, as the notches have to be a certain width for the thickness of the bars, and a certain distance apart for strength, which, together, prevent making the adjustment as fine as it is desired. I therefore attach a thin pawl blade, K, to the ends of these legs, and attach firmly-notched ratchet bars, L, to the chair legs, to receive the same, and thus obtain the fine adjustment desired."

In the Bobsert chair, which is claimed to be an infringement of the patent, the ends of the rod engage racks below the seat; and the pawls, *a*, above the rod, S, are omitted.

Andrew J. Todd, for complainant.

Jeroloman & Arrowsmith, (*Charles C. Gill*, of counsel,) for defendants.

WALLACE, J. At the hearing of this cause, I decided that the defendants had not infringed the second claim of the patent in suit, in

view of the limited interpretation of that claim required by the prior state of the art, and reserved for further consideration the question of the validity of the first claim, and its infringement by the defendants. After an examination of the record, I am of the opinion that the first claim is not destitute of novelty, or otherwise invalid, but that it is necessarily limited by the language of the specification to a chair in which the pawls, *a*, are located near the center of gravity of the arms, E, and in which the bar, S, is below the point of suspension of the pawls. Upon this construction the claim is not infringed by the Bohsert chair. The defendants have infringed the claim by the sale of three chairs, part of a lot of four or five that they purchased with the stock in trade of their predecessor in business. The complainant is consequently entitled to a decree; but as it has failed upon the main issues in controversy, and has succeeded only upon an issue of trivial importance, costs will not be allowed.

STANDARD PAINT CO. *v.* REYNOLDS *et al.*

(*Circuit Court, D. New Jersey.* August 20, 1890.)

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—INJUNCTION.

Where the answer denies the charge of infringement, and shows that the novelty of plaintiff's invention is doubtful, a preliminary injunction should not be granted.

In Equity.

Felix Jellinik and *Willard Parker Butler*, for complainant.

T. B. Wakeman, for defendants.

GREEN, J. This matter is brought before the court upon a motion for a preliminary injunction based upon the bill of complaint, the answer of the defendants, and the accompanying affidavits. The complainant, in its bill, charges the infringement of certain letters patent granted to its assignors, Pearce & Beardsley, for "an improvement in the production and manufacture of paper, having water-proof, non-conducting, and other valuable properties and qualities," which letters patent are numbered "No. 378,520," and bear date February 28, 1888. The invention protected by these letters patent consists in the coating, impregnating, or saturation of paper with a product or substance known as "maltha," which is defined to be "the solid residuum obtained in the distillation of the heavier grades of petroleum." The bill charges that the defendants are manufacturing and putting upon the market a paper which is identical, practically, with the paper which the complainant manufactures under the letters patent referred to, and is rendered identical by being coated, impregnated, or saturated with "maltha" in palpable and direct infringement of the complainant's rights, and to its great pecuniary loss, and hence they invoke the remedial power of the court. The defendants have answered under oath, fully denying every material

allegation of the bill. Especially emphatic is their denial of infringement. They admit the manufacture of a paper possessing in a high degree the qualities, virtues, and characteristies of the paper manufactured by the complainant under its letters patent, but they positively deny the use of "maltha," or any equivalent of "maltha," in such manufacture. They claim to have invented a new compound, never before known, which applied to paper, produces the result they seek, and for which compound they have applied for letters patent, which letters have been granted since the answer was filed. They give frankly the formula of this compound. Apparently maltha does not form a part of it. Beyond this denial of the chief allegations and charges of the bill the answer goes still further. The defendants boldly charge and assert that the patent of the complainant is wholly invalid because of lack of novelty in, and the prior use of, the alleged invention, and both American and English patents are annexed to the answer, antedating by several years the patent of the complainant, in which the coating of paper, by the residuum of the distillation of petroleum, is claimed by the respective patentees. The affidavits annexed to the bill and answer are strongly corroborative of the charges, allegations, and statement made in each, respectively, and are, of necessity, therefore, very contradictory.

It is a well-settled practice when the material allegations of a bill are fully denied in the answer, under oath, that no injunction will issue before final hearing. And this is quite strictly adhered to, although the bill discloses grounds of equitable relief. In the case under consideration there are clear, explicit, and circumstantial denials by the defendants, under oath, of every allegation made and put forward by the complainant as a basis for the granting of the preliminary injunction. Such denials must be a bar to the complainant's present right to the writ. As the case is now presented to the court upon the pleadings, the equities of the bill are fully answered. Of course, under these circumstances, there can be no preliminary injunction at this stage of the cause. But were this not so, there is another feature in the cause which must defeat the complainant's motion. The answer not only denies the alleged infringement, but as well calls in question the validity and force of the letters patent in question. The defendants charge want of novelty and prior use, and they produce before the court, in support of these allegations, affidavits of reputable witnesses testifying thereto, as well as letters patent, both English and American, which certainly antedate the patent of Pearce & Beardsley, and appear, to some extent, at least, to cover or comprise identical or strongly similar inventions to that claimed in this cause. A very serious question is thus raised, and one which ought not to be determined or disposed of on a motion for a preliminary injunction. In *Illingworth* v. *Spaulding*, 9 Fed. Rep. 154, a case very similar to the one under consideration, Judge NIXON, in this court, used this terse language:

"This is an application for a preliminary injunction. None should ever be granted where the answering affidavits show a reasonable doubt about the novelty or validity of the complainant's patent. The complainant, in such

case, must wait for his injunction until the final hearing, when the court will be better able, upon the proofs, to ascertain the facts."

I think the practice, so approved by Judge NIXON, is sound, and I shall follow it. The motion for preliminary injunction is denied.

STEINER FIRE-EXTINGUISHER CO. v. HOLLOWAY.

(*Circuit Court, D. Maryland.* June 27, 1890.)

PATENTS FOR INVENTIONS—NOVELTY—CHEMICAL FIRE-EXTINGUISHERS.

The fourth claim of patent No. 147,442, February 10, 1874, to John H. Steiner, for improvement in chemical fire-extinguishers, *held* valid, the defendant having admitted the infringement, and all the testimony adduced tending to support the novelty and patentability of the combination.

In Equity.

J. J. Alexander and *John P. Adams*, for complainants.

R. W. Applegarth, for defendant.

MORRIS, J. This is a bill in equity for an injunction and an account, alleging infringement by the defendant of letters patent No. 147,442, dated February 10, 1874, on application filed January 5, 1874, granted to John H. Steiner for improvement in chemical fire-extinguishers. The infringement charged relates solely to the fourth claim of the patent, which is for the following combination:

"(4) A chemical fire-engine, consisting of a wheeled frame provided with a generator or extinguisher, and with a hollow-journaled reel, N, the latter having its journal connected permanently to the generator by a pipe, M, and provided with a hose, O, coupled to it as shown and described."

The patentee disclaims any novelty in the hollow-journaled reel itself, and in his specifications states:

"I am aware that a hollow-journaled reel, such as used by me in this engine, is not new, and therefore I lay no claim thereto except in connection with the generator and connecting pipe as shown."

Although by the defendant's answer almost every possible defense is pleaded, no proof was introduced to support any one of them except that of prior invention, and in support of that only four prior patents were filed, and no other proof of prior publication or known use was produced. The defendant, who has been a leading manufacturer of chemical fire-extinguishers since 1872, in his own testimony admitted the infringement, and substantially admitted the novelty and patentability of Steiner's fourth claim. It is proven that the defendant has desired to obtain a license from the complainant, and the admissions in his testimony and the weakness of his defense cast some doubt upon the seriousness of this contest.

Some difficulties with regard to the Steiner fourth claim suggest themselves upon an inspection of the claim. They arise from apparent want

of novelty and patentability. It was not new to use ordinary hose wound on an ordinary reel, mounted upon the same wheeled carriage with the generators of a chemical fire-extinguisher. This is shown in patent No. 131,414, to Stillson & Kley, September 17, 1872. It is admitted that the hollow-journaled reel of itself was not new; and upon first impression it would seem that there was no invention in substituting the hollow-journaled reel for the ordinary reel. There is no doubt, however, that the proof shows that this substitution is a very great improvement in the usefulness and efficiency of the machine for the purpose for which it is designed. The hollow journal of the reel is permanently connected with the generator, or with the receiver of the generator, by a metal pipe controlled by a stop-cock, so as to be always ready for instant use, and so that any required length of hose can be uncoiled and used without severing the permanent connection between it and the generator, and without doubt this is a great advantage in a machine which depends for its usefulness upon the quickness with which it can be put to work.

Another difficulty which suggests itself upon first impression is whether, after the reel and the generator are permanently connected, they do not each operate just as before, remaining simply an aggregation of separate elements, without any new result produced by their union. But, contrary to this first impression, all the proof which has been produced, including the testimony of the defendant himself, tends to show that not only is the efficiency of the machine as to its readiness for instant use greatly improved by having the connection between the hose and the generator permanent, and the hose so attached that it can be used without uncoiling more than is actually required, but that the hollow journal itself acts as a revolving receiver for the gas and water, and effects a more permanent commingling of them, and also more perfectly neutralizes any free acid which may be forced from the generator, and that it eliminates the risk of the escape of the gas without the water. Thus it is claimed that the hollow journal performs a new function, and avoids a difficulty encountered in other contrivances in which there was a liability of alternate discharges of gas and water, the two not being properly commingled, and also avoiding the risk of a discharge of free acid which had not been entirely neutralized by thorough mixing. This, if true, is a new and beneficial result, due to the patented combination, quite apart from the mere mechanical convenience of having the hose and the generator permanently attached one to the other, and it relieves the claim from the objection which was fatal in *Hailes* v. *Van Wormer*, 20 Wall. 353, and *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 7 Sup. Ct. Rep. 1034.

As showing the utility of the Steiner combination, it is testified that since it has come into use it has become an essential part of all chemical fire-extinguishers of the class on which the defendant uses it, and that there is no market for those which do not have it; and as evidence that it did require invention to contrive it, there is proof that, although the difficulties which it is said to meet were well known to many manufacturers, who were all trying to improve their machines, no one discovered its advantages until Steiner introduced it, since which it has been ac-

knowledged to be an essential feature of a good wheeled chemical fire-extinguisher. With all the testimony in the case tending in one way, and with the legal presumption in favor of the validity of the patent to support it, it must be held, for the purposes of this case at least, that the Steiner fourth claim is valid, unless the four patents put in evidence as anticipations defeat it. These four patents are: (1) No. 131,414, September 17, 1872, to Stillson & Kley. This patent shows only the ordinary solid spindle hose-reel, and not the hollow-journaled reel, which is the only element in controversy in the present case. (2) No. 142,488, September 2, 1873, to O. R. Mason, for improvement in devices for thawing ice from water or gas pipes. This shows the hollow-journaled reel, in connection with a force-pump, but suggests nothing which the hollow-journaled reel alone would not as well suggest. (3) No. 142,637, September 9, 1873, to Finley Latta, for improvement in chemical fire-extinguishers. It shows a rotary generator, around which the hose is wound, so that the generator itself serves as a hollow journal. The defects of this apparatus are quite obvious, and the testimony shows that it was practically useless, and never could work, and it does not seem to me to be a step in the direction of what was accomplished by Steiner. (4) No. 146,386, January 13, 1874, to John Dillon, for an improvement in fire-extinguishers. This shows a hollow-journaled reel for a hose-pipe, to be connected with the ordinary water supply, and to be affixed to the wall of a building. It does not seem to me to suggest anything in the direction of the complainant's device which the hollow-journaled reel would not itself suggest. I do not find any one of these four patents to be an anticipation. I will sign a decree in usual form in favor of the complainant.

DEDERICK *v.* WILLSON.

(Circuit Court, E. D. Pennsylvania. April 23, 1890.)

PATENTS FOR INVENTIONS—PRIOR STATE OF THE ART—INFRINGEMENT.

The first claim of letters patent No. 170,997, to Peter K. Dederick, dated December 14, 1875, reading as follows: "In a bailing-press, the combination of the beater or feeder, E, with the lever, L, and the rod, *e*–2, for the purposes herein set forth," —is not invalid in view of the prior state of the art.

This was a bill in equity to recover for the infringement of letters patent No. 170,997, granted to Peter K. Dederick, the complainant, dated December 14, 1875, for improvements in bailing-presses. The first claim only of the patent, covering a peculiar kind of automatic feeding appliance, was put in issue. It reads as follows: "In a bailing-press, the combination of the beater or feeder, E, with the lever, L, and rod *e*–2, for the purposes herein set forth." The defense relied upon was want of invention, in view of the following patents: Walker, No. 27,584; Moore, No. 83,080; Cooper, No. 28,970; and Dederick, No. 152,084.

Church & Church, for complainant.
George H. Knight and *Lysander Hill*, for defendant.
Before McKENNAN and BUTLER, JJ.

PER CURIAM. We do not find anything in the state of the art that would justify us in declaring the patent in suit invalid. It is therefore sustained. The infringement is clear. A decree will therefore be entered for the complainant, with costs.

THE MIRANDA.

THE JOGGINS RAFT.

LEARY *v.* THE MIRANDA.

NEW YORK, N. F. & H. S. S. Co., Limited, *v.* LEARY.

(*Circuit Court, E. D. New York.* June 26, 1890.)

TOWAGE—RAFT—CONTRACT—STORM—NEGLIGENCE.

The owner of the steamer Miranda contracted, by a written charter-party, to tow a large raft of logs by sea from Port Joggins, Nova Scotia, to New York. The tow left Port Joggins on the 6th of December, 1887. On the 18th, in the midst of a heavy gale, the towing hawsers parted. The steamer lay by the raft for a time, and then started for New York, arriving there on the 22d. The raft became a total loss. Suit was brought to recover for the loss of the raft, and a cross-action to recover the towage money under the contract. The raft-owner claimed various faults in the Miranda: (1) That the original contract had been modified by an agreement that the raft should be towed to Eastport for orders, and not directly to New York, which modification had been violated. *Held*, that such agreement was not proved. (2) That the tow was taken to sea against the protest of a representative of the raft-owner aboard the Miranda. *Held*, that the charter-party contained no provision which gave any one power to direct the master of the Miranda where to go, and, on the evidence, the master committed no breach of duty in going as he did, for at the time he made such determination the weather was fine and the danger of a voyage to New York was not so obvious as to make the attempt negligence. (3) That the contract was violated when the master determined to go outside Nantucket shoals, instead of through Vineyard sound. *Held* that, under the then known facts of the availability of Vineyard sound for the passage of such a tow, it was no breach of the master's duty to omit to go through that sound. (4) That the master's failure to keep near ports of safety caused the loss. *Held* that, under the condition of weather which existed when the master determined to go outside, such failure was no breach of duty. (5) That the Miranda had insufficient hawsers and stores. *Held*, that such insufficiency was not proved. (6) That there was fault in not sooner sending the Miranda out again to look for the raft after arrival of the steamer at New York. *Held*, that this was no fault, as by the time the steamer's necessary repairs were finished it had become evident that further search was useless. The libel for the loss of the raft was therefore dismissed, and the cross-libel for the towage money sustained. Affirming 40 Fed. Rep. 533.

In Admiralty. On appeal from district court. See 40 Fed. Rep. 533.

Action by Leary, owner of a raft known as the "Joggins Raft," against the steamer Miranda for negligence in towage, resulting in the loss of the raft. Cross-action by the owner of the Miranda for towage money.

On appeal to the circuit court in the case of *Leary* v. *The Miranda*, the findings of the circuit justice were as follows:

"In this case I find the following facts:

"*First.* During the spring, summer, and autumn of 1887, a log raft was constructed at Port Joggins, Nova Scotia, on the shore of the Bay of Fundy, for the libelant, James D. Leary, under the superintendence of one Robertson, who had an interest in the profits of the enterprise. The raft consisted of 21,000 round timbers ranging from 10 to 30 inches in diameter and from 35 to 70 feet in length, and contained in all 3,000,000 feet of timber. It weighed 6,500 tons. It was 525 feet long, about 33 feet high and 50 feet beam, tapering to a diameter of 15 feet at each end. The raft was built in a cradle on the shore under a patent owned by Robertson, and was designed to be towed to New York and there to be broken up, as an economical method of transporting the timber of which it was constructed. Through the center length of the raft was a chain, from which at stated intervals smaller chains radiated to the circumference, and at the circumference each set of radiating chains was bound together by another chain encircling the raft. These sets of radiating chains were about 15 feet apart. The design was that the raft should be towed by the center chain. Any strain put upon the center chain, either at the forward end or the after end, was transmitted through the radiating chains to the outside chains, and so served to bind the raft together. The heavier the strain upon the center chain, the more closely bound was the raft.

"*Second.* The Miranda is an iron steamer of a registered tonnage of 734 tons, her length is 220 feet, her beam 32 feet, her depth 24 feet. She was built in England in 1884, and thereafter was maintained as a freight and passenger steamer between New York, Newfoundland, and Nova Scotia. Her agents in New York were Bowring & Archibald.

"*Third.* The raft was launched on the 15th of November, 1887. On the 9th of November, the libelant applied, through a broker, to Bowring & Archibald, to consider a proposition for towing the raft from Two Rivers or St. Johns, New Brunswick, to New York, and after that date there was some negotiation between the libelant and Messrs. Bowring & Archibald, looking to the employment of the steamer Miranda, then at Halifax, for the service, in the event of the proposed launch being a success. These negotiations failed, and, after the launching of the raft, and on the 16th of November, 1887, a charter-party was made in the terms following, to-wit:

"'This contract made the 16th day of Nov., 1887, between Bowring & Archibald, agts. of the Br. str. Miranda, of 734 tons reg., and J. D. Leary, of N. Y., owner or agent of the log raft recently launched in Nova Scotia, witnesseth, that the said Bowring & Archibald hereby agree to charter the said str. Miranda to tow said log raft from St. Johns, N. B., or other safe port in N. B. or Nova Scotia where the str. can always lie afloat, to the port of New York, on the following terms and conditions: That the said J. D. Leary shall pay to the said Bowring & Archibald for the use of the str. Miranda the sum of three thousand dollars ($3,000) U. S. currency for towage of said log raft from said safe port in N. B. or N. S. to the port of New York, payable in New York on delivery of said log raft. Should the log raft get adrift, str. Miranda to search for raft until she finds her and again takes her in tow, or until she is ordered to desist by charterers' representatives on board said str., or, in the event of no such representative being on board, until the captain thinks it advisable to desist. In case the steamer finds the raft, the str. is to be paid at the rate of three hundred dollars ($300) per day additional or proportional for any part of a day while searching. Should raft be lost, str. shall not receive amount named for towage, but shall be paid at the rate of three hundred dollars ($300) per day for each day, and proportionally for every part of a day, from the time she leaves said port in N. B. or N. S. as above, until she arrives at New York. It is agreed that charterer may have

a representative on board said str., whose passage will be free, and the officers and crew shall render all the assistance and facilities that may be required for the safety of the said log raft. Steamer to pay all her own port charges, and to provide towing lines only. Demurrage, two hundred and fifty dollars ($250) per day, should steamer be detained at said port in N. B. or N. S. waiting for raft. It is understood and hereby agreed that this contract is completed on the part of Bowring & Archibald when said log raft has been delivered in any part of the port of New York. Steamer to have a lien on said log raft for towages and other services as above, and for demurrage if incurred. Penalty for non-performance of this contract, estimated amount of damages.'

"Mr. Leary was at the time absent from New York, but after his return, and before the steamer sailed from New York, the clause, 'It is agreed that charterer may have a representative on board said str., whose passage will be free,' was altered to read, 'It is agreed that charterer may have representatives on board said steamer, but not exceeding three, whose passage will be free.'

"*Fourth.* At the time the charter was made the Miranda was on a voyage from Halifax to New York. She arrived in New York on the 21st of November, and at once commenced taking on board special equipment for the towing of the raft. This equipment was furnished by Bowring & Archibald upon consultation with Leary and one Littlefield, who was introduced to Bowring & Archibald by Leary as his representative who would accompany the raft. Later, upon Leary's suggestion that he might desire to have one or two men accompany Littlefield, the charter was modified as above noted. Bowring & Archibald complied in all particulars with the suggestions made by Leary and Littlefield. The equipment for towing consisted of a 14-inch manilla hawser, 200 fathoms long, not entirely new; a 10-inch manilla hawser, 1,000 feet long, which was new; a 5-inch wire hawser, 450 feet long,—all of which were procured by hire from the Merritt Wrecking Company; a new 10-inch manilla hawser, 600 feet long, purchased by Bowring & Archibald in New York; the ship's 9-inch manilla hawser, 540 feet long, which had never before been used; and the ship's 3½-inch wire hawser, which had never before been used. Besides these, there was a supply of shackles and chains, selected by Littlefield at the expense of the ship. The size and number of hawsers was far in excess of that originally proposed by Leary, and every requirement or suggestion made by him in respect to increasing the equipment was accepted by Bowring & Archibald. The steamer's equipment was complete and sufficient.

"*Fifth.* Littlefield had been a ship-master, and had superintended other towing operations for Leary. Littlefield proposed that the towing should be done by three hawsers, one running from a bridle over the stern of the Miranda to the forward end of the raft, and one running from each quarter of the Miranda to the sides of the raft. With this system of towing in view, certain timbers were taken on board at New York to strengthen the after-chocks of the steamer. It was arranged that the steamer should proceed from New York to the Bay of Fundy in ballast, but, upon Leary's suggestion that she would not tow well unless she was fully three-quarters loaded, it was arranged that she should there take cargo or ballast, to give her the requisite stability for towing, before proceeding to the raft. To that end a charter was made with King & Co. for a cargo of plaster to be taken on board at Windsor, provided the master of the Miranda should find Windsor a proper place for his vessel to enter. To provide against the contingency that the plaster charter might fail, Leary gave to Bowring & Archibald letters of introduction to Robertson and one Barnhill, requesting them to assist the master in procuring a cargo of coal or lumber, if such should be needed.

"*Sixth.* The steamer left New York in the morning of November 23d, Littlefield being on board, and, after a voyage made long by bad weather and heavy fogs, reached Hantsport in the Bay of Fundy on November 28th. There the master found that he could not procure a cargo of plaster within a reasonable time, and, after making inquiries by telegraph for other cargo, proceeded to West Bay, Parrsboro, to take coal. He arrived at West Bay, Wednesday, November 30th, and there took on board 450 tons of coal, which were lightered to him by the schooner Davida, there not being sufficient depth of water to permit the steamer to go up the river to the coal wharf. The coaling was completed at midnight of Monday, December 5th. While the steamer was lying in West Bay the master procured other timbers from shore and service from shore, to still further strengthen the stern chocks.

"*Seventh.* On Sunday, December 4th, Robertson came on board the steamer, and, upon examining the plans that had been made for towing the raft, announced that, owing to the peculiar construction of the raft, the proposed side hawsers would have an injurious effect, and would assist in tearing the raft to pieces, and that the towage must be entirely by the center chain. After some conference with Littlefield, this system of towing was adopted; and, considering the peculiar construction of the raft, it was the proper system.

"*Eighth.* The Miranda left West Bay at 1 A. M. of December 5th, and reached Port Joggins at 7 A. M. The raft was then lying at anchor, drawing nineteen feet. The work of getting up the raft's anchor and fastening the tow-lines occupied all of the 6th and the 7th, and was not completed until Thursday morning, December 8th. The making fast of the raft to the steamer was done under Littlefield's and Robertson's orders and directions, the work being performed by the crew of the steamer and by men employed from the shore by Robertson. As made up for towing, the 14-inch hawser was shackled to the forward end of the raft's center chain and carried to the port quarter of the Miranda, and thence made fast around her mainmast. This hawser carried the weight of the raft. The after-end of the raft's center chain was led over the top of the raft, and was shackled by means of intermediate steel hawsers and chains to the 10-inch manilla hawser which led to the Miranda's starboard quarter. This hawser was carried slack, and was intended to take a strain only in the event of the principal hawser's breaking. The raft had no rudder or steering apparatus, and carried no crew. At night it carried no lights.

"*Ninth.* On the 8th of December the steamer set sail from Port Joggins with the raft in tow, and on Friday morning, December 9th, was off St. John. At that point the hawsers fouled, and Robertson then suggested that the raft be taken into Eastport and the voyage to New York be abandoned for a time, but, after consultation with Littlefield, and on the hawsers being cleared, approved the prosecution of the voyage to New York. The steamer continued down the Bay of Fundy, and at the close of the day, the weather being fair, her master selected the course to sea outside of Grand Manan, instead of passing between Grand Manan and the main-land. Two days later bad weather came on, with strong winds from the southward, making a sea in which the raft labored heavily, and the raft dragged the steamer, during the continuance of this storm, ten miles back on her course. On Monday, the 12th, the weather moderated, but on Tuesday, the 13th, there was a strong north-west wind and a high cross-sea. On Thursday, the 15th, the weather grew heavy, and at midnight it was blowing a gale, which continued on Friday, the 16th, the steamer rolling rails under and the sea breaking over the raft. On Friday morning, and before the height of the gale, the steamer and raft had reached a point within sixty miles of Block island, but then were driven more than eighty miles further out to sea, the steamer being

powerless to control the raft. On Saturday, the 17th, the wind moderated somewhat, and at noon the steamer resumed her course to New York; but later in the day she was struck by another gale, which, by the morning of Sunday, the 18th, had grown to a hurricane, the wind blowing at times at the rate of over seventy miles an hour. On this morning Captain Leseman, her master, was on the bridge, and the storm was at its height; the wind was from south-south-west; and the sea was running completely over the steamer and raft most of the time. About half-past seven the steamer's engines were slowed, and a few minutes later the port hawser broke. The strain then fell on the starboard hawser, and that strain tore out the bitts of the vessel, to which it was fastened, and tore away certain portions of the deck of the vessel, and the raft was free. A small portion of the starboard hawser was saved by cutting it as it was running out after the bitts were torn out. All through that day the storm continued with such severity that the steamer could not resume a course, but lay hove to. Her crew was exhausted; her hawsers were gone; her bitts and decks were torn; her mainmast was strained. It was determined by all on board the Miranda, including Robertson and Littlefield, that the steamer should go to New York. She arrived at Whitestone, Long Island sound, on December 20th, and came up to New York two days later, and then underwent repairs, which occupied a week or ten days. She was not in condition to go to sea or to search for the raft until these repairs were completed, but on the 21st of December the United States government sent out their ship Enterprise, under command of Captain McCalla, to search for the raft, and to bring it into port, or to lie by the raft and warn vessels of it as an obstruction to navigation. The Enterprise sailed from Brooklyn at 6 P. M. of December 21st, went out through Long Island sound, and on the 24th of December found sufficient floating logs to assure her that the raft was broken up. On the 25th of December the steamer Missouri, bound on a voyage from Baltimore to London, fell in with a field of logs from the raft, extending as far as the eye could reach, and her course lay through this field for five miles. The libelant also sent out the steamer Morse, but she found nothing but drifting logs.

"*Tenth.* The Miranda was tight, staunch, and strong, was fully manned and equipped for the service which she undertook, and was fully provisioned. She prepared for and prosecuted the voyage with due dispatch. The service was a novel one. The enterprise on the part of the libelant was experimental and speculative, and without precedent. In performing the service the master of the Miranda exercised his best judgment, and he, with his officers and crew, were at all times diligent and attentive to the requirements of the situation.

"*Eleventh.* In taking a course to sea, on leaving the Bay of Fundy, instead of following the coast, the master of the Miranda acted upon his own best judgment, after consultation with Littlefield, who agreed with him that such was the better course; and, considering the size and weight of the raft, and its influence upon the steamer in case of storm, it was prudent and proper to proceed to sea instead of hugging the shore.

"*Twelfth.* In not going through Vineyard sound with the raft the master acted upon his own best judgment, formed after consultation with Leary and Littlefield and Bowring, in New York, before leaving for Nova Scotia, all of whom agreed with him. And, considering the draught of the raft, its weight, and the fact that it carried no lights, and the prevalence of fog in Vineyard sound, it would not have been prudent or proper to attempt to take the raft through those narrow waters.

"*Thirteenth.* The raft was lost through the perils of the sea and the inherent difficulties of the enterprise, and without any fault or negligence or omission on the part of the claimant in the performance of its duties.

"On the foregoing facts I find the following conclusions of law:

"*First.* The libelant, having failed to prove that the loss of the raft was the direct and natural result of any want of reasonable care and skill on the part of the Miranda, is not entitled to recover damages in this action.

"*Second.* The claimant is entitled to a decree of this court dismissing the libel, and for its costs in the district court taxed at $814.72, and for its costs in this court, to be taxed."

On appeal to the circuit court in the case of *New York, N. F. & H. S. S. Co., Limited*, v. *Leary* the findings of the circuit justice were as follows:

"In this case I find the following facts:

"*First.* During the spring, summer, and autumn of 1887, a log raft was constructed at Port Joggins, Nova Scotia, on the shore of the Bay of Fundy, for the appellant, James D. Leary, under the superintendence of one Robertson, who had an interest in the profits of the enterprise. The raft consisted of 21,000 round timbers ranging from 10 to 30 inches in diameter and from 35 to 70 feet in length, and contained in all 3,000,000 feet of timber. It weighed 6,500 tons. It was 525 feet long, about 33 feet high, and 50 feet beam, tapering to a diameter of 15 feet at each end. The raft was built in a cradle on the shore under a patent owned by Robertson, and was designed to be towed to New York and there to be broken up, as an economical method of transporting the timber of which it was constructed. Through the center length of the raft was a chain, from which at stated intervals smaller chains radiated to the circumference, and at the circumference each set of radiating chains was bound together by another chain encircling the raft. These sets of radiating chains were about 15 feet apart. The design was that the raft should be towed by the center chain. Any strain put upon the center chain, either at the forward end or the after end, was transmitted through the radiating chains to the outside chains, and so served to bind the raft together. The heavier the strain upon the center chain, the more closely bound was the raft.

"*Second.* The Miranda is an iron steamer of a registered tonnage of 734 tons; her length is 220 feet, her beam 32 feet, her depth 24 feet. She was built in England in 1884, and thereafter was owned and maintained as a freight and passenger steamer between New York, Newfoundland, and Nova Scotia by the libelant, a British corporation duly authorized to carry on such business. Her agents in New York were Bowring & Archibald.

"*Third.* The raft was launched on the 15th of November, 1887. On the 9th of November the appellant applied through a broker to Bowring & Archibald, to consider a proposition for towing the raft from Two Rivers or St. Johns, New Brunswick, to New York, and after that date there was some negotiation between Leary and Bowring & Archibald looking to the employment of the steamer Miranda, then at Halifax, for the service, in the event of the proposed launch being a success. These negotiations failed, and after the launching of the raft, and on the 16th of November, 1887, a charter-party was made in the terms following, to-wit:

"'This contract made the 16th day of Nov., 1887, between Bowring & Archibald, agts. of the Br. str. Miranda, of 734 tons reg., and J. D. Leary, of N. Y., owner or agent of the log raft recently launched in Nova Scotia, witnesseth, that the said Bowring & Archibald hereby agree to charter the said str. Miranda to tow said log raft from St. Johns, N. B., or other safe port in N. B. or Nova Scotia where the str. can always lie afloat, to the port of New York, on the following terms and conditions: That the said J. D. Leary shall pay to the said Bowring & Archibald for the use of the str. Miranda the sum of three thousand dollars ($3,000) U. S. currency for towage of said log raft from said safe port in N. B. or N. S. to the port of New York, payable in New York on delivery of said log raft. Should the log raft get adrift, str.

Miranda to search for raft until she finds her and again takes her in tow, or until she is ordered to desist by charterers' representatives on board said str., or in the event of no such representative being on board, until the captain thinks it advisable to desist. In case the steamer finds the raft the str. is to be paid at the rate of three hundred dollars ($300) per day additional or proportional for any part of a day while searching. Should raft be lost, str. shall not receive amount named for towage, but shall be paid at the rate of three hundred dollars ($300) per day for each day, and proportionally for every part of a day, from the time she leaves said port in N. B. or N. S. as above, until she arrives at New York. It is agreed that charterer may have a representative on board said str., whose passage will be free, and the officers and crew shall render all the assistance and facilities that may be required for the safety of the said log raft. Steamer to pay all her own port charges, and to provide towing lines only. Demurrage, two hundred and fifty dollars ($250) per day, should steamer be detained at said port in N. B. or N. S. waiting for raft. It is understood and hereby agreed that this contract is completed on the part of Bowring & Archibald, when said log raft has been delivered in any part of the port of New York. Steamer to have a lien on said log raft for towages and other services as above, and for demurrage if incurred. Penalty for non-performance of this contract, estimated amount of damages.'

"Leary was at the time absent from New York, but after his return, and before the steamer sailed from New York, the clause, 'It is agreed that charterer may have a representative on board said str., whose passage will be free,' was altered to read, 'It is agreed that charterer may have representatives on board said steamer, but not exceeding three, whose passage will be free.'

"*Fourth.* At the time the charter was made the Miranda was on a voyage from Halifax to New York. She arrived in New York on the 21st of November, and at once commenced taking on board special equipment for the towing of the raft. This equipment was furnished by Bowring & Archibald upon consultation with Leary and one Littlefield, who was introduced to Bowring & Archibald by Leary as his representative who would accompany the raft. Later, upon Leary's suggestion that he might desire to have one or two men accompany Littlefield, the charter was modified as above noted. Bowring & Archibald complied in all particulars with the suggestions made by Leary and Littlefield. The equipment for towing consisted of a 14-inch manilla hawser, 200 fathoms long, not entirely new; a 10-inch manilla hawser, 1,000 feet long, which was new; a 5-inch wire hawser, 450 feet long,—all of which were procured by hire from the Merritt Wrecking Company; a new 10-inch manilla hawser, 600 feet long, purchased by Bowring & Archibald in New York; the ship's 9-inch manilla hawser, 540 feet long, which had never before been used; and the ship's 3½-inch wire hawser, which had never before been used. Besides these there was a supply of shackles and chains, selected by Littlefield at the expense of the ship. The size and number of hawsers was far in excess of that originally proposed by Leary, and every requirement or suggestion made by him in respect to increasing the equipment was accepted by Bowring & Archibald. The steamer's equipment was complete and sufficient.

"*Fifth.* Littlefield had been a ship-master, and had superintended other towing operations for Leary. Littlefield proposed that the towing should be done by three hawsers, one running from a bridle over the stern of the Miranda to the forward end of the raft, and one running from each quarter of the Miranda to the sides of the raft. With this system of towing in view, certain timbers were taken on board at New York to strengthen the afterchocks of the steamer. It was arranged that the steamer should proceed from New York to the Bay of Fundy in ballast, but, upon Leary's suggestion that she would not tow well unless she was fully three-quarters loaded, it was

arranged that she should there take cargo or ballast, to give her the requisite stability for towing, before proceeding to the raft. To that end a charter was made with King & Co. for a cargo of plaster to be taken on board at Windsor, provided the master of the Miranda should find Windsor a proper place for his vessel to enter. To provide against the contingency that the plaster charter might fail, Leary gave to Bowring & Archibald letters of introduction to Robertson and one Barnhill, requesting them to assist the master in procuring a cargo of coal or lumber, if such should be needed.

"*Sixth.* The steamer left New York in the morning of November 23d, Littlefield being on board, and, after a voyage made long by bad weather and heavy fogs, reached Hantsport in the Bay of Fundy on November 28th. There the master found that he could not procure a cargo of plaster within a reasonable time, and, after making inquiries by telegraph for other cargo, proceeded to West Bay, Parrsboro, to take coal. He arrived at West Bay, Wednesday, November 30th, and there took on board 450 tons of coal, which were lightered to him by the schooner Davida, there not being sufficient depth of water to permit the steamer to go up the river to the coal wharf. The coaling was completed at midnight of Monday, December 5th. While the steamer was lying in West Bay the master procured other timbers from shore and service from shore, to still further strengthen the stern chocks.

"*Seventh.* On Sunday, December 4th, Robertson came on board the steamer, and, upon examining the plans that had been made for towing the raft, announced that, owing to the peculiar construction of the raft, the proposed side hawsers would have an injurious effect, and would assist in tearing the raft to pieces, and that the towage must be entirely by the center chain. After some conference with Littlefield, this system of towing was adopted; and, considering the peculiar construction of the raft, it was the proper system.

"*Eighth.* The Miranda left West Bay at 1 A. M. of December 5th, and reached Port Joggins at 7 A. M. The raft was then lying at anchor, drawing nineteen feet. The work of getting up the raft's anchor and fastening the tow lines occupied all of the 6th and 7th, and was not completed until Thursday morning, December 8th. The making fast of the raft to the steamer was done under Littlefield's and Robertson's orders and directions, the work being performed by the crew of the steamer and by men employed from the shore by Robertson. As made up for towing, the 14-inch hawser was shackled to the forward end of the raft's center chain and carried to the port quarter of the Miranda and thence made fast round her mainmast. This hawser carried the weight of the raft. The after-end of the raft's center chain was led over the top of the raft, and was shackled by means of intermediate steel hawsers and chains to the 10-inch manilla hawser which led to the Miranda's starboard quarter. This hawser was carried slack, and was intended to take a strain only in the event of the principal hawser's breaking. The raft had no rudder or steering apparatus, and carried no crew. At night it carried no lights.

"*Ninth.* On the 8th of December the steamer set sail from Port Joggins with the raft in tow, and on Friday morning, December 9th, was off St. John. At that point the hawsers fouled, and Robertson then suggested that the raft be taken into Eastport and the voyage to New York be abandoned for a time, but, after consultation with Littlefield, and on the hawsers being cleared, approved the prosecution of the voyage to New York. The steamer continued down the Bay of Fundy, and at the close of the day, the weather being fair, her master selected the course to sea outside of Grand Manan, instead of passing between Grand Manan and the main-land. Two days later bad weather came on, with strong winds from the southward, making a sea in which the raft labored heavily, and the raft dragged the steamer, during the continuance of this storm, ten miles back on her course. On Monday, the 12th, the weather moderated, but on Tuesday, the 13th, there was a strong

north-west wind and a high cross-sea. On Thursday, the 15th, the weather grew heavy, and at midnight it was blowing a gale, which continued on Friday, the 16th, the steamer rolling rails under and the sea breaking over the raft. On Friday morning, and before the height of the gale, the steamer and raft had reached a point within sixty miles of Block island, but then were driven more than eighty miles further out to sea, the steamer being powerless to control the raft. On Saturday, the 17th, the wind moderated somewhat, and at noon the steamer resumed her course to New York; but later in the day she was struck by another gale, which, by the morning of Sunday, the 18th, had grown to a hurricane, the wind blowing at times at the rate of over seventy miles an hour. On this morning Captain Leseman, her master, was on the bridge, and the storm was at its height; the wind was from south-south-west; and the sea was running completely over the steamer and raft most of the time. About half-past seven the steamer's engines were slowed, and a few minutes later the port hawser broke. The strain then fell on the starboard hawser, and that strain tore out the bitts of the vessel, to which it was fastened, and tore away certain portions of the deck of the vessel, and the raft was free. A small portion of the starboard hawser was saved by cutting it as it was running out after the bitts were torn out. All through that day the storm continued with such severity that the steamer could not resume a course, but lay hove to. Her crew was exhausted; her hawsers were gone; her bitts and decks were torn; her mainmast was strained. It was determined by all on board the Miranda, including Robertson and Littlefield, that the steamer should go to New York. She arrived at Whitestone, Long Island sound, on December 20th, and came up to New York two days later, and then underwent repairs, which occupied a week or ten days. She was not in condition to go to sea or to search for the raft until these repairs were completed, but on the 21st of December the United States government sent out their ship Enterprise, under command of Captain McCalla, to search for the raft, and to bring it into port, or to lie by the raft and warn vessels of it as an obstruction to navigation. The Enterprise sailed from Brooklyn at 6 P. M. of December 21st, went out through Long Island sound, and on the 24th of December found sufficient floating logs to assure her that the raft was broken up. On the 25th of December the steamer Missouri, bound on a voyage from Baltimore to London, fell in with a field of logs from the raft extending as far as the eye could reach, and her course lay through this field for five miles. Leary also sent out the steamer Morse, but she found nothing but drifting logs.

"*Tenth.* The Miranda was tight, staunch, and strong, was fully manned and equipped for the service which she undertook, and was fully provisioned. She prepared for and prosecuted the voyage with due dispatch. The service was a novel one. The enterprise on the part of Leary was experimental and speculative, and without precedent. In performing the service the master of the Miranda exercised his best judgment, and he, with his officers and crew, were at all times diligent and attentive to the requirements of the situation.

"*Eleventh.* In taking a course to sea on leaving the Bay of Fundy instead of following the coast, the master of the Miranda acted upon his own best judgment, after consultation with Littlefield, who agreed with him that such was the better course; and, considering the size and weight of the raft, and its influence upon the steamer in case of storm, it was prudent and proper to proceed to sea, instead of hugging the shore.

"*Twelfth.* In not going through Vineyard sound with the raft the master acted upon his own best judgment, formed after consultation with Leary and Littlefield and Bowring, in New York, before leaving for Nova Scotia, all of whom agreed with him. And, considering the draught of the raft, its weight, and the fact that it carried no lights, and the prevalence of fog in Vineyard

sound, it would not have been prudent or proper to attempt to take the raft through those narrow waters.

"*Thirteenth.* The raft was lost through the perils of the sea and the inherent difficulties of the enterprise, and without any fault or negligence or omission on the part of the libelant in the performance of its duties.

"On the foregoing facts I find the following conclusions of law:

"*First.* The libelant, having performed its contract, is entitled to payment, under the terms of the charter, for twelve days, at $300 per day.

"*Second.* The libelant is entitled to a decree of this court, for $3,600, with interest thereon from the 27th of December, 1887, and for its costs in the district court, taxed at $98.10, and for its costs in this court, to be taxed."

John Berry, for James D. Leary.

Butler, Stillman & Hubbard, for New York, N. F. & H. S. S. Co.

BLATCHFORD, Circuit Justice. I concur entirely with the views expressed by Judge BENEDICT, the district judge, in his opinion in these cases, reported in 40 Fed. Rep. 533, and decrees will be entered in accordance with the findings which I have signed.

CAMPBELL *v.* THE FRANK GILMORE.

(*District Court, W. D. Pennsylvania.* July 19, 1890.)

SHIPPING—LIABILITY OF OWNER—INJURY TO EMPLOYE.

The libelant, a deck-hand, while at work on a steam-boat, accidentally fell and injured his leg. The steward examined the limb, and thought the hurt was not serious, and applied simple remedies. All the officers of the boat supposed it was a sprain. Two days afterwards the boat reached Cincinnati. The libelant did not ask to be sent to the marine hospital there, nor for a surgeon. On the up-trip, by orders, he did some light work, but without compulsion. Eleven days after the accident he entered the marine hospital at Pittsburgh, and it turned out that he had sustained a partial lateral dislocation of the knee-joint, and he is likely to be permanently disabled. There was evidence that he did not receive proper attention at the hospital. *Held*, that he had no cause of action against the owners of the boat.

In Admiralty.

S. A. Will and *Charles A. Sullivan*, for libelant.

Knox & Reed, for respondents.

ACHESON, J. After the most careful consideration of the proofs, I am not able to see that the owners of the tow-boat Frank Gilmore are justly answerable in damages to the libelant. Certainly the accident which befell the libelant was not caused by any fault attributable to them, and on that score the libelant has not the shadow of a case against the respondents. Neither are they at all responsible for the treatment which the libelant's injured leg received at the marine hospital. Was there, then, any wrongful act or culpable negligence on the part of the officers or owners of the boat between the time of the accident on July 6th and the libelant's entrance into the hospital on July 17th, upon which a re-

covery in this suit could be rightfully based? I think not. Undoubtedly, very soon after the accident the fact came to the knowledge of the master and mate of the boat, although, under all the evidence, it is by no means clear that the libelant himself gave them the information, or made any special complaint to either of them as to his condition. It appears, however, that the steward of the boat looked after the libelant, and I think it is satisfactorily shown that he gave the libelant reasonable attention. The steward examined the injured leg, and his judgment was that the injury was not at all serious, and simple remedies were applied with beneficial results. All the officers believed that the hurt was nothing but a simple sprain. True, when the marine surgeon at Pittsburgh came to examine the libelant's leg, he found that he had sustained a partial lateral dislocation of the knee-joint,—but this was not apparent to unprofessional persons, and the officers of the boat had no reason to suspect that the accident was so serious. The libelant's own conduct at the time indicated that he did not regard the injury as a serious affair. In about two days after the accident the boat reached Cincinnati, where there was a marine hospital, which the libelant could have entered for treatment free of charge, yet he did not ask to be sent there, nor did he request the services of a surgeon. The only thing he asked for at Cincinnati was a bottle of arnica to apply to his leg, and this the steward procured. Now, the libelant was a man of mature age, of considerable experience, and of at least average intelligence, and, if he did not understand the serious nature of his injury, how can fault fairly be imputed to the officers for their want of knowledge as to the gravity of the case? As to whether the libelant was relieved altogether from work during the remainder of the trip to Cincinnati, after he was hurt, the testimony is conflicting, but I think the weight of the evidence upon this point is with the respondents. It is conceded that for two days on the return trip from Cincinnati the libelant was wholly off duty. During the rest of the trip up he did some work, but it was light work, at least in the main. I am not convinced that he was constrained to do any work. When the trip to Pittsburgh was completed the libelant left the boat without requesting to be sent to the marine hospital. He was in liquor the next day when he applied to Mr. Jenkins, and the latter did not know him. I think the respondents were not to blame for the delay in the libelant's entrance into the hospital after his arrival at Pittsburgh. And upon the whole I am of the opinion that the libelant has failed to establish any good cause of action against the tow-boat or her owners, and therefore the libel must be dismissed.

RUSSELL et al. *v.* THE TWILIGHT

(*District Court, W. D. Pennsylvania.* July 19, 1890.)

SEAMEN—DISCHARGE—FORFEITURE OF WAGES.

Libelants, deck-hands on an Ohio river tow-boat, were ordered by the mate, during a voyage, to draw ashes from the furnace. They refused, on the ground that it was a fireman's work. Persisting in the refusal, they were put ashore at the next port. *Held*, that the master of the boat was justified in discharging them, but that the libelants had not incurred a forfeiture of their wages for past services rendered on the trip.

In Admiralty.

Suit for wages, etc. Libelants, deck-hands on a tow-boat on the Ohio river, when ordered by the mate to draw ashes from the furnace refused, alleging it was a fireman's work. After warning, they were put ashore at the next port. There was evidence that on that boat it was work to be done by deck-hands, but when hired nothing was said to the libelants on the subject. There was evidence also that this was not the customary work of deck-hands on tow-boats generally.

Barton & Barton, for libelants.

Knox & Reed, for respondents.

ACHESON, J. 1. In any view that can be taken of the case under the proofs, the master of the Twilight was justified in discharging the libelants upon their refusal to "pull ashes" from the furnace when ordered to do so by their superior officer. The service was not an onerous one, and, even if usually, on this class of vessels, it is the work of the firemen, and does not come strictly within the scope of a deck-hand's employment, still the master here, under the circumstances, was well warranted in dismissing the libelants.

2. But I am not prepared to say that the libelants forfeited their wages for past services on the trip. This was not a case of insubordination pure and simple, but the refusal of the libelants to perform this particular work was based, avowedly, upon their supposed rights under the contract of hiring. Moreover, the Twilight sustained no loss or detriment by reason of the conduct of the libelants, and to enforce a forfeiture of wages already earned would be harsh.

3. I am, however, of the opinion that the decree in favor of the libelants should be without an allowance of any costs to them. Their behavior in this matter was not commendable, and, besides, they have sued for more than they are justly entitled to. As the respondents never offered to pay anything, they ought to be charged with the fees of the marshal and clerk. No other costs will be allowed. Let a decree be drawn in accordance with these views.

ANDERSON *et al.* v. BOWERS *et al.*

(*Circuit Court, N. D. Iowa, W. D.* August 29, 1890.)

REMOVAL OF CAUSES—LOCAL PREJUDICE.

Under Act Cong. Aug. 13, 1888, amending Act March 3, 1887, § 2, cl. 4, providing that in actions "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state," may remove the action on the ground of local prejudice, the right of removal does not exist where the controversy is between a citizen of the state wherein the suit is pending on the one side, and a citizen of the same state and a citizen of another state on the other side.

Motion to Remand to State Court.

Van Wagenen & McMillan and *Kauffman & Guernsey*, for complainants.

Henderson, Daniels, Hurd & Keisel, for Orient Fire Insurance Company.

SHIRAS, J. The motion to remand in this case presents the question whether, under the local prejudice clause of the act of congress of 1888,[1] the right of removal is confined to cases wherein all the defendants are citizens of a state other than that in which the suit is pending. The complainants in the cause are citizens of Iowa. The Orient Fire Insurance Company, a corporation created under the laws of the state of Connecticut, and George Provost, are defendants, the latter being a citizen of Iowa. The insurance company filed its petition for a removal of the case on the ground of local prejudice, and the petition was granted, following the ruling made by Judge JACKSON in *Whelan* v. *Railroad Co.*, 35 Fed. Rep. 863. The motion to remand was filed for the purpose of re-presenting the question of the true construction of the statute in this particular.

The original local prejudice act of 1867 provided "that where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, whether he be plaintiff or defendant, if he will file an affidavit," etc. The clause deals with two subjects: (1) It defines the class of controversies that are removable under its provisions; (2) it declares by whom the right of removal may be exercised. To be removable, there must be in the suit a controversy between a citizen of the state wherein the suit is brought and a citizen of another state. Such a controversy existing, then, upon the showing of the existence of local influence or prejudice, the citizen of another state, whether plaintiff or defendant, could remove the case. In cases wherein there was more than one plaintiff or defendant, it was held by the supreme court that all interested in one side of the controversy must be citizens of the state in which the suit was brought, and all interested adversely must be citizens of other states, and furthermore that all the citizens of the state or states, other than that in which the suit was pending, must unite in the application for removal. *Sewing-Mach. Case*, 18 Wall. 553;

[1] Act of August 13, 1888, amending act of March 3, 1887, § 2, cl. 4.

Vannevar v. *Bryant*, 21 Wall. 41. The same construction was applied, when the local prejudice clause was carried into the Revised Statutes, becoming subsection 3 of section 639 thereof. *Society* v. *Price*, 110 U. S. 61, 3 Sup. Ct. Rep. 440; *Hancock* v. *Holbrook*, 119 U. S. 586, 7 Sup. Ct. Rep. 341. In other words, the class of cases to which the local prejudice clause was applicable under the act of 1867 and section 639 of the Revised Statutes was that wherein one side of the controversy was represented by a citizen or citizens of the state wherein the suit was pending, and the other by a citizen or citizens of other states. The clause did not include cases wherein the controversy was partly between citizens of the same state. This was the settled construction of the language used in the act of 1867 and the Revised Statutes, and therefore, when congress enacted the statute of 1888, and used therein the same definition of the class of cases removable on the grounds of local influence or prejudice, is there any escape from the conclusion that it was the intent of congress that the same construction should be applied thereto? It is well settled that where the terms used in a statute have acquired a well-understood meaning, through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject, the presumption is that it was the legislative intent that the same interpretation should be given thereto, unless by qualifying or explanatory additions the contrary intent is made to appear. *The Abbotsford*, 98 U. S. 440; *Claflin* v. *Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507. Are such qualifying words to be found in the act of 1888? In describing the class of suits removable on the grounds of prejudice or local influence, the language is identical with that found in the act of 1867. Both acts define the class to be suits "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." When, however, we reach the part of the clause which declares who may exercise the right of removal, we find a wide divergence between the two acts. Under the act of 1867, the right was conferred upon the citizen or citizens of the state or states other than that in which the suit was pending, regardless of their position as plaintiff or defendant. Under the act of 1888 the plaintiff cannot remove a cause, but any defendant, who is a citizen of a state other than that in which the suit is pending, may remove the same upon a proper showing. It is urged in argument that the use of the words "any defendant, being such citizen of another state, may remove," etc., implies that there may be defendants who are not citizens of another state, and yet the cause may be removed, if there is a defendant who is a citizen of another state. It cannot be gainsaid that the words are susceptible of this construction, and if the class of cases removable under this clause had not been previously defined and limited, it might well be that such construction would be permissible. In view, however, of the settled construction given to the preceding portion of the clause, I do not think this possible implication should be held to show that it was intended to change the meaning of the terms previously used. It seems to me to be the true rule to give the words, "in which there is a controversy between a citizen of the state in which the suit is brought

and a citizen of another state," the same meaning in the act of 1888, as was given them in construing the act of 1867, thus holding that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is pending, and a citizen or citizens of another or other states, but not including such in which there is a controversy partly between a citizen or citizens of the state wherein the suit is pending, and a citizen or citizens of other states, and partly between citizens of the same state. Admitting that there is doubt as to the proper construction of the act, it still follows that this court should not retain the case, as it is better to leave the cause in the court whose jurisdiction is undoubted. The motion to remand is sustained.

PORTER LAND & WATER CO. *v.* BASKIN.

(*Circuit Court, S. D. California.* August 8, 1890.)

WRITS—SERVICE BY PUBLICATION.

In a suit to establish a trust in real estate, service may be had on a non-resident, though the bill also prays for an accounting and for other relief.

In Equity. On motion to dismiss.

Graves, O'Melveny & Shankland, for complainant.

Anderson, Fitzgerald & Anderson, for defendant.

Ross, J. This action was commenced in one of the superior courts of the state on the 7th of February, 1889. Among other things, the complaint alleges, in substance, that during the times therein mentioned the plaintiff was and still is a corporation duly organized and existing under the laws of the state of California, for the purpose, among other purposes, of buying, selling, and otherwise disposing of lands, waters, and water-rights; and that from the time of its organization until May 2, 1888, the defendant was one of its directors. That on the 29th of June, 1887, defendant, while such director, entered into a contract with plaintiff by which defendant was constituted sole agent of the corporation plaintiff for the selling of its lands, with his compensation fixed at $100 per month, and 6 per cent. commissions on all sales, which compensation, the complaint alleges, "was an exorbitant, unjust, and unconscionable sum." It alleges that many sales of the lands of the corporation made under the agreement mentioned were made upon credit, without any payment being made to the corporation; that many sales were never completed, from which no consideration was realized by it, and were afterwards canceled or "treated as null and void," yet on all these transactions defendant charged against the corporation, and was allowed, commissions to the maximum extent provided for by the contract under which he acted. "That, in the capacity of agent, as aforesaid, and dis-

regarding his duties as director, and with a view solely to his personal profit, said defendant effected pretended sales to many persons, without any money coming therefrom to the treasury of the corporation, but upon which he charged his full commissions, and caused credit to be given himself therefor upon the books of said corporation." That, in this way, during a period of less than 10 months, defendant received from the corporation plaintiff, in pretended payment of his services, under the contract mentioned, the sum of $15,727.71 in cash; "also a promissory note executed by said corporation, dated April 19, 1888, payable in ninety days, bearing interest at the rate of ten per cent. per annum, upon which there remains unpaid $4,379.50, with interest; also the further sum of $2,000," which it is alleged accrued to the defendant in this wise: A certain tract of plaintiff's land was sold by defendant to one Byran for $2,000. No money was in fact paid by Byran to the corporation; nevertheless defendant caused the corporation to be credited upon its books with $2,000 on account of the sale, and himself to be charged with the same amount, and took from Byran to himself an assignment of a mortgage executed by one Charlotte E. Smith to Byran on August 20, 1887, on a certain lot of land in Los Angeles city, to secure the payment of two promissory notes, each for the sum of $1,000, one payable one year, and the other two years, after date. That on the 19th of April, 1888, and while defendant was a director of the corporation plaintiff, he procured the corporation to transfer and hypothecate to him, as security for the payment of the aforesaid note of the corporation, certain notes of third parties, specifically described in the complaint, all of which, it is alleged, were secured by mortgages recorded in the office of the recorder of Los Angeles county. That defendant, while a director of the corporation plaintiff, bought from the corporation certain described lots of land and water, situated in Los Angeles county, deeds for which he caused to be executed by the corporation to his wife, Mary G. Baskin, who paid no consideration therefor, and who received the title merely for the accommodation and to the use and benefit of the defendant, and thereafter transferred the same to him. The complaint alleges that the services rendered by defendant to the corporation plaintiff, beyond his duties as director, were reasonably worth $100 per month, which plaintiff offers to pay, together with any sum defendant may have expended on plaintiff's account; but beyond that it is alleged that the charges and commissions made and received by defendant were false, simulated, and fictitious. The prayer is that the agreement made by plaintiff and defendant be annulled; that defendant be adjudged to be a trustee for the plaintiff of all moneys, promissory notes, choses in action, and real property, including the real property transferred by plaintiff to defendant's wife, and by her to defendant, and that he be adjudged to convey the same to plaintiff, or, if such transfer cannot be made, that he be charged with the value thereof; that an injunction be issued to restrain defendant from transferring any of the said property, or collecting or disposing of it; that the promissory note executed by plaintiff to defendant be canceled, and the securities hypothecated to secure the same be directed to

be retransferred to plaintiff; that an accounting be had between the plaintiff and defendant, and plaintiff be given judgment against defendant for such sum as it may be justly entitled to, and for such other and further relief as in equity it ought to have.

The defendant being, at the time of the bringing of the suit, a resident of the state of Kentucky, the plaintiff caused summons to be served upon him by publication, pursuant to that provision of the Code of Civil Procedure of California providing for such service in cases where the person on whom it is to be made resides out of the state. On the 8th of October, 1889, the defendant appeared in the state court for the special and only purpose of moving the court to set aside the attempted service of summons, on the ground that the action is one *in personam*, and, the defendant being a non-resident of the state, service by publication is void. The motion was overruled by the state court, to which action the defendant excepted, and tendered his bill of exceptions, which was settled. Thereupon the cause was, on defendant's motion, removed to this court, and here the defendant, disclaiming any general or voluntary appearance, moves the court to dismiss the suit upon the same grounds urged by him in the state court for the quashing of the service of summons. His special appearance in the state court for the purpose of calling attention to the alleged illegality of the service was in no respect a waiver of such illegality, if it in fact existed. *Harkness* v. *Hyde*, 98 U. S. 479; *Powers* v. *Braly*, 75 Cal. 238, 17 Pac. Rep. 197. It is, however, contended for the plaintiff that, defendant having submitted to the state court the question of the validity of the service upon him, and that court having held it valid, the case comes here with that adjudication in force, and that it must therefore be here considered that the state court acquired jurisdiction of the defendant by the service in question, and therefore this court will take jurisdiction, even though it would not have acquired such jurisdiction had the case been commenced here. In none of the cases referred to by counsel do I find that the precise point now made was decided. In *Brooks* v. *Farwell*, 4 Fed. Rep. 166, relied on by the plaintiff, the state court having ruled in effect that the facts set up by the defendant to defeat the service of summons could, under the Code of the state, be pleaded by answer, the circuit court held that it must accept as correct and conclusive the ruling of the state court in respect to the proper practice under the state statutes, and, in accordance with that ruling, that the plea must be received in the circuit court. The cause was doubtless an action at law, in which the rules of practice in the state court would prevail in the circuit court. In *Loomis* v. *Carrington*, 18 Fed. Rep. 98, also relied upon by the plaintiff, it was held that in cases removed from a state court the circuit court will not review an order made prior to the removal, if the state court acted within its jurisdiction, but will take the case precisely as it finds it, accepting all prior decrees and orders as adjudications in the cause. In *Duncan* v. *Gegan*, 101 U. S. 810, the supreme court said that "the circuit court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its

jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off." This language had reference to a condition in which the case had been placed by the positive decree of the state court. In *Werthein* v. *Trust Co.*, 11 Fed. Rep. 689, Judge SHIPMAN held that where one of the parties had, by his non-action within the time prescribed by the state court, prevented himself from asserting a defense or an objection to the jurisdiction of the court, and thereafter in that court such defense or objection could not be considered as existing, the circuit court takes the case in the condition in which the non-action of the party left it, and accordingly refused to permit the defendant to plead in abatement in the circuit court the defective service of the complaint, on the ground that he had, prior to the removal, lost by his inaction the right to object to such defective service in the state court. In *Kauffman* v. *Kennedy*, 25 Fed. Rep. 785, before the removal of the cause from the state to the federal court, defendant appeared specially, and moved the court to quash the service of summons on the ground that service was obtained on defendant while he was attending as a witness in the state in a criminal prosecution against the plaintiff, defendant at the time being a resident of another state. The case having been subsequently removed to the federal court, the motion was insisted upon, and by the court granted. The motion does not appear to have been ruled upon by the state court, in which respect it differs from the case at bar. In a number of cases cited by defendant it has been held that the filing of the petition and bond for removal of the cause from the state to the federal court was not such an appearance as waived the question of jurisdiction, and precluded the defendant from moving in the federal court to quash the service of process. In *Atchison* v. *Morris*, 11 Fed. Rep. 582, Judge DRUMMOND, in deciding the point there made that defendant, by making the motion and giving the bond for the removal of the case, made such an appearance as admitted the sufficiency of the service upon him, and that he could not thereafter in the federal court move to set aside the service of summons, said:

"There was, in fact, no appearance entered in the state court, unless the filing of a petition and the giving a bond constituted an appearance; but I think it was not, in any event, such an appearance as to deprive the defendant of the right to make objections in this court to the service of summons. In fact, it may have been, among other reasons, for the very purpose of objecting to the service of summons that defendant requested that the cause should be removed to the federal court, because in a proper case a party has the right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleading and merits, but to the service of process; and it would be contrary to the manifest intent of the act of congress to hold that a party who has a right to remove a cause is foreclosed as to any question which the federal court can be called upon under the law to decide; and I have no doubt this is such a question."

On the contrary, it was said by Mr. Justice CURTIS, in *Sayles* v. *Insurance Co.*, 2 Curt. 212, and, it seems to me, with great force, that the de-

sign of the act of congress was to enable citizens of other states to remove their cases here for a trial of their merits; and that when a defendant—

"Appears in the state court, files a petition to remove the action, gives a bond to enter it in the circuit court, and actually enters it there, he has thereby waived any personal privilege he might have had to be sued in another district. If pleading to the action amounts to a waiver of such a privilege, upon the ground that he ought not afterwards to be heard to object to the means by which he was brought into court, I do not perceive why these proceedings should not have the same effect. The defendant comes in, becomes the actor, treats the suit as one properly instituted, removes it to another court, and enters it there, and then says he was not obliged to appear at all, and the state court in effect had no suit before it. This, I am of opinion, he cannot do. I consider that this court will not look back to inquire into or try the question whether the state court had jurisdiction. The act of congress allows defendants to remove actual and legally pending suits from the state courts. If this was not such a suit, the defendant should not have brought it here. By bringing it here he voluntarily treats it as properly commenced and actually pending in the state courts, and he cannot, after it has been entered here, treat it otherwise."

In answer to the suggestion that this would prevent citizens of other states from trying in the federal court the question whether the state court had jurisdiction, the justice said:

"Not so. If the state court had no jurisdiction, and the defendant does not appear, its proceedings are all void, and may be shown to be so in an action brought in this court against any one who meddles with the person or property of the defendant under the color of such proceedings. The only objections which the defendant will be precluded from trying here are technical objections which do not affect the merits; and I see no good reason why he should not be prevented from trying them here."

From the view I take of the nature of the present action it becomes unnecessary to decide whether the bringing and entering of the suit here by the defendant was such an appearance as precluded the objection to the exercise of jurisdiction over him, or whether the decision of the state court that the service of summons upon defendant was a valid service is an adjudication of that question binding upon this court. The object of the suit, in part, is to reach and control the title to certain lands and water, and certain interests in certain other lands situated in this state and within this judicial district. To the extent, at least, of determining the title to and interests in the lands and water in question, I think the service of summons on defendant by publication, concerning the regularity of which no question is made, was a valid service under the state statutes, and sufficient to authorize a valid decree in the suit. Whether, should the facts warrant it, such decree may also establish a trust in respect to the moneys and other property alleged to have been unlawfully received by defendant, and include a valid money judgment against him, under the principle that, where jurisdiction is acquired against the person by the service of process or by a voluntary appearance, a court of general jurisdiction will settle the matter in controversy between the parties, need not now be determined. In the late case of *Arndt* v. *Griggs*,

10 Sup. Ct. Rep. 557, the supreme court held that it is the established doctrine of that court that a state has power by statute to provide for the adjudication of title to real estate within its limits, as against non-residents who are brought into court only by publication, and that it was not the intention of the court in the case of *Hart* v. *Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, to overthrow the series of cases affirming that power; on the contrary, that the court in *Hart* v. *Sansom* distinctly recognized it by saying, among other things, that—

"It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose."

And in *Arndt* v. *Griggs* it is added:

"Of course it follows that, if a state has power to bring in a non-resident by publication for the purpose of appointing a trustee, it can in like manner bring him in and subject him to a direct decree."

The court in *Arndt* v. *Griggs* cited and reviewed the cases upon the subject at length; among others that of *Boswell's Lessee* v. *Otis*, 9 How. 336, where, said the court,—

"Was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting, and an adjudication that the amount due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question. The court held that portion of the decree and the sale made under it void; but, with reference to jurisdiction in a case for specific performance alone, made these observations: Jurisdiction is acquired in one of two modes: *First*, as against the person of the defendant, by the service of process; or, *second*, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or by bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but, where such a procedure is authorized by statute on publication without personal service of process, it is substantially of that character."

If a bill for the specific execution of a contract to convey real estate is substantially a proceeding *in rem*, where by statute service of process in such suit may be had by publication, surely a suit to establish a trust in real estate is of the same character in cases where the statute authorizes a similar service. In the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 727–734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Justice FIELD, thus stated the law:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. * * * It is true that

in a strict sense a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings *in rem*, in the broader sense which we have mentioned."

The principle of these cases, in my opinion, sustains jurisdiction here to the extent, at least, of settling the rights of the parties in respect to the real property in question. The motion to dismiss the suit is denied.

MONTGOMERY PALACE STOCK-CAR CO. v. STREET STABLE-CAR LINE.

(Circuit Court, N. D. Illinois. April 14, 1890.)

FEDERAL COURTS—JURISDICTION—PATENTS—OWNERSHIP.

Where a suit is brought to determine the ownership of patents assigned to defendants, but which plaintiff claims under a contract by the patentee that all patented improvements on former patents granted him, as those in suit are alleged to be, shall belong to the corporation under whom plaintiff claims, and both parties are citizens of the same state, the United States circuit court has no jurisdiction.

In Equity.

Alfred Moore, for complainant.

J. J. McClellan and *West & Bond*, for defendant.

BLODGETT, J. This case is now before the court on a demurrer, both general and special, to the bill. The essential facts, as stated in the bill, are these: On the 25th of August, 1870, one John W. Street was the owner of patents Nos. 96,362, and 96,500, which had been issued less than a year previously for improvements in stock-cars, and on that day he made an agreement with 18 other persons for the formation of a corporation under the laws of Illinois to be called the "Street Palace Stock-Car Company," to utilize the said patents by the construction and running of cars made in accordance therewith. The agreement related mainly to the amount of capital stock of the company, and the distribution thereof among the parties to the contract and otherwise; but the only clause in the contract material to the purposes of this case is the following:

"It is further understood and agreed that any inventions or improvements, to be applied as an improvement to the above-named cattle-car, heretofore or hereafter originated or developed by any member of said company, the same being patentable, shall be patented in the name and for the benefit of the aforesaid company."

The bill avers the subsequent formation of the said Street Palace Stock-Car Company under the laws of Illinois, and its entry upon busi-

ness; the patents being duly assigned to the company. It is further charged that in October, 1872, said company became financially embarrassed, and such steps were subsequently taken as that all the rights, property, franchises, and patents of the company were assigned to the McNairy & Clafflin Manufacturing Company of Cleveland, Ohio, and, by a series of mesne conveyances, these assets became vested in the complainant, a corporation organized under the laws of Illinois. It is further charged that in February, 1885, patents Nos. 336,372 and 336,373 were duly issued to the said John W. Street and one S. M. Fischer for improvements in stock-cars; that, after the issue of the two last-named patents, Street and Fischer secured the organization of the defendant corporation under the laws of Illinois, and ever since that time the defendant company has constructed and used cars made in accordance with said patents Nos. 96,362 and 96,500, owned by complainant, and the two last-named patents, whereby the defendant company has made large profits, for which profits an accounting is prayed by the bill. It will be noticed that both complainant and defendant corporations are organized under the laws of Illinois, and are citizens of said state. This court, therefore, has no jurisdiction, unless such jurisdiction arises from the subject-matter of the controversy stated in the bill.

As to the claim for an accounting for the alleged use of the two patents owned by Street in 1870, those patents both expired,—one in 1886, and the other in 1887; and, under the ruling of the supreme court in *Root* v. *Railway Co.*, 105 U. S. 189, that equity has no jurisdiction in suits for infringement of patents unless a case is shown entitling the complainant to an injunction as part of his remedy, it is manifest that there is no case made for equitable relief as to the alleged infringement of these two old patents, as complainant's remedy in that regard must be wholly in a court of law. The case made by the bill as to the two patents of February, 1885, is that, under the clause I have quoted from the contract of August 25, 1870, between Street and his 18 associates, the complainant, as the owner of the rights, property, franchises, and patents of the Street Palace Stock-Car Company, is entitled to the benefit of these two patents as the inventions of Street. The controversy in regard to these two last-named patents, then, is not a controversy as to the construction, validity, or infringement of these two patents, but is a controversy as to the title or ownership of them, depending, not upon any laws of the United States, but upon general principles of equity growing out of the contracts set out in the bill by virtue of which complainant claims title. In *Wilson* v. *Sandford*, 10 How. 99, this question was considered, and Chief Justice TANEY, speaking for the court, said:

"Now the dispute in this case does not arise under any act of congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common-law and equity principles. The object of the bill is to have this contract set aside, and declared to be for-

feited; and the prayer is 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside; and, if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent-rights."

This opinion has been affirmed in *Hartell* v. *Tilghman*, 99 U. S. 547, and in *Albright* v. *Teas*, 106 U. S. 613, 1 Sup. Ct. Rep. 550. See, also, *Burr* v. *Gregory*, 2 Paine, 426. This, then, being, as to the two patents of February, 1885, a controversy wholly between parties who are citizens of the state of Illinois, in regard to the effect of a contract, this court has no jurisdiction to hear and determine it. Taking this view of the question of jurisdiction it would not be proper for this court to express any opinion as to the merits of the case, which have been elaborately discussed in the briefs of the counsel. The demurrer is sustained, and the bill dismissed for want of jurisdiction.

JOHNSON RAILROAD SIGNAL CO. *v.* UNION SWITCH & SIGNAL CO.

(*Circuit Court, W. D. Pennsylvania.* June 5, 1890.)

1. EQUITY—PLEADING—CROSS-BILL.
   An original bill was for the infringement of letters patent relating to electric signals granted to Frederick Cheeswright, assignee of William R. Sykes. In a cross-bill the plaintiff therein set up, among other things, an exclusive right to the term "The Sykes System" as a trade mark or name designating a system of electric signals, and sought protection for that right. *Held*, that this was new and distinct matter not within the scope of the original bill, and must be stricken out.
2. SAME—SERVICE OF CROSS-BILL—NON-RESIDENT PLAINTIFF.
   When the plaintiff in the original bill is a corporation of another state, and has no agent or representative in the judicial district where the suit is pending other than its solicitor in the suit, an order will be made for substituted service, as respects the cross-bill, upon such solicitor.

In Equity. Motion for leave to file cross-bill, and for an order for substituted service.

George H. Christy, for the motion.

William S. Pier, *contra*.

ACHESON, J. 1. I am of the opinion that the cross-bill, as presented to the court, offends against the well-settled rule which forbids the introduction into such a bill of any new and distinct matter not within the scope of the original bill. *Cross* v. *De Valle*, 1 Wall. 1, 14. Here, the subject-matter of the original bill is the patent No. 241,246 granted to Frederick Cheeswright, assignee of William R. Sykes, with the infringement of which the bill charges the defendant. But the cross-bill, among

other things, sets up the right of the plaintiff therein (the defendant in the original bill) to the exclusive use of the term "The Sykes System" as a trade mark or name designating a system of electric signals, and seeks protection for that right. This, however, goes far beyond the case of the plaintiff in the original bill, is not necessary as a defense to that bill, and is, indeed, matter entirely foreign to the primary controversy. Therefore, everything relating to this alleged trade mark or name must be stricken out before the court will grant leave to file the cross-bill.

2. The defendant in the cross-bill (plaintiff in the original) being a corporation of the state of New Jersey, and having no agent or representative in this judicial district other than its solicitor in this suit, an order for substituted service as respects the cross-bill upon him is sought. The application is resisted upon the ground of the alleged invalidity of such service, and several English decisions are produced to sustain the objection. But I find it laid down in Conkling's Treatise on U. S. Courts that where a non-resident has instituted a suit in equity, and a cross-bill is filed by the defendant in the suit, the court, upon motion, will order that service of the subpœna upon the solicitor of such non-resident party shall be sufficient. Page 143. Certainly, this practice had the sanction of Judge WASHINGTON. *Ward* v. *Sebring*, 4 Wash. C. C. 472. And in *Rubber Co.* v. *Goodyear*, 9 Wall. 807, such substituted service is impliedly recognized as good, in a proper case. Why should it not be so held? A cross-bill is a mere auxiliary proceeding, either for discovery in aid of the defense against the original bill or to procure a more complete determination of the matter already in litigation in the court, or for both these purposes. Daniell, Ch. Pr. 1653. In *Ayres* v. *Carver*, 17 How. 591, 595, the court quotes with approval the declaration of Lord HARDWICKE, that "both the original and the cross-bill constitute but one suit, so intimately are they connected together." I have not been referred to any American decision adverse to this motion, and such investigation of the subject as I have been able to make leads me to the conclusion that the substituted service here asked for is in accordance with precedents of long standing in the English courts of chancery. *Geledneki* v. *Charnock*, 6 Ves. 171; *Hobhouse* v. *Courtney*, 12 Sim. 140; *Cooper* v. *Wood*, 5 Beav. 391; *Hope* v. *Hope*, 4 De Gex, M. & G. 328; *Hope* v. *Carnegie*, L. R. 1 Eq. 126. If the cross-bill is made to conform to the views expressed in this opinion leave to file it will be granted, and the motion for substituted service upon the solicitor of the Johnson Railroad Signal Company will be allowed.

SOUTHERN PAC. R. CO. *v.* WIGGS *et al.*

(Circuit Court, N. D. California. June 23, 1890.)

1. PUBLIC LANDS—RAILROAD GRANTS.
The act of congress of July 27, 1866, granting lands to the Southern Pacific Railroad Company, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location and building and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land to the amount of 10 alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant, or indemnity limits.

2. SAME—LOCATION.
The Southern Pacific Railroad Company filed its map of definite location on the 3d of January, 1867, in the office of the commissioner of the general land-office, showing the present granted and indemnity limits thereon, which granted and indemnity limits are clearly defined in the act of congress; and the indemnity belt is particularly limited to specified boundaries outside of the granted limits. *Held*, that upon filing the map of definite location, and upon the secretary of the interior issuing his order withdrawing all the lands within 40 miles of the line of the road, the odd-numbered sections both within the present granted and indemnity limits were withdrawn from pre-emption, homestead entry or any other disposition by the government. Furthermore *held*, that the statute itself in terms provides that the odd sections shall not be liable to sale or entry or pre-emption other than to the company. Congress intended to withdraw from sale, entry or pre-emption all those lands set apart within specifically defined limits, as well those authorized to be selected as lieu lands, as those absolutely granted, in which the title itself presently vested. The right of selection indefeasible by pre-emptioners vested upon filing the map of definite location, and withdrawal, as provided by the statute, although the title to the land itself did not vest till the selection.

3. SAME—RIGHT OF SELECTION.
The secretary of the interior had no authority, while a deficiency existed, to allow a pre-emption to be made upon an odd section within these indemnity limits. While such deficiency existed, the secretary could not throw open the odd sections within the indemnity limits to pre-emption, or homestead entry. The right of selection, in the company, to these lands, is given in the statute itself, and the secretary cannot revoke it.

4. SAME.
This joint resolution of 1870 (16 St. 382) conferred no new rights upon a pre-emptor going upon these lands subsequent to the order of withdrawal. It only saved, and reserved, such rights as he had already acquired before its passage.

5. SAME—CLOUD ON TITLE.
A patent issued in the name of the United States to a pre-emptor, entering upon these lands subsequent to the order of withdrawal, is, erroneously, issued, without authority of law, and is void. The existence of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's rights, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined.

6. SAME—SECRETARY OF INTERIOR.
Where the secretary of the interior, acting upon a known and recognized state of facts, draws therefrom an erroneous conclusion of law, and, in pursuance of such erroneous conclusion, issues a patent to a party not entitled thereto, his action is not conclusive, but, is subject to review and reversal by the courts.

(Syllabus by the Court.)

This is a bill in equity seeking a decree declaring void and annulling a patent of the United States to a quarter section of land claimed by the complainant, as a part of the land granted to it to aid in the construction of its railroad under the act of congress of July 27, 1866, found in 14 St. 292. The land lies outside of the 20-mile limit, and within the 30-mile limit fixed by the statute, and being a portion of the land which the complainant was authorized to select to make up for any deficiency that might be found in the odd sections within the 20-mile limit by

reason of a prior disposition thereof, or the acquisition of prior rights therein.

The complainant filed its map of definite location in the proper office on January 3, 1867, and a subsequent map on September 3, 1871, covering substantially the same lines. A letter of the secretary of the interior, accompanied by a plat showing the 30-mile limit, withdrawing the lands from sale, entry or pre-emption, and so forth, in accordance with the statute, within the said 30-mile limits, was filed in the Stockton land-office on May 3, 1867, which plat and withdrawal included the lands in question. This withdrawal does not appear to have ever been revoked, or attempted to be revoked, either by congress or the interior department. The plat of the township embracing the land in dispute was filed in the proper land-office on March 19, 1881.

On May 19, 1881, the respondent, Wiggs, filed in the said land-office at Stockton, his pre-emption declaratory statement for the said land, claiming a settlement thereon on May 15, 1868, which date is more than a year after complainant filed its map of definite location. He made final proofs of said pre-emption on February 19, 1884, and received the patent therefor, now in question, on June 12, 1885. There was a contest in the land-office from the beginning, between the complainant and defendant Wiggs, over the latter's right to pre-empt the land, which being decided in favor of respondent was taken before the department at Washington on appeal; and in a decision rendered by the commissioner on January 28, 1882, respondent's right to pre-empt was affirmed.

This decision was affirmed by the secretary of the interior on November 27, 1883; and, in accordance with the determination of the secretary, the patent in question was issued to respondent on June 12, 1885. On July 9, 1885, the duly-authorized agent of complainant, having selected the lands so far as it could make a selection, without the concurrence of the department, presented in the Stockton land-office list No. 7 of lands selected by the Southern Pacific Railroad Company to make up deficiency, under and in pursuance of said statute of July 27, 1866, and tendered the full amount of fees receivable thereon, the full costs and expenses of survey having been paid, said list being in the usual form in use in such cases; and the register and receiver of said land-office rejected said list and selection, not on the ground that there was no deficiency, or of any irregularity in the form of proceeding, or in the selection, or that they were not otherwise subject to selection, but "for the reason that, as appears by the records of this office, said land was patented to Walter Wiggs, June 12, 1885." This was the sole objection assigned. Said list of said selected land embraced the land in question. The said patent is the patent issued as hereinbefore stated.

The complainant had, before said selection, built and completed its line of road opposite and beyond the said lands within the time, and in all respects in the manner, as required by law, and it had been accepted by the proper officers of the government.

Joseph D. Redding, for complainant.

Joseph H. Budd, for defendants.
Before SAWYER, Circuit Judge.

SAWYER, J., (*after stating the facts as above.*) Upon the facts stated, the question arises, whether the lands, under the statute, were open to pre-emption by the respondent, at the time he settled upon them, for the purpose of acquiring a pre-emption right, and whether the patent, upon fulfilling the other conditions, was lawfully issued to him; or whether, on the contrary, the complainant, by the acceptance of the land grant, filing its map of definite location and building the road in all respects in accordance with the requirements of the act of congress, did not from the date of filing its map of location acquire a right indefeasible by pre-emption claimants under the existing laws, to select this land in lieu of lands within the 20-mile limit, lost by reason of any of the causes enumerated in the statute. In *Ryan* v. *Railroad Co.*, 5 Sawy. 261, affirmed in 99 U. S. 382, it was held that, in a similar grant, the grant attached and title vested to the specific alternate sections designated by odd numbers within the 40-mile limit of that grant, on the filing of the plat of the surveyed line of the road with the secretary of the interior; and the withdrawal of the land from sale by him; but that the title did not vest in any particular division of land that might be selected outside the limit to make up a deficiency until said deficiency had been ascertained, and the selection in lieu thereof had been actually made. This decision has been repeatedly recognized since.

It is insisted on the part of the respondent that these decisions must control the case, as the lands are in the belt of lands liable to be selected as lieu lands only, and were not selected to supply a deficiency till after the settlement for the purpose of pre-empting, at which time the title under the decision had not vested. But I am of the opinion, that those decisions are not broad enough to reach this case. The ultimate question in those cases was quite different. In this case, the right to select, in the future, this land, in the part limited for that purpose, vested, should there turn out to be a deficiency, on filing the map of definite location, thereby fixing the limit of the district for selection, although no title to the land vested till selection. The precise question now involved is not, so far as I am aware, presented in any other case. The statute itself makes a specific grant of every alternate section within certain specified limits, to which no other right has attached at the time when the line of the road becomes definitely fixed; and in case some of the lands are lost by reason of prior interests having attached, it gives a right to select an amount equal to that so lost out of any odd sections of public lands free from other prior claims within other specified limits of no great extent. The right to select, at once vests, though the title to specific lands does not, till selection is made. And, to preserve that right of selection, the statute itself, in terms, provides, that said odd sections shall not be liable to sale, or entry, or pre-emption other than to the company; that no pre-emption right shall be allowed in those lands specified. The language of the statute is,

"That there be and hereby is granted"—to the railroad company—"every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line of the route, the United States have full title, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land-office."

And section 6 provides as follows:

"And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereon extended to all other lands on the said line of said road when surveyed, excepting those hereby granted to said company." 14 St. p. 294, § 3; page 296, § 6.

Thus, in express terms, it is provided, that the odd sections thus granted within the whole boundaries shall not be subject to sale, entry or pre-emption before, or after, they are surveyed, except by said company, as provided in this act. It is apparent that congress intended to preserve all these odd sections, within the space limited, till it could be ascertained what deficiency there would be; and the company could supply them by selections within the prescribed limits. It permitted sales and pre-emptions, within the prescribed limits, of even sections only. Congress intended that the grants should be substantial. This case affords an illustration of the injustice of any other view. This map of definite location was filed on January 3, 1867, whereby the limits became fixed, and the right of selection upon the arising of the conditions, vested. The government did not file its plat of the survey till March 17, 1881, 14 years afterwards, and long after the completion of the road opposite the lands. Until this time it could not be ascertained whether any, or if any, what, deficiency would exist; and if it could be known, there could be no selection of odd sections to supply the deficiency until it could be known where the odd sections would fall, and this would require a survey. But if during all this time the lands were open to pre-emption the lands could all be taken up, while the hands of the complainant were tied. In this very case the respondent initiated his pre-emption claim by settlement in 1868, but did not, because he could not, file his declaratory statement till a short time after the filing of the plat in 1881, immediately after which the contest between him and the company, as to which had the right, commenced before the department, and it was followed up till finally decided, a short time before the patent issued. If one pre-emptor can enter upon the land

wanted, and wait 10 years or more for a survey, and thereby acquire a right, while the railroad company must wait for a survey before it can make its selection and acquire a right thereby, all the lands can be in that manner wrested from the company; and of what use to it, under such conditions, would be the right to select given by the statute?

If such a right of pre-emption exists, while the company cannot act, all the lands which derive their greatest value from the very construction of the road, or its contemplated construction, could be wrested from the company, even after the road is constructed, by a failure of the government to make the survey.

Manifestly, I think, congress intended to withdraw from sale, entry or pre-emption, by parties other than the company, all those lands set apart within fixed limits, as well those authorized to be selected as lieu lands, and thereby preserve the right of selection, till selection was possible to be made, as those absolutely granted in which the title itself presently vested. No time was limited by the act for selection, or limitation of time put upon the express withdrawal, either by the act or the secretary of the interior. A right to select which could be cut off at the sole discretion of any pre-emptioner without any fault of the company, and without any power on its part to prevent it, would be illusory, and no right at all. By the statute the president was required to "cause the lands to be surveyed for forty miles in width,"—the whole 40 miles. And the odd sections granted within the whole 40 miles "shall not be liable to sale, entry or pre-emption before or after they are surveyed, except by said company, as provided in this act." It does not appear to me that this language is susceptible of more than one construction, and that is, that no pre-emption right could be perfected or initiated in the face of that prohibition till congress sees fit to withdraw it, while still in its power to do so, or till the whole claim of the company for deficiency is both ascertained and satisfied. As congress did not see fit to put any limitation upon the time for selection, neither the secretary of the interior, nor the courts, are authorized to prescribe such limitation.

In *U. S.* v. *Curtner*, 38 Fed. Rep. 1, and 14 Sawy. ——, this court held, the circuit justice and circuit judge concurring, that, under a similar grant, no other right than that of the railroad company could be acquired or initiated in any of the odd sections within the limits of the grant, after the filing in the proper office of the map of the general route of the road, and the withdrawal of the lands by the secretary of the interior; that the filing of such map of the general route and the withdrawal protected the lands from the acquisition of any right by any other parties till the routes should be definitely fixed, when the title would definitely vest in the odd sections of the specific grant (14 Sawy. ——, and 38 Fed. Rep. 1.) It was, also, held, that no pre-emption right, could be acquired, or even initiated, on any lands except those as to which such rights were expressly authorized by statute to be acquired, and *a fortiori* none can be acquired or initiated when there is, as in this case, an express statutory inhibition. In that case the lands were thus protected and withdrawn in a tract 10 miles wider than was necessary

for the grant after the line of the road became definitely fixed. The same rule was held with respect to pre-emption claims in *Railroad Co.* v. *Orton*, 6 Sawy. 198; *Buttz* v. *Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100; *Denny* v. *Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Missouri, K. & T. Ry. Co.* v. *Kansas Pac. Ry. Co.*, 97 U. S. 491. The principles thus established in my judgment cover and control this case.

The joint resolution of congress of June 28, 1870, (16 St. 382,) "saving and reserving all the rights of actual settlers," conferred no new rights upon respondent. It only saved and reserved such rights as he had already acquired under prior laws before its passage. But he had acquired no rights under prior laws at that time to protect, as the land, as we have seen, was not subject to pre-emption; and when he entered he was a mere trespasser against the express law of the land, and the rights of the complainant were in no wise limited by this resolution. Congress did not attempt to limit them; and it could not limit such rights as had already fully vested had it desired to do so. *Railroad Co.* v. *Orton*, 6 Sawy. 197 *et seq.*

The land, in the present case, was awarded by the department and patented to respondent expressly upon the authority of a decision of the secretary of the interior rendered in 1878, before the decision in *Orton's Case*, cited. *Orton's Case*, and those cited in the opinion of the court, and especially those cases since decided by the supreme court and cited in the present opinion, established a rule wholly inconsistent with that adopted by the secretary of the interior relied on, and necessarily overruled it.

Although the selection of the lieu lands were to be "made under the direction of the secretary of the interior," they were to be "selected by said company," not by him; nor was the selection required to be approved by him as is required by some other acts; and when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the secretary, whereas the statute says in express terms, "other lands shall be selected by said company in lieu thereof."

It is urged that the matter of determining the rights of these parties was vested in the secretary, and that his action cannot be reviewed by the court, but is conclusive. I do not so read the decisions of the supreme court. There is no dispute about the facts here. The secretary acted upon a known and recognized state of facts, and on that state of facts drew an erroneous conclusion of law, and on those recognized facts gave the land to the respondent, whereas he should have awarded it to the complainant. He issued a patent to the respondent to land in which he had no legal right; a patent which, upon the known and recognized state of facts, he had no authority of law to issue.

It is urged, that if the claim of the complainant be established, it has the legal title, and an adequate and complete remedy at law, and that

there is no ground for equitable relief or jurisdiction. But this patent is a cloud upon the complainant's title, which it is entitled to have removed. The existence of the patent gives color of title and is recognized by the land department. Its existence embarrasses the assertion of complainant's right, and prevents it from getting a patent to the same land, to which it is entitled. These circumstances constitute ground for equitable relief. The remedy at law is not equally adequate and complete. *Van Wyck* v. *Knevals*, 106 U. S. 370, 1 Sup. Ct. Rep. 336; *Pixley* v. *Huggins*, 15 Cal. 128.

Let there be a decree for complainant, in pursuance of the prayer of the bill, adjudging respondent's title to be void and annulling it; that there be a perpetual injunction against his using it, or setting up any claim of title or right under it, and that he convey to the complainant any right he may have, or claim to have, under it.

McCONNAUGHY v. PENNOYER *et al.*

(District Court, D. Oregon. August 18, 1890.)

1. CLOUD ON TITLE.
   A resale and conveyance of a tract of swamp land under the act of 1873, before sold by the state, under the act of 1870, on the ground that it had reverted to the state for the failure to pay the 10 per centum of the purchase price within the time required by law, would cast a cloud on the title of the purchaser or his assignee, under the act of 1870.
2. MULTIPLICITY OF SUITS.
   The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, and this suit is clearly maintainable on that ground.
3. ACTION AGAINST STATE.
   This is not a suit against the state of Oregon or its authorized agents or representatives, but against the defendants, claiming to act as such, but without authority of law. The cases of *In Re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, and *Hans* v. *Louisiana*, 134 U. S. 1, 10 Sup. Ct. Rep. 504, considered and distinguished from this.

(Syllabus by the Court.)

In Equity. Bill for injunction.

Mr. Charles B. Bellinger, for plaintiff.

Mr. Earl C. Bronaugh, for defendants.

DEADY, J. On the application of the defendants a rehearing was allowed in this case.

On the argument the case of *Hans* v. *Louisiana*, 134 U. S. 1, 10 Sup. Ct. Rep. 504, was cited by counsel for defendant as a case not referred to, because not at hand, on the former hearing.

On examination, the decision was found not to be at all in point, and it was so admitted by counsel.

Briefly, the case was this: A citizen of Louisiana sued the state to recover the amount of certain coupons annexed to the bonds thereof. These bonds were issued in 1874, and by an amendment to the constitution of that year they were declared valid contracts between the state and the holders thereof, and by the constitution of 1879 payment of

the same was repudiated. The eleventh amendment does not prohibit a suit in the national courts against a state by a citizen thereof, and the judicial powers of the United States extend to all cases arising under the constitution or laws of the United States, (Const. art. 3, § 2,) which jurisdiction is conferred upon the circuit courts by section 1 of the Act of 1875, (18 St. 470.)

So the plaintiff brought his action against the state, as one arising under the constitution of the United States, which forbids a state to "pass a law impairing the obligation of contracts."

The case was a new one, the question involved never having been before the court. It was held that a suit arising under the constitution of the United States cannot be maintained against a state by a citizen thereof, without its consent.

This conclusion rests, in the opinion of the court, on the general doctrine that a state is not suable, except with its own consent, and therefore the grant of judicial power to the United States, though in language extending to all cases arising under the constitution thereof, must be construed as not including a case against a non-consenting state.

But Mr. Justice BRADLEY, who delivered the opinion of the court, in conclusion took care to say, (page 20, 134 U. S., and page 509, 10 Sup. Ct. Rep.:)

"To avoid misapprehension it may be proper to add that, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the state consents to be sued, or comes itself into court, yet, where property or rights are enjoyed under a grant or contract made by a state, they cannot be wantonly invaded. Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void, and powerless to affect their enjoyment."

Now, the case under consideration is clearly within this category. While the purchaser of this property may not be able to sue the state to compel a specific performance of its contract to convey the same to him when he is entitled thereto on "reclamation" and payment of the balance of the purchase price, because a "state," in the language of the court, "cannot be compelled to perform its contracts," yet the purchaser has already acquired an interest in this land under his contract with the state, and a right to the possession and enjoyment of the same in the mean time; and any attempt by the state or its agents to deprive him of such interest or right, or to impair the value of the same, contrary to such contract, may be judicially resisted. And that is what the plaintiff seeks to do by this suit.

On the argument counsel for the defendants endeavored to show that this case came within the ruling in *Re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164.

But the cases are really just the antipodes of each other. The court, in that case, after stating the general rule as laid down in *Hagood* v. *Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, that a suit against the offi-

cers of a state to compel them to do and perform certain acts, which, when done and performed, constitute a performance of an alleged contract by such state, is a suit against the state, say, (page 502, 123 U. S., and page 181, 8 Sup. Ct. Rep.:)

"The converse of this proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also necessarily be a suit against the state."

Now, the plaintiff in this case is not seeking by this suit to compel the performance, directly or indirectly, of any contract with the state.

On the sale of this land under the act of 1870 the purchaser or his assignee became entitled, on payment of the purchase price and proof of reclamation within the time prescribed, to a conveyance from the state.

If this were a suit to compel the specific performance of so much of that contract as remains unperformed by the state,—that is, the execution by these defendants of a conveyance of the land to the plaintiff,—it would be a suit against the state, although not named in the record.

A decree for the plaintiff in such a case would require the defendants to do and perform an act which they could only do as the agents and representatives of the state, and therefore the court would be without jurisdiction.

By this suit the plaintiff is not seeking to compel the defendants to do or perform any act, but rather to prevent their doing an act injurious to his right and interest in this property, without authority of law or the state, and contrary to its express contract.

If the legislature had authorized the defendants to cause suit to be brought against the purchasers under the act of 1870 to declare the contracts of sale void for want of compliance with the conditions subsequent, and the plaintiff should bring a suit to enjoin the defendants from bringing any suit against him, alleging that he was not in default as to any of said conditions, the case would be parallel with *In re Ayers*, and the answer would be the same in each case; this is a suit against the defendants, as agents and representatives of the state, to prevent the state from doing a lawful act, namely, to bring a suit to set aside a sale of its lands, which it claims has become forfeit for want of compliance with the terms of the sale, and in which the plaintiff may allege and show a compliance with the contract, and thereby defeat the suit.

On the rehearing no question was made but that the legislation under which the defendants are acting in making sales of the plaintiff's land is unconstitutional and void, and therefore furnishes no justification for their conduct.

On the hearing it was not seriously questioned that equity would grant the relief sought by the plaintiff in this case if the suit was not one against the state, on the ground of preventing a cloud being cast on his title, and also of preventing a multiplicity of suits.

On this point counsel at the rehearing contended himself with saying

that if the defendants were not authorized to sell this land their deeds thereto would be void on their face, and therefore would not cast a cloud on anything.

But the case assumed by counsel is not this case by any means, for the invalidity of the defendants' deeds would not necessarily appear on their face, if at all.

The defendants have the general and exclusive authority to dispose of the swamp lands of the state, including those which may have reverted thereto for delinquency under section 9 of the Act of 1878. The plaintiff, to overcome the apparent legal title which the sale and conveyance of his land would vest in the defendants' grantee, would be obliged to resort to extrinsic evidence to show that this land had been duly bargained and sold to his grantor, and had not reverted to the state under section 9 of the Act of 1878, and therefore the second sale was unauthorized and wrongful.

This constitutes a cloud on title within all the authorities; and particularly where, as in this case, the plaintiff's interest is equitable in its nature. Pom. Eq. Jur. §§ 1398, 1399; *Coulson* v. *Portland*, 1 Deady, 489. And an injunction will issue to prevent acts which would create a cloud upon title, under the same rules that control in a suit to remove such cloud. Id. § 1345.

The prevention of a multiplicity of suits is a recognized head of equity jurisdiction. Id. § 243 *et seq.*

The defendants are not now authorized to dispose of swamp land in larger quantities than 320 acres to any one person, and that may be sold outright, and a conveyance made to the purchaser at once. The disposition of this large tract of land in this manner may involve at least 150 sales, to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers to quiet title or to charge him as a trustee of the legal title for the benefit of the plaintiff, the owner of the equitable estate.

This presents a very strong case of a multiplicity of suits, that may be prevented by this suit, in which the whole matter may be considered and determined at once, and thus save expense and delay to all persons concerned.

This suit is very properly brought in this court, independent of the diverse citizenship of the parties, as it turns altogether on federal questions, which must ultimately be settled by the judgment of the supreme court of the United States.

These questions are: (1) Does the legislation under which the defendants are proceeding to sell the plaintiff's land impair the obligation of his contract with the state? and (2) Is this a suit against the defendants as individual wrong-doers, claiming to represent the state, but without authority therefrom, or against them as the authorized representatives of the state?

And my judgment still is that said legislation does impair the obligation of the state's contract; and that this is not a suit against the defend-

ants acting as the authorized agents and representatives of the state, but as individual wrong-doers, acting under an unconstitutional act of the legislature, which is not and cannot be a law of the state, and therefore is no justification for the conduct complained of.

MARSHALL v. WHITNEY *et al.*

(Circuit Court, D. Indiana. July 30, 1890.)

1. FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.
Where a debtor buys land which he causes to be conveyed to his wife in alleged satisfaction of a debt due from him to her, but with the intention of putting his property beyond reach of his creditors, and she agrees at the time to mortgage the land for his benefit, the transaction is fraudulent as to his creditors.

2. HUSBAND AND WIFE—DOWER—FRAUDULENT CONVEYANCES.
Rev. St. Ind. 1881, § 2508, which provides that in all cases of judicial sales of land in which any married woman has an inchoate interest by virtue of her marriage, such inchoate interest shall, unless the judgment otherwise direct, immediately become vested as if her husband were dead, does not apply to land to which the husband never had title, and which has been sold on execution against him only because it was bought with his money and conveyed to his wife to defraud his creditors.

In Equity. Bill to quiet title.

McDonald, Butler & Snow and *T. W. Harper*, for complainant.

Rhoades & Williams, for defendant.

WOODS, J. Whitney and Currier recovered in this court a judgment in attachment against James A. Marshall, on the ground that he had fraudulently disposed of his property with intent to hinder and delay his creditors. Mrs. Marshall prosecutes this suit to quiet her title in certain real estate, upon which the attachment was levied, against the the judgment rendered, on the ground that she was a good-faith purchaser for value of the property, which she asserts was purchased by her husband, and upon his procurement conveyed to her in payment and discharge of a debt which he owed her. The master, speaking to this point, concedes the right of a husband to pay an indebtedness to his wife in preference to other creditors, but says: "While the law allows this, it requires, in fairness to other creditors of the husband, that transactions between husband and wife, when she claims a preference, should be viewed with suspicion, and that her claim as a creditor * * * should be made perfectly clear;" and to this statement of the rule of evidence exception is taken, counsel insisting that in respect to the transactions of husband and wife, as in respect to the dealings of others, the presumptions are in favor of honesty and fairness. Whether the proposition of the master is precisely accurate I do not find it necessary to decide. In his support, see Wait, Fraud. Conv. §§ 300, 301, and cases cited. In this case it is shown, and not seriously or directly denied, that the intention of the debtor in disposing of his prop-

erty, and in taking the title to that in question in the name of the plaintiff, was to put his leviable goods beyond the reach of creditors; and, this being so, it was certainly proper that any claim asserted by or in behalf of the wife, in hostility to the creditors whom the husband was seeking to defraud, should have been received by the master with a degree of caution and hesitation amounting to suspicion. In respect to the question whether the plaintiff was a creditor of her husband to the extent asserted, the master has reported against her, and that, when she accepted the conveyance made to her, "she was cognizant of the fraud which the court adjudged her husband guilty of in procuring this conveyance to be made to her;" and the circumstances in evidence tending to the support of this conclusion are such as to forbid interference by the court to set it aside. If in fact there was as much due her as claimed, it was remarkable and extraordinary. The extraordinary sometimes happens, but in this instance the proof of it was not such as to make belief compulsory.

But if it were conceded that the debt was as large as stated, there is one fact in proof, testified to by both Mr. and Mrs. Marshall, which shows that the property was conveyed to her, not in final and effective discharge of the liability, but only in colorable payment,—to the extent at least of one-half of the indebtedness. In answer to the question whether she "had any intention at the time of hindering, cheating, or defrauding any creditors of Mr. Marshall in taking this conveyance," she said: "No, sir; there wasn't anything of the kind ever thought of, or ever mentioned, because I agreed with him that, if he would deed me this property, that in case he could not get through with his indebtedness I would allow him him to take a mortgage upon this vacant lot [a part of the property in question] of $1,000; and Mr. Balue had already negotiated a loan on this lot, and knew where he could get this money; and, of course, if it had not been attached, in a few days a loan would have been made on this lot. Of course there was a mortgage on the other [part of the] property, and there could not be anything done with it, and I was willing to do that in order to get through." And when asked on cross-examination if she did not know that she could not make a loan on her property to apply on her husband's debts, she answered: "I could make the loan, and turn the money over to him to pay his debts. That was the agreement." The testimony of Mr. Marshall is to the same effect, and they both represent that the $1,000 which it was proposed to raise he intended in a certain contingency to pay to Whitney and Currier; but whether he would have done that or not would have been a matter of mere choice on his part. The essential feature of the transaction to be considered here is that the plaintiff's right to hold this property against the creditors of her husband depends on the truth of the assertion that she received it in payment of what was due her; but, instead of that being the fact, a mere shuffle was made, by which, to the extent of $1,000, at least, she took title, not for her own benefit, but for the benefit of her husband, to do with it as he should please; and that his purpose was fraudulent, if not conceded, is not to be denied.

Another question remains. The statutes of Indiana allow a debtor who is a resident householder an exemption of property from sale upon execution or attachment to the amount of $600 in value, and to the wife of one whose real estate, whether his title be legal or equitable, is sold at judicial sale, the interest which had before been only inchoate becomes absolute and vested, (Revision 1881, §§ 704–715, 2491, 2508;) and on the strength of these provisions, as construed and interpreted by the supreme court of the state, it is contended that, if the property in suit should be declared subject to sale on the attachment as the property of her husband, she will be entitled, in any view of the facts or law, to one-third of the property in her own right as wife, and out of the proceeds of the sale to the sum of $600, exempted to the debtor, and that, the remainder of the property being fully covered by incumbrances which were upon it when purchased by her husband, and subject to which the conveyance to her was made, there remains nothing of value which creditors can reach, and consequently, as was decided in *Brigham* v. *Hubbard*, 115 Ind. 474, 17 N. E. Rep. 920, there is no ground for equitable interference in behalf of creditors. If this were conceded, it would not follow that the plaintiff should have the active aid of a court of equity to confirm a title obtained as hers was. The proposition, however, is not conceded. Mr. Marshall is not now a resident householder, but dwells in another state, and connot claim an exemption; and, if the question is referable to the date of the conveyance, (which seems to me not allowable under the circumstances,) it does not appear that he did not then have money or other valuables, not subject to seizure on execution, exceeding the exemption allowed by law.

Whether or not the plaintiff can claim one-third of this property, as wife of the debtor, if it shall be sold upon the attachment against him, under section 2508 of the Revision, is a more important and perhaps more difficult question. The language of the provision, so far as important here, is:

"That in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold, or barred by virtue of such sale, such interest shall become absolute and vested in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of her husband, whenever by virtue of said sale the legal title of the husband in and to such property shall become absolute and vested in the purchaser thereof."

The inchoate right as declared and granted by another statute, (section 2491,) is given in lands in which the husband has only equitable interests, as well as those of which he has held the legal title, and in the conveyance of which the wife has not joined. The supreme court, as the cases cited below will show, has put upon these statutes a broad and liberal construction, treating as within their spirit cases which are plainly enough not within their letter. *Ketchum* v. *Schicketanz*, 73 Ind. 137; *Lawson* v. *De Bolt*, 78 Ind. 563; *Leary* v. *Shaffer*, 79 Ind. 567; *Hudson* v. *Evans*, 81 Ind. 596; *Keck* v. *Noble*, 86 Ind. 1; *Straughan* v. *White*, 88

Ind. 242; *Mattill* v. *Baas*, 89 Ind. 220; *Shelton* v. *Shelton*, 94 Ind. 113; *Mansur* v. *Hinkson*, Id. 395; *Rupe* v. *Hadley*, 113 Ind. 416, 16 N. E. Rep. 391; *Citizens' Bank* v. *Bolen*, 121 Ind. 301, 23 N. E. Rep. 146. Some of these cases go to the extent of holding that where a conveyance of the husband in which the wife has joined is set aside as fraudulent, and the land sold on execution against the husband, the wife takes an interest, and in some of them it is so held in respect to lands in which the husband had only an equitable, and not the legal, title; but in no case like the one in hand has it been held that the wife can, upon sale of the property, assert a right under this statute against a creditor who by attachment or execution or by means of a creditors' bill seizes upon and subjects to sale in satisfaction of the husband's liability property of which he never had title, and in which the wife never had an inchoate right, and which is subject to such sale only because it was purchased with his means, and the title conveyed to another for the purpose of defrauding his creditors. There are expressions in some of the cases to the effect that, if a creditor elects to treat a conveyance as void, he cannot say it is valid for any purpose; and if he elects to have property sold as the property of his debtor, he cannot dispute the legal consequences of the fact; and in legal parlance it is quite common to speak of setting aside fraudulent conveyances, and to treat the remedy granted to creditors as given upon the theory that the conveyance was never made, or that the title wrongfully transferred had been reinvested in the debtor; and in cases where he had once held the title, this theory will ordinarily subserve the ends of justice, but, if applied to this case, and others readily conceivable, it will lead to consequences too plainly wrong to admit of approval by a court of conscience. A better and more effective theory of relief is well recognized in the books and opinions of the courts. That theory recognizes the validity of such conveyances as between the immediate parties; and the creditor, by seeking his remedy against the property, instead of estopping himself to deny, is compelled to concede, that fact, and to take his relief accordingly. In *Stout* v. *Stout*, 77 Ind. 537, a case in which there had been mesne conveyances between the fraudulent grantor and the defendant holder of the title, it is said:

"The theory of the action is not to annul the deeds and revest the title in the original grantor, but to convert the fraudulent grantee into a trustee holding for the benefit of the injured creditors. Except as to creditors, the conveyance is valid, and it will not be interfered with further than necessary to secure their rights."

To the same effect, see *Lippincott* v. *Carriage Co.*, 34 Fed. Rep. 570. To hold the wife, in a case like this, entitled to take an interest as against attaching creditors, would be to make of the law itself an invitation to fraud. The embarrassed and dishonest debtor would need only to exchange all his possessions for real estate incumbered already for two-thirds or three-fourths of its value, take the title in the name of his wife, and bid defiance to his creditors. Perhaps it will be said he can, without question, do the same thing by taking the incumbered title in his own name, and, when the creditor levies upon and sells the property,

have the wife assert her right, and leave the creditor nothing of value beyond the incumbrances. I am not ready to concede that the courts are powerless to give relief in such a case, upon proof that the investment was made in that way for the purpose of defrauding creditors. The case in hand, however, is not like the one supposed, in which, the title having been in the husband, the wife's assertion of right would have support in the letter of the law, if not in its spirit, while in this case the claim is entirely outside the letter of the statute, and has no support in its spirit or in considerations of justice and fair dealing. Exceptions overruled.

MOORE *v.* MILLER *et al.*

(Circuit Court, S. D. California. August 8, 1890.)

LIMITATION OF ACTIONS—RUNNING OF STATUTE.

The statute of limitations begins to run against a suit to quiet title from the time the defendant takes possession of the land.

In Equity.

F. S. Stratton and *Finlayson & Finlayson*, for complainant.

Mastick, Belcher & Mastick, for defendants.

ROSS, J. This is a bill in equity to quiet title to a certain tract of land under the provisions of section 738 of the Code of Civil Procedure of California, and by stipulation of counsel the sole point for decision is whether or not the suit is barred by the statute of limitations. The facts in relation to that question are conceded to be truly set out in the amended answer, and are, in substance, as follows: The land is a thirty-sixth section, and was granted to the state of California by the act of congress of March 3, 1853, and the title of the state thereto became complete and absolute August 6, 1855. On the 7th of April, 1874, the state issued its patents for the land to one Hewlett, and on April 17, 1874, Hewlett conveyed his interest therein to defendants, who thereupon and on that day entered into possession of the premises under claim of title, exclusive of other right, founding their claim upon the patents to Hewlett and the conveyance from him, and without any knowledge of any defect in that title; and at all times since they have had and maintained, and now have and maintain, actual, continuous, open, and notorious possession of the premises, claiming title thereto in good faith under said patents and conveyance, adversely to the state of California and to complainant and his grantors and predecessors in interest, and to the whole world; and during all of that time defendants had, and now have, the premises protected by a substantial inclosure, and have used, and still use, the same for pasturage. Complainant claims title under certain certificates of purchase issued by the state June 16, 1869, to one Porch and one Mardis, whose title, if any, is vested in complain-

ant. These certificates were duly and regularly issued, and the purchasers paid to the state thereon 20 per cent. of the purchase price, and one year's interest on the balance; but no further payments have been made. Neither the state of California, nor complainant, nor any of his grantors or predecessors in interest, have received the rents or profits of the premises, or of any part thereof, at any time within the space of 10 years preceding the commencement of this suit, and said state has never since issuing the patents to Hewlett asserted or claimed any title to or interest in the premises. The amended answer sets up these facts, and also alleges that the right or title claimed by complainant did not accrue to the state, or to complainant, or to any of his grantors or predecessors in interest within 10 years before the commencement of the suit, and also pleads in bar of the action sections 315 and 316 of the Code of Civil Procedure of California, which read as follows:

"Sec. 315. The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless (1) such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or (2) the people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years. Sec. 316. No action can be brought for or in respect to real property by any person claiming under letters patents or grants from this state, unless the same might have been commenced by the people, as herein specified in case such patent had not been issued or grant made."

Applying these provisions of the statute to the conceded facts of the case, it does not seem to me to admit of doubt that the suit is barred. Unless the state could have commenced the suit had no grant been made by it, the complainant is barred by the provisions of section 316, and whether or not the state could have done so must be determined by reference to section 315. By that section the legislature declared that the people should not sue any person for or in respect to any real property by reason of their right or title to the same unless such right or title shall have accrued within 10 years before the commencement of the suit, or the people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of 10 years. It is a conceded fact that neither the people of the state nor those from whom they claim have received the rents or profits of the land in controversy, or of any part of it, within the space of 10 years next preceding the bringing of this suit. Did their right or title accrue within 10 years next before its commencement? Manifestly, the right and title of the people to the property accrued at least as early as the grant from the general government became complete and absolute, which is conceded to have been August 6, 1855. But, of course, until there was some interference with that right or title no cause of action could accrue. The complainant contends that the suit in question is not within the statute because it is not brought by reason of his right or title to the property, but by reason of the adverse claim of the defendants. Clearly this is not so. Neither of those things alone, in this case or in

any other case, could constitute a cause of action. In every case that must necessarily consist of at least two things: the right of the complaining party, and the wrong committed against that right by the other party. In this case the cause of action arose upon the entry of the defendants upon the premises April 17, 1874, which was an invasion of the right flowing from the title to the property, and the suit, not having been commenced within 10 years from that time, is barred by the provisions of the section in question. *Weber* v. *Commissioners*, 18 Wall. 70, 71; *People* v. *Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *People* v. *Arnold*, 4 N. Y. 508. There must be judgment for defendants dismissing the bill, with costs.

DOYLE *v.* SAN DIEGO LAND & TOWN CO.

(*Circuit Court, S. D. California.* August 8, 1890.)

EQUITY—PARTIES.

In an action against a corporation and its officers, in which relief is sought against the corporation and discovery from the officers, the latter are not merely nominal parties.

In Equity. On demurrer to bill.

Deakin & Story, for complainant.

Luce, McDonald & Torrance, for defendants.

ROSS, J. The defendants to the bill in this case are a corporation organized and existing under the laws of the state of Kansas and four individuals, two of whom are alleged to be officers, and the other two stockholders, of the corporation. The complainant and the individual defendants are all citizens and residents of this state. If it be true, as contended by counsel for complainant, that the individual defendants are merely nominal parties, the fact that they are made defendants to the bill would not oust the court of jurisdiction. But are they nominal parties only? The bill is one for relief against the corporation, and, as incidental to that relief, for discovery against the individual defendants. To such a bill I do not see how the parties from whom the discovery is sought can be said to be nominal defendants. If the whole scope of the suit was against the corporation alone the mere fact that the officers of the corporation were made parties would be unimportant, because a corporation acts and is made to act through its officers, and they are therefore bound in their official capacity by any valid judgment against it. To such a suit such officers would not only not be necessary, but they would not be proper, parties; and, if made such, would not be real, but nominal, parties only. *Hatch* v. *Railroad Co.*, 6 Blatchf. 114, 115. But, as said by Judge BLATCHFORD in the case cited, where the officer is "made a party defendant, jointly with the corporation of

which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a discovery from him in regard to matters peculiarly within his knowledge," he is a real party to the suit. I do not see how it can be otherwise. One who is made a defendant to a suit for the purpose of obtaining discovery from him as incidental to the relief sought against another defendant is just as much a necessary, and therefore a real, party as though made a defendant to a bill for discovery alone. In either case it is obvious that unless made a party no discovery can be obtained from him, and when sued for that purpose it would seem to be plain enough that he cannot be held to be a nominal party. It results that the second ground of demurrer is well taken, and must be sustained, with leave to complainant to amend within the usual time, if he shall be so advised.

AYLESWORTH *v.* GRATIOT COUNTY.

(Circuit Court, E. D. Michigan. November 30, 1889.)

1. COUNTIES—ACTION ON DRAIN WARRANTS—JURISDICTION.
   An action lies in the federal court upon drain orders drawn by a county drain commissioner upon a county treasurer, though the orders themselves create no debt against the county, and the sole duty of the county officers is to assess and collect the cost of constructing the drain from the owners of property benefited by it. In such case the judgment is special, and is enforceable only by *mandamus* to compel the collection of the tax.
2. SAME—ACTION BY ASSIGNEE.
   Such orders are so far negotiable that suit may be brought upon them by the holder, though the court would have no jurisdiction of an action brought by the assignor of such holder.
3. SAME—EVIDENCE.
   Such orders are *prima facie* valid, and plaintiff is not bound to prove the regularity of the proceedings for the assessment and collection of the tax.
4. JUDGMENT—RES ADJUDICATA.
   A decision of the supreme court of the state denying relief to a prior holder of such orders is not *res adjudicata.*

(Syllabus by the Court.)

At Law.

This was an action upon certain orders originally issued to one John Scriven for work done and materials furnished in the construction of two drains in the defendant county, such drains being located in the townships of Newark, New Haven, and Arcada, and no other. These orders were issued in pursuance of Act 43, Laws 1869, as amended by Act No. 169, Laws 1871. To the special count in the declaration were also attached the common counts, together with copies of these orders, which were signed by the drain commissioner and countersigned by the chairman and clerk of the board of supervisors. An indorsement upon such orders shows that they were presented for payment to the county treasurer about the time they were issued, and that on the 31st of March, 1883, all but one of them were again presented, and a payment made thereon.

The following is a sample copy of the orders, with their indorsements.

"No. 257. ITHACA, MICHIGAN, Nov. 7th, 1872.

"*County Treasurer, Gratiot County:* Pay to John Scriven or bearer three hundred and seventy-six dollars out of the drain tax assessed in the township of Arcada for construction of Newark and Arcada ditch in said township. Act number 169, Laws 1871. D. W. ATTENBURG,

"Drain Commissioner of Gratiot County.

"Countersigned: H. T. BARNABY.

"Chairman Board of Supervisors.

"N. CHURCH, Clerk."

Indorsed

"Presented for payment this 16th day of Nov., 1872.

"W. S. TURK, Treasurer Gratiot County, Michigan.

"Paid March 31st, 1883, on the within order, $148.46.

"S. B. HAVERLO, County Treasurer.

"Received March 31st, 1883, of said county treasurer the above $148.46 as the agent of Eliza W. Brownell, of Niagara county, New York.

[Signed] "W. E. WINTON."

The defendant pleaded the general issue, and gave notice of the following defenses: *First*, the statute of limitations; *second*, that the orders were payable out of a special fund, which was not supplied with funds with which to pay them on account of the action of the party through whom plaintiff claimed title; *third*, *res adjudicata*.

These drains were constructed by John Scriven under contract—*First*, with the drain commissioner of Gratiot county; *second*, under contract with E. W. Kellogg, special commissioner by Act 445, Laws 1871, which provided that certain state lands in Gratiot county might be used in the payment for certain drains located in said township. These lands were benefited by the construction of the drains, and were assessed for the same. Before the assessment was reported to the commissioner of the land-office, Scriven made his selection of lands in payment of his contract with Kellogg. The commissioner of the land-office would not issue patents to Scriven until these taxes were paid. In 1879, Scriven brought a suit in chancery in the circuit court for Gratiot county to set aside these taxes, and compel the commissioner to issue patents, and had a decree in his favor as prayed. This decree was not appealed from, and patents were issued. By this means the special fund from which these orders were to be paid was diminished by about $2,000. Had those taxes been collected by the land commissioner, and turned over to the county treasurer, the orders would all have been paid.

In 1881, one Eliza W. Brownell, who claimed to have received these orders from Scriven, petitioned the supreme court of Michigan for a *mandamus* against the board of supervisors compelling them to pay these orders. Her petition was denied. 49 Mich. 414, 13 N. W. Rep. 798.

Marston & Jerome, for plaintiff.

F. H. Canfield and *C. J. Willett*, for defendant.

BROWN, J. While this is nominally an action to recover the amount of these orders from the county, the real object is to procure the issue of

a writ of *mandamus* for the collection of this tax from the property benefited by the drain. Several defenses are interposed, which I will proceed to consider in their order.

1. That the orders created no obligation against the county. If by this it is intended merely to urge that the orders created no debt against the county which, as a municipal corporation, it is bound to pay, the position taken is correct. It is well settled that, where public improvements are by law to be made at the expense of the adjoining property, no charge against the corporation is created, and its only duty is to take the necessary and legal steps to collect the assessment, and to pay it to the parties justly entitled thereto. Thus it was held in the case of *Lake* v. *Trustees*, 4 Denio, 520, in an action upon an order given by the president of a village upon the treasurer to pay the contractor a certain sum out of particular funds, that the corporation was the agent or instrument of the land-holder having an interest in the matter, to ascertain how much each one ought to pay and another to receive, and collect the money from those who were benefited, and see that it was properly applied to the particular object, and that this was the extent of its duty. It was held that the plaintiff could not recover generally against the corporation as for a debt, and it was intimated that the plaintiff had a remedy by *mandamus*, or by an action on the case against the trustees for neglect of duty. This is also the intimation of the supreme court in the case of *Ogden* v. *County of Daviess*, 102 U. S. 634. And I believe that the authorities are uniform to the effect that no action will lie against the county upon these obligations as for a debt chargeable against it. *Goodrich* v. *Detroit*, 12 Mich. 279; *Bank* v. *Lansing*, 25 Mich. 207 The proper remedy in this class of cases in the state courts is by writ of *mandamus* to compel the assessment and collection of the tax by the officers charged with that duty, and payment of the same to the party entitled thereto.

As a petition for a writ of *mandamus* in the federal court will not be entertained as an original proceeding, it was at one time supposed that no action of any kind would lie against a municipality. In the case of *Boro* v. *Phillips Co.*, 4 Dill. 216, it was held that the failure or refusal of the county to discharge its duty in such cases did not make it liable to a general judgment for the obligations of the particular district, and could not be made the foundation of an action against the county for a money judgment. This may be entirely true, and yet it does not follow that there is no remedy in the federal court where the plaintiff is entitled to sue therein by reason of his citizenship. The general rule is believed to be without exception that, where the plaintiff is otherwise entitled to relief in this court, he will not be debarred therefrom by reason of the fact that his remedy in the state court, upon the same cause of action, would be of a character which we are not entitled to administer here. Hence it was held by Judge DILLON, in the case of *Jordan* v. *Cass Co.*, 3 Dill. 185, that the holder of county bonds issued by a county court on behalf of a township voting aid to a railway might sue the county in the federal court, and recover judgment thereon, although

such judgment could not be enforced against the county or its property, or the tax-payers of the county at large, but only by *mandamus* to the county court to compel the levy and collection of the special tax, according to the statute. This is believed to be the earliest case upon the subject, and the opinion is a very interesting and instructive one. This case was approved in *County of Cass* v. *Johnson*, 95 U. S. 360, and was applied in the case of *Davenport* v. *County of Dodge*, 105 U. S. 237, to bonds issued to county commissioners on behalf of a precinct which had no corporate existence, and could not contract or be contracted with. The court considered the bonds in this case as special bonds, which the county commissioners were to issue for the precinct, and that they were in legal effect the special bonds of the county, payable out of a special fund, to be raised in a special way. Similar ruling was made in the case of *Blair* v. *Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. Rep. 449. This case differs from the others in the fact that the bonds contained no promise by the county to pay, but a promise by a precinct, which had no separate corporate existence. Notwithstanding this, the county was held liable to the performance of the obligation.

As the authority of the drain commissioner to draw these orders is unquestioned, it is evident that there must be a remedy in favor of the payee or holder against some one for payment. It is an axiom of the law that for every wrong there is a remedy. It is evident, however, there can be no remedy against the commissioner, as he has no corporate powers, and as he is required by law to draw these orders upon the county treasurer in behalf of the contractor, but has no power to enforce the collection of the tax, or to provide in any other way for their payment. It is equally clear that the county treasurer is not bound to pay them unless he has the funds, and that no action will lie against him unless he refuses to disburse moneys actually in his hands for that purpose. An examination of the statute, we think, demonstrates that there is an obligation on the supervisors representing the county that they can only discharge by an assessment and collection of the tax. By section 1 of the drain law of 1869, as amended in 1871, the board of supervisors of each county is authorized to appoint one county drain commissioner, who is required by section 3 to execute the duties of his office and the resolutions and orders of the board of supervisors. He is bound to keep a full record of his official acts in a book to be furnished by the county, to draw all proper orders on each drain fund, to report to the board of supervisors his action in relation to each drain, and file the same with the clerk. Orders drawn by him must be countersigned by the chairman and clerk of the board. By section 4, on application to him by 10 or more owners of land in each township, he is required to make examination by surveys, and to determine the route of any drain they may require, and may have the assistance (section 6) of a court of record for the appointment of special commissioners to examine the property, and the necessity for the construction of such drain. By section 11, he shall make a full report of all his doings, and present the same to the board of supervisors at their next annual meeting. This board shall charge

the apportioned sum against each township, and direct the supervisor of each township to levy the same upon the several parcels of land benefited by the drain. By section 12 the county treasurer is charged with the duty of returning all lands upon which a tax shall be levied and not paid to the auditor general, and the same shall be advertised and sold, and, if bid off to the state, the state treasurer shall pay over to the county treasurer the amount of the taxes. By section 15, whenever such tax shall be set aside by any court of competent jurisdiction, it shall be lawful for the supervisor to reassess such tax on the same land where such drain has been made, and, in case of any mistake or misapportionment of taxes, the board of supervisors, upon the recommendation of the drain commissioner, or upon a review before them had by appeal from the action of the drain commissioner, may reassess upon the various lands or portions of lands such amount of drainage taxes as may be necessary to correct such mistake or misapportionment. By section 17, no money shall be paid by any county treasurer except on a warrant drawn by the commissioner and countersigned by the chairman and clerk of the board of supervisors, and then only from the particular fund provided for each ditch. If there be no funds in his hands, the county treasurer must indorse the date of the presentation of the orders with his signature thereto, and his orders shall draw interest from and after such presentation and indorsement. Section 19. By section 24 the board of supervisors has full power and authority to control the action of the commissioner, and may order reassessment of the drain tax, or any portion thereof, to correct errors, and may make any other order in relation to such ditches or drains as may be necessary. By section 33 the most ample powers are conferred upon courts to make such orders as shall be just and equitable, and may order such tax to remain on the roll for collection, or order the same to be levied, or may enjoin the same, or may order the whole, or such part thereof as may be just and equitable, to be refunded.

It is evident that under this act most ample powers are conferred on the board of supervisors with regard to the assessment and collection of these taxes, and in case of any dereliction of duties on their part there ought to be a remedy against the corporation, of which they are the authorized expression and agent. As before observed, the proper remedy in the state court is by writ of *mandamus*. As this court is incompetent, in the first instance, to afford this relief, we think an action may be brought against the county, and the collection of the judgment enforced by the same process of *mandamus* that would be resorted to if the proceedings had been instituted in the state court.

My only doubt in this connection is whether the declaration should not count upon the failure of the board of supervisors to take the proper proceedings for the levy and collection of this tax. The state courts have repeatedly held that no action as for a debt will lie against the municipality upon these warrants, (*Goodrich* v. *Detroit*, 12 Mich. 279; *Bank* v. *Lansing*, 25 Mich. 207; *Whalen* v. *City of La Crosse*, 16 Wis. 271; *Finney* v. *City of Oshkosh*, 18 Wis. 209; *Fletcher* v. *City of Oshkosh*, Id. 232; *Mor-*

gan v. *City of Dubuque*, 28 Iowa, 575;) but may not an obligation to pay these orders arise from a failure to collect them from the land?

2. The second defense in this case is that these orders are not negotiable, and hence that plaintiff is not authorized to bring suit upon the same in this court. By the act of 1887 this court cannot take cognizance of any suit, except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation unless such suit might have been prosecuted in such court, to recover said contents, if no assignment or transfer had been made. There is no doubt that under the case of *Mayor* v. *Ray*, 19 Wall. 468, instruments of this description may be transferred from hand to hand, but that they are not commercial paper, in the sense of creating an absolute obligation to pay for them, free from legal and equitable defenses, and that the holder takes them subject to such defenses.

We understand, however, that they are negotiable instruments in the sense that suit may be brought upon them by the holder, though they have no validity unless issued for the purpose authorized by law, and that, while *prima facie* valid, they may be shown to have been irregularly or fraudulently issued. *District of Columbia* v. *Cornell*, 130 U. S. 655, 9 Sup. Ct. Rep. 694; *Wall* v. *County of Monroe*, 103 U. S. 74; *Claiborne County* v. *Brooks*, 111 U. S. 408, 4 Sup. Ct. Rep. 489; *Kelley* v. *Mayor, etc.*, 4 Hill, 263. They were also held to be negotiable instruments in *Bull* v. *Sims*, 23 N. Y. 570, and in *Brill* v. *Tuttle*, 81 N. Y. 454. It was said that they operated as an assignment of so much of the fund as the amount of the order. The act of 1887 does not seem to be limited to negotiable paper, but to extend to any chose in action if the instrument be payable to bearer, and be made by a corporation or in behalf of a corporation; but, even assuming that it is limited to negotiable paper, we think that these instruments so far participate of that character that suit may be brought upon them by any holder.

3. The third defense is that the plaintiff is bound to prove the proceedings for the assessment and collection of the tax to have been regular. Undoubtedly, the regularity of such proceedings may be examined on *certiorari* to the drain commissioner, (*Kroop* v. *Forman*, 31 Mich. 144; *Whiteford* v. *Probate Judge*, 53 Mich. 130, 18 N. W. Rep. 593;) or upon a bill filed to restrain the collection of the tax, (*Frost* v. *Leatherman*, 55 Mich. 33, 20 N. W. Rep. 705.) But in actions upon orders drawn upon the county treasurer to pay for services rendered, it is said by the supreme court, in *Wall* v. *County of Monroe*, 103 U. S. 77, the orders established *prima facie* the validity of the claims allowed, and authorized their payment. It is further said that the warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them; but they are not negotiable in the sense of the law-merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity, or defenses available against the original payee, would

be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee.

4. It is said, however, that the case of *Brownell* v. *Supervisors*, 49 Mich. 414, 13 N. W. Rep. 798, is conclusive against the right of recovery in this case. That was an application for a writ of *mandamus* for the payment of these very orders. The court held that the relator, Eliza W. Brownell, had not shown herself to be the holder and legal owner of these orders, and that she was not entitled to the writ unless her right to such orders was either admitted or proved. It was further intimated in that case that Scriven, the original holder of these orders, could not have recovery upon them, because he, having purchased certain state lands, against which a portion of these taxes had been assessed, had filed a bill in chancery in the circuit court for Gratiot county against the commissioner of the state land-office, and procured a decree declaring the assessment on such lands to be illegal and void. In pursuance of this decree, these lands were patented by the state to Scriven without the payment of said taxes, or any part thereof. It was said that, under these circumstances, neither Scriven nor any person claiming under him could, with a very good grace, ask that a discretionary writ should be issued as prayed for in that case. We do not understand, however, what there is in this opinion to create an estoppel. We are not informed of the grounds on which the court set aside these taxes, nor do we understand why the board of supervisors had not ample power, under the act, to re-assess these taxes upon the same or other lands benefited by the drain. We know of no reason why a paving contractor, for instance, owning a lot upon a certain street which he has paved, may not institute a bill to have the taxes assessed upon such lot declared to be illegal, in which case we understand the tax would either be reassessed or assessed upon the other lots upon the same street. To say that he is thereby debarred from recovering the amount of his paving contract is practically to say that he must pay a tax himself which the court has declared to be illegal or improperly assessed. While we should desire to give full force to the opinion of the supreme court in this case, the point really decided was that the relator had not made title to these orders. There was no such construction given to the drain law as would be binding upon this court, nor are there any reasons given in this opinion why a holder of these orders might not maintain suit upon them. It was said to be doubtful whether, under this legislation, it was contemplated that parties could purchase state lands against which taxes had been entered up, and have the same set aside; but that is precisely what Scriven appears to have done in this case. We do not understand the court to decide that an action could not be maintained against the county upon these orders, but only in its discretion it would refuse a writ of *mandamus*. We are not fully persuaded that the reason stated in the latter part of this opinion for denying the writ is a sound one, but in any event we hold that it is not applicable to this case.

We do not find it necessary to discuss at length the question as to when the statute of limitations begins to run upon these orders, because,

as to all but one of them, it is admitted that a payment was made in 1885, which, upon any construction, would take them out of the statute. Upon the remaining order it is quite evident that the statute is a complete defense. I shall therefore instruct the jury to render a verdict for the plaintiff in this case for the sum of $4,847.12, and interest from November 7th.

NOTE. A motion for a new trial, argued before the circuit and district judges, was denied.

PECK *et al.* *v.* FIRST NAT. BANK.

(Circuit Court, S. D. New York. May 22, 1890.)

BANKS AND BANKING—COLLECTIONS.

Plaintiffs sent to a certain bank a bill of exchange indorsed to said bank for collection. At the time the bank received the bill of exchange it was insolvent, to the knowledge of the managing officer, and on that day, or following morning, it failed. Prior to the failure it indorsed the bill of exchange to defendant bank, which collected it, and kept the proceeds, crediting the insolvent bank, which was indebted to it, with the amount thereof. *Held*, that the first bank acquired no title because of its fraud in not disclosing its insolvency, and defendant had no better title, as plaintiffs' indorsement showed that the bank was merely plaintiffs' agent to collect the proceeds.

At Law.

Action by John P. Peck and others, copartners, doing business as "Farmers' Bank of Coshocton," against the First National Bank of New York to recover the proceeds of a bill of exchange, which was sent to the Fidelity National Bank of Cincinnati, with the following indorsement thereon: "Pay to the order of Ammi Baldwin, cashier, for collection, account of Farmers' Bank of Coshocton, Ohio. SAMUEL IRVINE, Cashier." Said Samuel Irvine was cashier for plaintiffs. The Fidelity Bank indorsed the bill of exchange to the defendant bank, and, after the failure of the Fidelity Bank, the defendant bank collected it, and kept the proceeds, crediting the Fidelity National Bank, which was indebted to defendant, with the amount thereof.

Henry C. Andrews, for plaintiffs.

Peabody, Baker & Peabody, for defendant.

WALLACE, J. At the time when the Fidelity Bank received the draft belonging to the plaintiffs for collection, the bank was, according to the agreed statement of facts, "hopelessly and irretrievably insolvent, as was known to E. L. Harper, the vice-president of the Fidelity Bank, who was then the managing officer of the business of the bank." The bank failed the same day, or the next morning, and never resumed business. Under these circumstances, it was a fraud upon the plaintiffs, on the part of the bank, to acquire their property upon the faith of its apparent prosperity, without disclosing the real situation. The Fidelity Bank,

therefore, did not acquire any title to the draft, or its proceeds. *Railroad Co.* v. *Johnston*, 10 Sup. Ct. Rep. 390. The restrictive indorsement upon the draft was notice to the defendant that the Fidelity Bank was merely an agent for the plaintiffs to collect the proceeds, consequently the defendant did not acquire any better title to the draft, or its proceeds, than the Fidelity Bank had. Judgment is ordered for the plaintiffs.

MOSIER *et ux.* *v.* BEALE.

(Circuit Court, S. D. California. August 8, 1890.)

1. INJURIES BY ANIMALS—PLEADING—SCIENTER.
In an action for personal injury, caused by defendant's cow, it is not necessary to allege *scienter* where it is alleged that the injury was committed while the cow was negligently permitted, by defendant, to trespass on plaintiff's premises.
2. HUSBAND AND WIFE—ACTIONS—PLEADINGS—MISJOINDER.
In an action by husband and wife, a complaint stating as the cause of action a personal injury done to the wife, and averring that by reason of such injury both plaintiffs have been damaged, is demurrable for misjoinder of causes of action, since the husband, though a proper party plaintiff, cannot recover for such injury.

At Law. On demurrer to complaint.

J. W. Ahern and *Del Valle & Munday*, for plaintiffs.

Stephen M. White, for defendant.

ROSS, J. Two objections are urged by the demurrer to the amended complaint in this case. One is that there is no allegation to the effect that the defendant had any knowledge of the dangerous character of the cow which, it is alleged, inflicted the injuries complained of. But the complaint alleges that the defendant negligently permitted the cow to trespass and unlawfully to be upon the premises of the plaintiffs, and that while so trespassing the injuries were inflicted. Under such circumstances it is not necessary to allege that the owner had knowledge of the vicious propensity of the animal. *Van Leuven* v. *Lyke*, 1 N. Y. 515; *Decker* v. *Gammon*, 44 Me. 322, and authorities cited in note to that case in 69 Amer. Dec. 103. The plaintiffs are alleged to be husband and wife, and the injuries to have been inflicted on the wife, and by reason of such injuries that "the plaintiff Nellie L. Mosier, and both plaintiffs herein, have been injured in the sum of fifty thousand dollars." Wherefore they pray judgment for that sum, with costs.

The ground of the action being the wife's personal injuries, the cause of action is hers. The husband was properly joined as a plaintiff, because the common-law rule, requiring that he do so, is yet in force in this state. But the husband cannot himself recover for the personal injuries sustained by his wife. *Matthew* v. *Railroad Co.*, 63 Cal. 451, and authorities there cited. Upon the ground that there is a misjoinder of causes of action in the amended complaint, the demurrer is sustained, with leave to plaintiffs to further amend within 10 days.

In re LEE SING *et al*

In re SING TOO QUAN *et al.*

(*Circuit Court, N. D. California.* August 25, 1890.)

MUNICIPAL CORPORATIONS—ORDINANCES—CONSTITUTIONAL LAW.

The ordinance enacted by the city of San Francisco, known as the "Bingham Ordinance," which requires all Chinese inhabitants to remove from the portion of the city theretofore occupied by them, outside the city and county of San Francisco, or to another designated part of the city and county, is void as being in direct conflict with the constitution, treaties, and statutes of the United States, particularly in the sense that it is discriminating and unequal in its operation, and an arbitrary confiscation of property without due process of law.

At Law.

The ordinance under which the arrest was made is as follows:

"Order No. 2190 designating the location and the district in which Chinese shall reside and carry on business in this city and county.

"The people of the city and county of San Francisco do hereby ordain as follows:

"Section 1. It is hereby declared to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter prescribed for their location.

"Sec. 2. The following portions of the city and county of San Francisco are hereby set apart for the location of all Chinese who may desire to reside, locate, or carry on business within the limits of said city and county of San Francisco, to-wit: Within that tract of land described as follows: Commencing at the intersection of the easterly line of Kentucky street with the south-westerly line of First avenue; thence south-easterly along the south-westerly line of First avenue to the north-westerly line of I street; thence south-westerly along the north-westerly line of I street to the south-westerly line of Seventh avenue; thence north-westerly along the south-westerly line of Seventh avenue to the south-easterly line of Railroad avenue; thence north-easterly along the south-easterly line of Railroad avenue to Kentucky street; thence northerly along the easterly line of Kentucky street to the south-westerly line of First avenue and place of commencement.

"Sec. 3. Within sixty days after the passage of this ordinance all Chinese now located, residing in or carrying on business within the limits of said city and county of San Francisco shall either remove without the limits of said city and county of San Francisco or remove and locate within the district of said city and county of San Francisco herein provided for their location.

"Sec. 4. Any Chinese residing, locating, or carrying on business within the limits of the city and county of San Francisco contrary to the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not exceeding six months.

"Sec. 5. It is hereby made the duty of the chief of police and of every member of the police department of said city and county of San Francisco to strictly enforce the provisions of this order.

"And the clerk is hereby directed to advertise this order as required by law.

"In board of supervisors, San Francisco, February 17, 1890.

"Passed for printing by the following vote: Ayes—Supervisors Bingham,

Wright, Boyd, Pescia, Bush, Ellert, Wheelan, Becker, Pilster, Kingwell, Barry, Noble."

Thos. D. Riordan, for petitioners.
John I. Humphreys, for the City.
Before SAWYER, Circuit Judge.

SAWYER, J. The petitioners are under arrest for the violation of order No. 2190, commonly called the "Bingham Ordinance," requiring all Chinese inhabitants to remove from the portion of the city heretofore occupied by them, outside the city and county, or to another designated part of the city and county.

Article 14, § 1, of the constitution of the United States reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws."

Article 6 of the Burlingame treaty with China, provides, that

"Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." 16 St. 740.

Section 1977 of the Revised Statutes of the United States provides as follows:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

And article 6, subd. 2, of the national constitution provides, that, "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The discrimination against Chinese, and the gross inequality of the operation of this ordinance upon Chinese, as compared with others, in violation of the constitutional, treaty, and statutory provisions cited, are so manifest upon its face, that I am unable to comprehend how this discrimination and inequality of operation, and the consequent violation of the express provisions of the constitution, treaties and statutes of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman.

The ordinance is not aimed at any particular vice, or any particular unwholesome or immoral occupation, or practice, but it declares it "to

be unlawful for any Chinese to locate, reside or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter provided for their location."

It further provides that "within sixty days after the passage of this ordinance all Chinese now located, residing or carrying on business within the limits of said city and county of San Francisco, shall either remove without the limits of said city and county of San Francisco, or remove and locate within the district of the city and county of San Francisco, herein provided for their location." And again, section 4 provides that "any Chinese residing, locating, or carrying on business within the limits of the city and county, contrary to the provisions of this order, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for a term not exceeding six months. Upon what other people are these requirements, disabilities and punishments imposed? Upon none.

The obvious purpose of this order, is, to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than 40 years. Many of them were born there, in their own houses, and are citizens of the United States, entitled to all the rights, and privileges under the constitution and laws of the United States, that are lawfully enjoyed by any other citizen of the United States. They all, without distinction or exception, are to leave their homes and property, occupied for nearly half a century, and go, either out of the city and county, or to a section with prescribed limits, within the city and county, not owned by them, or by the city. This, besides being discriminating, against the Chinese, and unequal in its operation as between them and all others, is simply an arbitrary confiscation of their homes and property, a depriving them of it, without due process or any process of law. And what little there would be left after abandoning their homes, and various places of business would again be confiscated in compulsorily buying lands in the only place assigned to them, and which they do not own, upon such exorbitant terms as the present owners with the advantage given them would certainly impose. It must be that or nothing. There would be no room for freedom of action, in buying again. They would be compelled to take any lands, upon any terms, arbitrarily imposed, or get outside the city and county of San Francisco.

That this ordinance is a direct violation, of, not only, the express provisions of the constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China, and of the statutes of the United States, is so obvious, that I shall not waste more time, or words in discussing the matter. To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly

unnecessary and superfluous. To those minds, which are so constituted, that the invalidity of this ordinance is not apparent upon inspection, and comparison with the provisions of the constitution, treaties and laws cited, discussion or argument would be useless. The authority to pass this order is not within any legitimate police power of the state. See, *In re Tie Loy*, 11 Sawy. 472, 26 Fed. Rep. 611; *In re Ah Fong*, 3 Sawy. 144; *Chy Lung* v. *Freeman*, 92 U. S. 275; *In re Quong Woo*, 7 Sawy. 531, 13 Fed. Rep. 229; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *Ho Ah Kow* v. *Numan*, 5 Sawy. 552.

Let the order be adjudged to be void, as being in direct conflict with the constitution, treaties, and statutes, of the United States, and let the petitioners be discharged.

MONTGOMERY *v.* TOWNSHIP OF ST. MARY'S.

CHADBOURNE *v.* SAME.

(Circuit Court, D. Kansas. August 30, 1890.)

TOWNS—BONDS—EXECUTION.

Gen. St. Kan. § 414, requires bonds issued by a township to be "signed by the township trustee, and attested by the town clerk." *Held*, that township bonds were not invalidated by the fact that the name of the township trustee was signed for him by a third person, in his presence, and at his request, the bonds being subsequently duly delivered and certified, and the interest paid thereon by the township for 10 years.

At Law.

S. L. Seabrook, for plaintiffs.

Johnson, Martin & Keeler, for defendant.

FOSTER, J. These are suits upon municipal bonds issued by the defendant township. The facts of the case are briefly as follows: On the first day of August, 1871, the defendant township issued its bonds in the sum of $40,000, due in 20 years, at 10 per cent. interest, payable to the King Wrought-Iron Bridge Manufactory and Iron Works, for the purpose of building a bridge over the Kansas river in said township. Coupons were attached for the semi-annual interest, and these actions are brought on the coupons. The defendant denies that the bonds or coupons were ever made or executed by the defendant township or its officers. The bonds and coupons bear the name of J. D. Downing, township trustee, and Alva Higbee, township clerk. The facts in reference to the execution and issue of the bonds are as follows: The bridge was built and accepted by the township, and the bonds were prepared, with the exception of the signature of the officers, and taken to the city of Topeka, in January, 1882, where Mr. T. B. Mills, president of the bridge company, and William H. Jenkins, and James D. Downing, who was trustee of said township, and Alva Higbee, who was clerk of said town-

ship, met together at an hotel in said city, and Mr. Higbee signed said bonds and coupons, as clerk, and, at the request of Mr. Downing, who was present, but who said that he was nervous, and a poor penman, Mr. William H. Jenkins signed the name of the said Downing to the said bonds and coupons, in the presence of the said Downing, and the other parties. After signing the bonds they were delivered by Downing and Higbee to Mills for the bridge company. In July, 1872, this issue of bonds was certified by the township trustee, clerk, and treasurer, as a valid and subsisting indebtedness against said township of St. Mary's; and again, in January, 1873, said bonds were certified by the township clerk as a valid and subsisting indebtedness against said township. The township paid the interest on said bonds for a period of 10 years.

This case turns on the single question, whether the name of the trustee signed as it was, followed by delivery of the bonds, and the subsequent acts of the township officers, makes the indebtedness a legal obligation of the defendant township. Section 414 of the General Statutes of Kansas, making provision for the issuing of municipal bonds, provides as follows: "And if issued by a township shall be signed by the township trustee, and attested by the township clerk." The doctrine is well settled that a public officer cannot delegate to another the exercise of his official duties. It is equally well settled that, in the transaction of private business, a person may orally authorize another to sign his name in his presence, and such signature is valid. Can a public officer delegate to another, not the exercise of official discretion, but simply the performance of a ministerial act, such as signing his name in his presence, and under his order? In *Chapman* v. *Limerick*, 56 Me. 390, the court held that a constable's return to a warrant calling a township meeting must bear the sign-manual of the constable who executed it. This conclusion was largely induced by a statute of the state which provided: "When the signature of a person is required, he must write it, or make his mark." This is the principal case to which my attention has been called on the part of the defendant. On the other side we find several cases more or less pertinent. *Ring* v. *County of Johnson*, 6 Iowa, 272; *Railroad Co.* v. *Marion County*, 36 Mo. 303; *Just* v. *Wise Tp.*, 42 Mich. 575, 4 N. W. Rep. 298. In this case the township clerk signed the highway commissioners' names to an order on the treasurer in the presence of, and by order of, the commissioners, who then indorsed on the order that the labor and material for which the order was given had been performed and furnished, and delivered the order to the proper person. The court held, if there was any question as to the validity of the signatures, that the indorsement and delivery of the order by the commissioners was an adoption and approval of the signature, and the order was valid. The court uses this language:

"If either had been unable to sign his name, and had directed another to sign for him, and this had been done in his presence, the act would have been good, whether he made his mark thereto or not."

See, also, *Town of Weyauwega* v. *Ayling*, 99 U. S. 118; *Com.* v. *Harnden*, 19 Pick. 482; *People* v. *Bank*, 75 N. Y. 555.

From the cases above cited, I am led to the conclusion that the signature of James D. Downing, trustee, to the bonds and coupons must be held valid; but while doing so I cannot forbear to condemn this practice as reprehensible. No cautious business man would either issue or receive bonds executed in this manner. It doubtless is susceptible of proof that this is not the writing of J. D. Downing. Several of the parties to the transaction are already dead. It is shameful that the holders of municipal bonds should risk investments on the life or memory of a living witness, with no other evidence of the transaction. Besides, it opens the door to fraud and perjury, and casts a cloud of suspicion on the transaction. Judgment must go for the plaintiffs for the amount claimed.

ROBSON *v.* MISSISSIPPI RIVER LOGGING CO.

(*Circuit Court, N. D. Iowa, E. D.* September 22, 1890.)

1. CONTRACT—INTERPRETATION—DURATION.
Plaintiff and defendant entered into a contract which, after reciting that plaintiff owned a large quantity of pine land tributary to certain rivers, and then had a large quantity of logs and timber in said streams, and expected to cut annually thereafter, and deliver in said streams, a large quantity of logs and timber to be driven to market down said streams, and that defendant was engaged in driving logs down said streams, and that differences had arisen between the parties in respect to the driving of logs, provided that, "therefore, for the purpose of settling all said differences, and providing for the future, it is mutually agreed" that defendant shall, for a certain consideration to be paid at the end of each season's business, take possession and control of all logs and timber, not exceeding a certain amount per year, which plaintiff shall deliver in said streams, and shall drive and deliver them at a certain point. Ever since the organization of defendant corporation it had driven and cared for plaintiff's logs. The differences referred to in the contract and over which litigation was pending were chiefly in regard to compensation. Said streams were the only means by which plaintiff's logs could be got to market, and defendant either directly or by its control over other companies managed all the facilities on said streams for getting logs to market. *Held*, that the contract was not revocable at pleasure, since, as applied to its subject-matter, it showed that it was to remain in force until all the logs on the lands then owned by plaintiff had been cut and delivered in said rivers.

2. SAME—CONSIDERATION.
Even if said contract does not bind plaintiff to deliver any logs to defendant to be driven, it is not therefore void for want of consideration, as, if any logs are delivered, plaintiff is bound by the contract to pay for driving them, and defendant is not bound to do anything until they are delivered.

3. SAME.
As the execution of the contract settled the litigation then pending between the parties, this was a valuable executed consideration for entering into the contract.

At Law. On demurrer to petition.

Action by John Robson against the Mississippi River Logging Company to recover damages for breach of written contract regarding driving and delivery of logs.

J. M. Gilman, *J. A. Tawney*, and *Henderson*, *Hurd*, *Daniels & Kiesel*, for plaintiff.

E. S. Bailey and *Young & Young*, for defendant.

SHIRAS, J. In the petition filed in this cause it is averred that plaintiff has for many years past been engaged in the lumber and logging business on the Chippewa and Flambeau rivers, in the state of Wisconsin; that he still is the owner of large quantities of pine timber upon said rivers, and expects to continue in such logging business, not only until the pine lumber upon the lands now owned by him is marketed, but so long as there is to be found, tributary to said streams, timber that can be purchased and put into the market; that the defendant is a corporation created under the laws of the state of Iowa, but since its organization, in 1871, it has been engaged in the business of driving and running for hire saw-logs and timber down the Chippewa and Flambeau rivers, into the boom at Beef slough, near the mouth of the Chippewa river, and there brailing the same ready for transportation down the Mississippi river, and delivering them for that purpose to the owners thereof, when turned out of said boom at Beef slough, which said boom was owned and operated by a corporation known as "the Beef Slough Manufacturing, Booming, Log-Driving & Transportation Company," but which last-named company was largely composed of the members of the defendant company, and its business was practically under the control and management of the defendant; that from the date of the organization of the defendant company, in 1871, up to the year 1882, the plaintiff has yearly cut large quantities of logs and timber upon said Chippewa and Flambeau rivers, all of which were delivered to the defendant company to be driven and cared for by it, while the same were being taken to the Beef Slough boom, to be there prepared for transportation down the Mississippi river; that in the year 1882, certain differences and disputes touching said business had arisen between the plaintiff and defendant, and litigation over the same was pending in the courts, when the parties, for the purpose of ending such litigation, and settling such past differences, and providing in respect to the driving, brailing, booming, scaling, and delivering plaintiff's logs in the future, entered into an agreement in writing, as follows:

"Articles of agreement made and entered into this 23d day of August, 1882, by and between the Mississippi River Logging Company, a corporation organized under the laws of Iowa, party of the first part, and John Robson, party of the second part, witnesseth: Whereas, the party of the second part owns a large quantity of pine lands tributary to the Chippewa and Flambeau rivers and their branches in Wisconsin, and now has a large quantity of saw-logs and timber in said streams, and expects to cut annually hereafter, and deliver in said streams, a large quantity of saw-logs and timber to be driven to market down said streams to the Mississippi river; and whereas, the said party of the first part is engaged in the business of driving logs down said streams to Beef slough for other parties; and whereas, differences having arisen between said parties hereto, and between the party of the second part and the Chippewa Lumber & Boom Company, (which is controlled by the party of the first part,) in respect to the running and driving of logs: Now, therefore, for the purpose of settling all said differences and providing for the future, it is mutually agreed as follows: *First.* Said party of the first part, in consideration of the premises and of the promises of the said party of the second part hereinafter mentioned, agrees to take possession and control of

all logs and timber which the party of the second part shall deliver in said Chippewa river, below the east and west forks thereof, and all that shall be delivered in said Flambeau river, at or below the north and south forks of said stream, and to drive the same at its own cost, charges, and expense down said streams to and into Beef Slough boom, not exceeding an average of twenty-five millions of feet annually, said logs to be driven each season with all reasonable dispatch, and with as much care and facility as it shall drive its own logs. The logs of the party of the second part now in said streams are to be driven by said first party under this agreement. Any charges to be paid the Chippewa Lumber & Boom Company, or any other company, person, or persons, on account of said logs, or any of the same, between the aforesaid forks of said streams and said Beef Slough boom are to be paid by the said party of the first part. *Second.* And the said party of the first part, in consideration of the premises, further undertakes and agrees that the charges of the said Beef Slough Boom Company shall not exceed sixty cents per thousand feet for booming, assorting, and delivering in pockets, and watching the said logs of the said party of the second part at all the mills on the Chippewa river. *Third.* And the party of the first part, in consideration of the premises, further undertakes and agrees to brail and deliver to the said second party, in a proper and usual manner, his said logs, ready to be taken in tow by boat after the same are turned out into pockets by said Beef Slough Boom Company, and to do the same with all reasonable dispatch. *Fourth.* And the said party of the second part, in consideration of the premises, promises and agrees to pay to the said first party annually, at the close of each season's business, for taking the care, control, and delivering said logs into Beef Slough boom as agreed, as aforesaid, the sum of two hundred and fifty dollars, and for brailing and delivering said logs ready for the tow-boat twenty-five cents per thousand feet. And said party of the second part also further agrees to return to the said party of the first part the brailing lines used in brailing said logs, unless the same shall have been three times used. *Fifth.* In case the said party of the second part associates any person or persons with him as partner or partners in such lumbering business this agreement is to stand, apply, and operate in respect to such partnership. But no logs are to be handled by said party of the first part under this agreement, except such as shall be owned by said party of the second part, or by him and others as partners. The cost of scaling the said logs as the same are turned into said Beef Slough boom is to be paid equally by the parties hereto.

"Witness our hands and seals this 23d day of August, 1882.

"MISSISSIPPI RIVER LOGGING CO.
"F. WYERHAUSER, Pt.
"JOHN ROBSON."

It is further averred in said petition that from the date of said contract down to the spring of 1889, all of the logs belonging to plaintiff delivered into said Chippewa and Flambeau rivers were driven and cared for by the defendant under the terms of said contract, and said work and services were paid for by plaintiff in strict accordance with the terms of such contract; that however, in the spring of 1889, the defendant, without cause or reason therefor, notified plaintiff that it would no longer drive, care for, and brail his logs under the terms of said agreement, and would no longer abide by and perform the same; that during the winter season of 1888–89, plaintiff had cut and put into the said Chippewa and Flambeau rivers, to be driven down the same to said Beef slough, some 14,840,136 feet of logs and timber, which defendant refused to drive

and care for under said agreement, and plaintiff was forced and compelled to employ other agencies in order to drive said logs; that the only other company engaged in such business is a corporation known as the "Chippewa Logging Company," which is owned, controlled, and operated by the same parties that form the defendant company, and plaintiff was compelled to employ the Chippewa company to do the work at an increased price; that in addition to the logs already cut plaintiff owns at least 60,000,000 feet of saw-logs and timber, tributary to said Chippewa and Flambeau rivers, which he desires and intends to cut, and which can only find a market by being driven down said streams into the Beef Slough boom; that on said streams there is a large quantity of timber land for sale, and a large quantity of logs and timber are sold each season; that plaintiff has heretofore, and in the ordinary course of business will hereafter, purchase logs and timber on said streams, in addition to those cut upon his own land, which must be driven down said streams to said Beef slough, and which it is and will be the duty of defendant under said agreement to drive and care for as therein provided; that in consequence of the refusal of defendant to carry out said agreement, plaintiff will be compelled in the future, as he was in 1889, to pay, for driving and caring for his logs, a sum much larger than that named in said written contract, to the damage of plaintiff in the sum of $75,000. To this petition a demurrer is interposed on the grounds: (1) That it appears from said petition that the contract set out therein is silent as to the time during which it should remain in force, and the defendant had therefore the right to terminate it at its pleasure, or upon giving reasonable notice; (2) that the contract is void for want of mutuality, in that the plaintiff does not therein agree to deliver any logs or timber to defendant to be driven under said contract.

In support of the first ground of demurrer, the contention is that, where a contract is silent as to its duration, it may be terminated at the pleasure of either party, upon giving reasonable notice of the intent to terminate the same. Counsel cite in their brief a large list of cases as authorities supporting this proposition. Upon examination it appears that the majority thereof are instances of persons engaging in the employ of another, thus creating the ordinary relation of master and servant, or principal and agent, and, as to contracts of this nature, the rule is that—

"Unless there is a definite time fixed, no action can be maintained for the breach of a contract to hire a person at stipulated daily wages. Such a contract is determined at the pleasure of either party, and no cause therefor need be alleged or proved. It is only when a definite term is fixed that the parties are liable for a breach of the contract, except where there is an actual legal excuse." Wood, Mast. & Serv. 265.

In Mechem on Agency, § 210, it is said:

"Where no express or implied agreement exists that the agent shall be retained for a definite time, the power and the right of revocation coincide. Such employments are deemed to be at will merely, and may therefore be terminated at any time by either party, without violating contract obligations, or incurring liability. The law presumes that all general employments are

thus at will merely, and the burden of proving an employment for a definite period rests upon him who alleges it."

Of the cases cited by counsel for defendant, *Wilder* v. *U. S.*, 5 Ct. Cl. 462; *Irish* v. *Dean*, 39 Wis. 562; and *Coffin* v. *Landis*, 46 Pa. St. 430, are specially relied upon as furnishing the rule to be applied to the construction of the contract declared on. *Wilder* v. *U. S.* is a case wherein a contractor, in 1861, agreed to furnish transportation for all public stores sent from St. Paul to Fort Abercrombie, at a certain rate named in the contract, which, however, specified no period of duration. In July, 1863, the contractor refused to longer carry the stores, and thereupon a parol contract was entered into between the contractor and the quartermaster by which it was agreed that the contractor should carry the stores at a higher rate of compensation. The contractor did so, and the court of claims held that he could recover upon the parol contract. In *Irish* v. *Dean*, *supra*, the facts were that a written contract was entered into whereby H. T. Jewett & Co. agreed to sell to Mark H. Irish milk and cream in sufficient quantity for his use in the hotel kept by said Irish, and known as the "Park Hotel," at certain prices specified in the contract, nothing being contained in the agreement which fixed the time it was to continue in force. The supreme court of Wisconsin held:

"The true rule, we think, is this: In a contract for personal services or for the sale of personal property to be delivered from time to time, if the contract is silent as to its duration, either party may terminate it at pleasure by giving reasonable notice to the other party of his intention to terminate it."

In *Coffin* v. *Landis*, *supra*, is found another case of personal hiring, wherein the one party agreed to devote his entire time and energy to making sales of land for the other party, his remuneration to consist in one-half of the net profits realized from sales made by him, and the contract being silent as to its duration; the court held that "the plaintiff undertook not a continuous employment, but an agency to sell land. Such contracts are generally revocable at pleasure, unless the power to revoke is restrained by express stipulation, or unless given for a valuable consideration." Construing the language of these opinions with reference to the contracts involved in each case, the rule deducible therefrom is that, when a contract is silent as to the matter of its duration, then it is ordinarily terminable at pleasure of either party, reasonable notice being given to the other party. When there is nothing in a contract, when applied to its subject-matter, which either directly or by fair implication can be construed to fix a limit to its duration, then the law infers that the parties intended that such a contract is terminable at the option of either party, reasonable notice of the exercise of such option being required, when such notice is needed for the protection of the other party to the contract. Before, however, this rule for determining the duration of a contract can be applied, it must appear that the contract is silent upon the subject, or, in other words, if the contract fairly construed gives any other means of determining its duration, then the contract is not silent on the subject, and the rule of revocation at pleasure is not appli-

cable. The real intent and agreement of the parties on the matter of duration, as the same is made to appear by the contract, is to be enforced just the same as the other provisions thereof, so that on this point, as upon all others, we look to the contract in all its parts and entirety, as the evidence of the intent of the parties. It is a fundamental and well-recognized rule that in construing contracts, courts may look not only to the specific language employed, but also to the subject-matter contracted about, the relation of the parties thereto, the circumstances surrounding the transaction, or, in other words, may place themselves in the same position that the parties occupied when the contract was entered into, and view the terms of the agreement in the same light in which the parties did when the same were formulated and accepted. *U. S.* v. *Peck*, 102 U. S. 64; *Merriam* v. *U. S.*, 107 U. S. 437, 2 Sup. Ct. Rep. 536; *Canal Co.* v. *Hill*, 15 Wall. 94.

Especially is this true when the written contract itself, by way of inducement, refers to the situation of the parties touching the subject-matter of the contract, as the same existed at and prior to the date of the contract. From the averments of fact in the petition contained, and the recitals of the written contract declared on, it appears that the plaintiff had for many years been engaged in the lumber business, on the Chippewa and Flambeau rivers, in the state of Wisconsin, and that at the date of the contract he owned a large quantity of timber land tributary to the named rivers, and that he proposed to continue in said lumber business upon said rivers, and to cut and take to market the timber upon the lands owned by him, as well as such other timber and logs as he might from time to time purchase in that vicinity. It also appears that to market such timber plaintiff would be of necessity compelled to rely upon the Flambeau and Chippewa rivers, and the facilities connected therewith, as the means for reaching a market. It also appears that the defendant corporation was engaged in the business of driving logs down said streams for the owners thereof, and preparing them for further transportation down the Mississippi river, receiving compensation therefor; that the Chippewa Lumber & Boom Company was likewise engaged in the same business, being a corporation under the same control and management as the defendant company, and that the Beef Slough Company, likewise, under the management and control of the defendant, controlled the boom at Beef slough; that, in effect, the defendant directly and by means of its power of control over the Chippewa and Beef Slough Boom Companies, managed all the facilities found upon said Chippewa and Flambeau rivers, for the driving, booming, taking care of, and brailing logs and lumber sent down said streams; that from the date of the organization of the defendant company, it had received, driven, and cared for all logs and lumber forwarded to market by plaintiff; that in 1882 differences had arisen between the parties in carrying on the business named, which had resulted in litigation in the courts, and that, for the purpose of settling this litigation over the past affairs, and providing for the future carrying on of the business in question, the written contract of August 23, 1882, was entered into. This contract binds the

defendant to take possession and control of all logs and timber, which the plaintiff should deliver annually on each of the rivers named, below certain specific points, and to drive the same and pay all the costs and charges made by the Chippewa Lumber Co., and to brail the same in at Beef slough ready for further transportation down the Mississippi. Can it be fairly inferred that the parties, in view of the facts surrounding them, intended that this contract should only continue in force at the mere pleasure of either party? The main bone of contention was the compensation to be paid by the plaintiff for the services in driving, caring for, and delivering the logs. The recitals in the contract show that it was mutually understood that plaintiff expected in the future to cut and market the timber owned by him on the streams named in the contract, which could only be effected through the co-operation of the defendant, and the other companies controlled by it. Can there be any question that the logs and timber that the defendant agreed to take possession of, when placed in the named rivers, and to drive and care for, was the timber which the plaintiff would in the future, as in the past, cut and place in the Chippewa and Flambeau rivers, with the limitation found in the contract that the annual amount should not exceed an average of 25,000,000 feet? One of the main purposes of the contract was to settle for the future the compensation to be paid for the work done in driving and caring for the logs marketed by the plaintiff. Is it possible that the parties intended to make a contract which could be terminated by either party at any time, as is the present contention of defendant? Such contract would not go far "in providing for the future," which is declared to be, in connection with the settlement of the past differences, the purpose of the written contract. The provision in regard to the annual payments and other matters clearly show that it was the contemplation of the parties that the contract would be in force for years. Still it is true that if the contract, as applied to its subject-matter, furnishes no rule for determining its possible duration, it must be held to be terminable at will, upon due notice, and the fact that it appears that it was the expectation of the parties that it would be in force for years does not prevent this rule from governing the case. The fact, however, that the provisions clearly indicate that it was the expectation of the parties that the contract would be in force for years may have weight upon the question whether there cannot be found in the contract and its subject-matter a limitation upon its duration, thus taking the contract out of the class that is held to be terminable at will. The duration of a contract may be made dependent upon the expiration of a period of time, or upon the completion of a given undertaking, or the happening of some event, all of which in turn may be certain or uncertain as to the date when the undertaking may be completed, or the event may happen. This uncertainty, however, does not render the contract terminable at will. Thus contracts for driving all the logs that might be cut and placed in the stream by a given date, or for driving 1,000,000 feet of logs as soon as it could be reasonably done, or for driving all the logs that could be cut from a given quantity of land, would each, by their terms, point

out the event which fixed the duration of the contract. In the contract declared on the exact number of acres of land owned by plaintiff is not named, but it was a matter easily ascertainable. In legal effect it does refer to a fixed quantity of land, to-wit, that owned by plaintiff at the date of the contract, and the undertaking of the defendant was that it would take possession of, drive, care for, and deliver the logs cut from the premises owned by plaintiff. The recitals and terms of the contract clearly show that it was the main purpose of the contract to fix the rates or compensation to be paid by plaintiff for the driving, caring for, and delivery of the logs cut by him upon the land owned by him, and it is equally clear that the rates agreed upon were intended to apply to all logs cut by plaintiff upon the lands owned by him, and delivered in the Chippewa and Flambeau rivers named in the contract. Thus the contract, as applied to its subject-matter, furnishes the means for determining its duration, and it not being silent therefore upon this point, the rule of revocation at will is not applicable.

On behalf of plaintiff, it has been forcibly urged that, in view of the peculiar control exercised by defendant over the facilities found upon the Chippewa and Flambeau rivers for the driving, taking care of, and booming logs upon those streams, and the resulting interdependence of the branches of business carried on by the respective parties, the contract should be construed to be in force so long as plaintiff should continue in the lumber business upon the named rivers. In passing upon the demurrer, it is not necessary to consider this view of the contract, as the real question presented by the demurrer is whether the contract is terminable at will, and if in any view it is not so terminable the demurrer cannot be sustained.

The second ground of demurrer, to the effect that the contract is void for want of mutuality, is clearly not well taken. Even if it be true, as claimed by defendant, that the contract does not bind the plaintiff to deliver any logs to the defendant to be driven, that does not render it void for want of consideration. The defendant is not bound to drive any logs, unless they are delivered, but if, being delivered to defendant, the same are driven, then the contract binds the plaintiff to pay the agreed price therefor, and the fact of performance on the part of defendant renders binding the obligation to pay on part of plaintiff. The execution of the contract between the parties settled the litigation then pending between them, thus showing a valuable executed consideration received by defendant as well as the plaintiff, for entering into the contract, which cannot be held to be void for want of consideration.

The point made, that the defendant is bound to drive and care for the logs, but that plaintiff is not bound to deliver the same to defendant to be driven, and therefore there is a want of mutuality, is not well founded in point of fact. It is clear that defendant is not bound to drive or care for any logs, until the same are delivered to it by plaintiff; and the latter is just as much bound to deliver as the former is to drive and care for. The obligation of defendant does not take effect until plaintiff delivers the logs, and the moment the defendant undertakes the care of

the logs, then the plaintiff becomes bound to pay the stipulated price, and thus it is clear that both parties are mutually bound in such sense that the contract cannot be held void for want of consideration. The demurrer is overruled, with leave to defendant to answer in 30 days.

In re HARMON.

(Circuit Court, N. D. Mississippi, W. D. August 6, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALE—ORIGINAL PACKAGE—CONSTITUTIONAL LAW.
Where bottles of whisky, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company, and marked, "To be returned," are shipped from one state to another, the boxes, and not the bottles, constitute the "original packages" within the meaning of decisions of the supreme court upon the interstate commerce provision of the national constitution.

At Law. Petition for *habeas corpus*.
W. Miller and *Sullivan & Whitfield*, for relator.
Echols & Smith, for the State.

HILL, J. The questions to be decided in this cause arise out of the following facts: The town of Sardis is situated in Panola county, Miss. In pursuance of an act of the legislature of the state of Mississippi, a vote was taken at an election for the purpose, and a majority of the voters in the county voted to prohibit the sale of spirituous liquors in the county, so that it became what is called a "prohibition" county. The relator, acting as the agent of one Jordan, a citizen of Memphis, Tenn., received from Jordan, shipped by the Mississippi & Tennessee Railroad, or rather the express company on said road, a number of boxes containing bottles or flasks of whisky, some containing a pint each, and others a quart. These bottles or flasks had each a paper wrapper or box placed around it, and sealed with mucilage or sealing-wax. These bottles, so wrapped or inclosed, were by Jordan placed in ordinary pine boxes, but without a cover, closely packed together, which boxes, the relator and Jordan testify, were furnished by the express company, with a promise to return them when emptied. These boxes were received by the relator in Sardis, and the boxes and flasks taken out when sold and delivered to the purchasers, but were kept in the box until all were sold and delivered. The boxes had marked on them, "To be returned." Relator continued to receive and sell these bottles filled with whisky until the 25th day of July, 1890, when he was arraigned before J. D. Hightower, mayor and *ex officio* justice of the peace for Sardis and the county of Panola, acting as a justice of the peace for Panola county, charged upon a warrant issued by said mayor and justice of the peace, founded upon the affidavit of C. W. Fulmer, marshal of said town, with having violated the laws of the state by making in said town sales of whisky to three different persons. To this charge the defendant

in that case and relator in this pleaded not guilty. The sales were proven, and the defendant offered no proof and set up no defense. The mayor and justice rendered judgment against him, and imposed upon him a fine of $50 and costs for each sale, and that he be imprisoned in the jail of said county until the said fines and costs should be paid; and that in addition thereto he should be imprisoned in said jail for 60 days as part of the penalty for said violations of the law of the state, and which imprisonment was immediately imposed. The relator, being so imprisoned and deprived of his personal liberty, presented to this court his petition, alleging that he was unlawfully deprived of his personal liberty, reciting the proceedings mentioned, and admitting that he made the sales, and the proceedings had, but alleging that he had made no other sales of whisky other than that shipped to him as the agent of Jordan, and that all of said sales were made of original and unbroken packages, and alleging that said sales were authorized under the constitution and laws of the United States, and praying this court to grant him a writ of *habeas corpus*, and for his release. The petition set forth sufficient causes for the issuance of the writ, which having been executed, the sheriff made his return, with the causes for the imprisonment of the relator, which not being controverted, the burden is cast upon the relator to show that he was authorized, under the constitution and laws of the United States, to make the sales for which he was so convicted and imprisoned, and which presents the single point as to whether or not the whisky so shipped and sold in the boxes described constituted one package as put up and shipped, or was each bottle or flask a separate package, and the shipping and sale protected by the constitution and laws of the United States from the penalties imposed by the laws of the state. In other words, was the whisky contained in the box, though in different bottles and flasks, one package? The question has been strongly presented by counsel on both sides, and it is urged on the part of the relator that the fact that paper wrappers sealed up around each bottle made a separate package, and that, as the express company furnished the pine boxes to be returned, they had no other effect. I am satisfied that these were mere subterfuges, resorted to by Jordan and the relator to avoid the penalties of the state law, and that it made no difference whether there were paper boxes around each bottle or not; if each was a separate package within the provisions of the constitution of the United States, as construed by the supreme court of the United States, with the box or wrapper, it was equally so without it. Nor does it make any difference to whom the boxes belonged. These bottles were closely packed together in the boxes by Jordan, the shipper, and in that form shipped to Sardis, and in that way they were kept by relator until sold and taken out, one bottle at a time. It was, in other words, a retail saloon. I am satisfied that the whisky in the box, although in separate bottles, for the convenience of the trade in this retail saloon, was but one package within the meaning of the interstate clause of the constitution as construed by the supreme court, and might have been sold together in one sale without breaking the package, and, if this had

been done, the relator would have been protected in making the sale, and entitled to his release; but this was not done, and he is not entitled to the protection and release as asked of this court. The sale was made in violation of the laws of the state, and the conviction and judgment of the mayor and justice were justified under the law and testimony. Indeed, that court, as the case was presented to it, could not consistently have rendered any other, the defense here not having been presented to that court.

It may be a question of doubt whether, under these circumstances, this court ought to interfere for this reason alone. In reaching the above conclusion I do not decide that a single bottle of whisky may not be shipped and sold by itself alone as a single and unbroken package, within the protection of the constitution of the United States, under the interstate commerce clause; but it must be shipped alone, and sold as shipped. I am not aware that any court has held otherwise. All the cases brought to my attention in which the facts were set out are cases of the exportation of whisky from one state to another. The exportation was made by the manufacturer, and the packages were put up and stamped as required by the revenue laws of the United States; so that these were original packages. There is no evidence in this case that Jordan manufactured the whisky, or that he had any stamps upon the bottles; so that the facts in this case are different from any of the decided cases, so far as I have been able to ascertain. Judges of respectability have held that to relieve the importer and vendor from the penalties of the laws of the state the package, as an original and unbroken one, must be that put up by the manufacturer or rectifier. I am inclined to the opinion that this position is correct, and, if so, the relator for this, if no other reason, cannot be discharged. The result is that the release prayed for must be refused, and the relator returned to the custody of the sheriff of Panola county, and that he pay the costs of this proceeding, to be taxed.

UNITED STATES *v.* CRAFT.

(District Court, D. Kentucky. March 11, 1890.)

INDICTMENT—RECOVERY OF FINES AND PENALTIES.

Fines, forfeitures, and penalties incurred under the laws of the United States may, under section 3213, Rev. St. U. S., be recovered by indictment.

At Law. Motion in arrest of judgment.

Samuel McKee, for the motion.

George W. Jolly, U. S. Atty., cited Rev. St. U. S. § 3213, and *U. S.* v. *Moore*, 11 Fed. Rep. 249; *U. S.* v. *Mann*, 1 Gall. 177; *U. S.* v. *Bougher*, 6 McLean, 277, 24 Myer, Fed. Dec. 383; 3 Bac. Abr. 550; *U. S.* v. *Foster*, 2 Biss. 455; and *U. S.* v. *Ebner*, 4 Biss. 119.

BARR, J. The defendant has been indicted under section 3265 of the Revised Statutes, for setting up a copper still, to be used for the purpose of distilling, without first obtaining from the collector of internal revenue for the district a permit to do so. He has been found guilty, and now moves for an arrest of judgment, because, as he claims, an indictment will not lie, but the sum precribed by the section should have been sued for in a civil action. Section 3265 provides that any person who shall set up any such still, without first obtaining a permit from the collector of the district, shall pay the sum of $500, and shall forfeit the distilling apparatus thus set up in violation of law. Section 3213 provides that "all suits for fines, penalties, and forfeitures, when not otherwise provided for, shall be brought in the name of the United States in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred." This does not prescribe any special form of action, but allows any appropriate action or proceeding to be used, and the question is whether, upon general principles, an indictment will lie for a mere penalty. The language used in section 3265 is, "shall pay $500," but this is only another mode of declaring and imposing a penalty of $500 for a violation of the law. In 3 Bac. Abr. 550, it is said:

"Generally when a statute either prohibits a matter of public grievance, or commands a matter of public convenience, as repairing the common streets of the town, etc., every disobedience of such statute is indictable; but if the party has once been fined in an action on the statute, such fine is, it seems, a good bar to the indictment."

And again, on the same page, it is said:

"When the statute makes a new offense, which was in no way prohibited by the common law, and appoints a particular proceeding against the offender, as by commitment or action of debt or information, etc., without mentioning an indictment, it seems to be settled at this day that it will not maintain an indictment, because the mentioning of the other methods of proceeding only seems impliedly to exclude that by an indictment. Yet it hath been adjudged that, if such statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment."

This, I think, is a correct statement of the law at the present day. See *U. S.* v. *Moore*, 11 Fed. Rep. 249, for an able and elaborate discussion of the question; also *U. S.* v. *Bougher*, 6 McLean, 277. The motion in arrest of judgment should be overruled, and it is so ordered.

UNITED STATES *v.* HARNED.

(*District Court, D. Washington, N. D.* June 25, 1890.)

1. EXTORTION—PUBLIC OFFICERS—EXCESSIVE FEES—EVIDENCE.
In a trial upon an indictment founded upon section 5481, Rev. St., proof that money in excess of legal fees was received by an officer of the United States, and that in receiving the money he acted in an official capacity and corruptly, is not sufficient to warrant a conviction, without evidence tending to prove that the excess was exacted by the defendant, and not paid voluntarily.

2. SAME—DIRECTION OF VERDICT.
When, upon trial of a criminal case, the prosecution fails to introduce any evidence to show one of the elements of the crime charged, a motion to instruct the jury to acquit the defendant will be granted.

(*Syllabus by the Court.*)

Defendant was indicted for the crime of extortion, under section 5481, Rev. St., which is as follows: "Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment for not more than one year, except those officers or agents of the United States otherwise differently and specially provided for in subsequent sections of this chapter." Upon the trial, after all the evidence for the prosecution had been introduced, his attorney moved the court to instruct the jury to render a verdict for him.

Patrick H. Winston, U. S. Atty., and *P. C. Sullivan*, Asst. U. S. Atty.

A. R. Coleman, for defendant.

HANFORD, J., (*orally.*) I will have to grant this motion. This indictment is founded upon section 5481 of the Revised Statutes. The defendant is brought to the bar to answer the charges in this indictment, and nothing else. He cannot be convicted here on general principles, or for any sort of wrong-doing except the crime of extortion. As has been said in the argument, the statute does not attempt to define "extortion," and it does not attempt to define the crime by any other word than the word "extortion." It simply states that any officer of the United States guilty of extortion shall be punished in a certain manner. It is incumbent on the prosecution in a criminal case to prove every material fact by competent evidence, sufficient to convince the jury beyond all reasonable doubt. Every single element of the crime must be shown by affirmative proof. Now, there is evidence in this case sufficient to go to the jury as to almost everything necessary to constitute this offense. There is evidence here that the defendant was an officer of the United States. There is evidence here that he received money from Capt. Sprague in excess of the legal fees. There is evidence that he knew that those fees were illegal, (but that would not have been necessary to prove, because under no circumstances could he defend his action on the ground of ignorance as to what the fees were,) but there is evidence to go to the jury that he had full and ample knowledge of all the facts which would be necessary for him to have in order to commit the offense. There is evi-

dence that I would be willing to submit to the jury of a corrupt motive. All those things are necessary to make out this offense, but insufficient without proof of an additional fact. The word "extortion" implies that the money paid was extorted on the part of the one who received it, and was paid unwillingly by the party paying the same, and the weak point here is that the prosecution has utterly failed to introduce any evidence whatever that this money was not voluntarily paid by Capt. Sprague, he knowing at the time that it was in excess of the amount that was required to be paid, and for that reason I do not think that any conviction of the defendant on this indictment would be lawful. This proposition is sustained by the following authorities: 1 Russ. Crimes, (9th Amer. Ed.) 207; 7 Amer. & Eng. Enc. Law, 591; *Com.* v. *Dennie*, Thacher, Crim. Cas. 165.

The testimony of Mr. Fennimore, as I remember it, is the strongest of any testimony in the case going to show that the fees concerning which he testified were extorted. He states that they charged that amount, but his testimony is too weak to go to the jury to connect the defendant with any particular transaction, as the one who exacted the payment. He states in a general way that his instructions in the custom-house were to do so and so, but fails to instance any particular order or instruction given by the defendant. The indictment alleges that those excessive charges were made with the intention of injuring and oppressing Capt. Sprague. Capt. Sprague has not been called as a witness here, and there is not any evidence that he ever protested against paying those charges, or that he did not pay them voluntarily after reading the fee-bill, and with full knowledge of what the legal charges were. In addition to this, and in support of some one or more counts in the indictment, it is shown by the evidence that some of the fees were not paid by Capt. Sprague, but by a custom-house broker, who was acting as the agent of Capt. Sprague, or of the owners of the vessel, and in paying them he should know what the fees were, and the master of the vessel should also know what the fees were, and what his duties were, and, if he paid any money without objecting, it would be very hard to say that the evidence here was sufficient to convict this defendant of extortion. But this case is not as strong as that, because it fails to show that Capt. Sprague did not voluntarily on his own part tender and pay this money without any request or act of the defendant in fixing the amount. In answer to the contention that the mere taking of illegal fees by an officer of the United States is punishable as extortion under this section, I will remark, in the first place, that the language used by congress in this section does not imply any such rule of law, because the crime of extortion at common law was not proven by the mere taking of excessive or illegal fees by an officer unless they were exacted and paid unwillingly, under color of his office. And congress has indicated very clearly in the Revised Statutes that it does not regard the mere taking of illegal fees as being synonymous with extortion. The law in the case of pension agents is a special enactment of congress, and providing for those particular cases. Congress has not in

that instance been content to enact that a person who, under color of his office or as a pension agent, extorts a sum in excess of that prescribed by law, shall be punished, but it has prescribed that the person who takes it and retains it shall be punished; and so, also, in section 3169, there is a plainer illustration of what congress understood by extortion, and of what was intended to be included in that word. This section is a part of the internal revenue law, and provides that every officer or agent of the United States who is guilty of any extortion, or who knowingly demands other and greater sums than are authorized by law, or who receives any fee or compensation, etc. Now, certainly, in framing that section, it was not understood by congress that extortion, and the mere taking of money in excess of the lawful fee, was the same thing; for in this instance, after mentioning extortion, they have gone a step further, and expressly provided a punishment for a person who knowingly takes or receives any fee, compensation, or reward except as by law prescribed. On this ground alone, that there is no proof that the money was not voluntarily paid by Capt. Sprague, I think the motion will have to be sustained. Mr. Winston, if you have any other evidence to offer, or if you desire to reopen the case, I will allow you to do so; otherwise I shall write out the form of verdict for the jury.

Verdict, not guilty.

KELLER *et al.* *v.* STOLZENBAUGH *et al.*

(*Circuit Court, W. D. Pennsylvania.* June 9, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DREDGING MACHINES.
A claim in letters patent for "the combination of a dredging apparatus for dredging and elevating the material, a screen for separating the material, and a device for elevating and discharging the water into the screen, substantially as specified," *held* to be be infringed by the use of a water-jet pipe placed directly over the screen, and lengthwise of the same, from which water raised from the river by means of a pulsometer was discharged directly on the top and exterior of the revolving screen.

2. SAME—DAMAGES.
In assessing damages for a brief infringement of a patent, an established license fee is not to be adopted as the arbitrary standard, but should be used as affording proper guidance, in connection with the qualifying circumstances of the particular case, in the ascertainment of the plaintiff's actual damages.

At Law.

In pursuance of a written stipulation this case was tried by the court without the intervention of a jury. The following facts are therefore found by the court:

First. On the 17th day of August, 1875, the letters patent here in suit, being reissue No. 6,598, were issued upon the surrender, and in lieu of letters patent No. 126,968, dated May 21, 1872, to Nicholas J. Keller, one of the plaintiffs, for an improvement in sand and gravel separating machines, the first claim of said reissued letters patent being as follows:

"(1) The combination of a dredging apparatus for dredging and elevating the material, a screen for separating the material, and a device for elevating and discharging water into the screen, substantially as specified."

And the third claim being in the following words:

"(3) The combination of a cylindrical screen, suitable devices for elevating water, and the material to be separated and feeding the same to the screen, a receptacle or receptacles for the material which has passed the screen, and an elevator or elevators for carrying away the screened material."

The said reissued letters patent are made part of this finding the same as if herein recited at length.

Second. On March 31, 1883, by an instrument of writing duly executed, Nicholas J. Keller assigned to his co-plaintiff, Thomas R. Williams, the one-half of said reissued letters patent, and said assignment was recorded in the patent-office on April 2, 1883.

Third. In October, 1888, the defendants placed on their dredging-boat, called the "Progress," two sand and gravel separating machines, one on each side of the boat, and thenceforth until the expiration of the patent on May 20, 1889, used the same upon said boat in the course of their business within the western district of Pennsylvania, for elevating sand and gravel from the river-beds, and separating the material so raised. Each of said machines was provided with a water-jet pipe placed directly over the screen, and lengthwise of the same, and water raised from the river by means of a pulsometer was discharged from said pipe directly on the top and exterior of the revolving screen. Including this device as a constituent, each of said machines contained and had in use the combination described in and covered by the first claim of said reissued letters patent, and the combination described in and covered by the third claim of said reissued letters patent.

Fourth. The defendants' said two sand and gravel separating machines were of a construction similar to that shown by the drawings of letters patent No. 324,158, granted on August 11, 1885, to Philip M. Pfeil, and their avowed object in using the pulsometer and water-jet pipes for raising water and discharging the same upon the screens was to clear the sieve of small grains of gravel which sometimes get wedged into the meshes of the screen, but, in fact, by means thereof, the water was fed to and discharged through the sieve into the screen in such quantity and manner as to aid materially in washing and separating the sand and gravel, and in preventing the tendency of the screen to clog, and in assisting in the discharge of the refuse matter.

Fifth. The plaintiffs had an established license fee of $1,000 for the use of one of their aforesaid patented machines.

D. F. Patterson and *Wm. L. Pierce*, for plaintiffs.

George H. Christy, for defendants.

ACHESON, J. Whatever may have been the real purpose of the defendants in using the pulsometer and the water-jet pipe, the effect of the discharge of the water upon the top of the revolving screen was as stated in the fourth finding of fact. Indeed, with the amount of water used, it is

not easy to see how the result could be otherwise. The conclusion above stated upon this question of fact is, I think, fully warranted by the evidence. Now, to hold that to constitute infringement the water must enter the screen at the end where the material to be washed enters, would be a very narrow and unreasonable construction of the patent. The claims are not so limited in their terms. Manifestly, if water in sufficient quantity is elevated and then fed to the screen through the upper side thereof as it revolves, the beneficial result of the invention is attained substantially in the manner contemplated by the inventor. It is here worthy of note that the specification states that a steam siphon pump may be used for elevating the water, either as an adjunct to the chain and buckets, or in place thereof, as may be found desirable. And the specification describes the discharge of the water as "at or about the same point as the buckets of the elevator B discharge their contents,"—the material to be treated. I am of the opinion, then, that the defendants are liable as infringers of the plaintiffs' patent. Upon any fair construction of the contract, the licenses in evidence, I think, only conferred each the privilege of using one patented machine; and as the defendants had on their dredging-boat two machines, they would be chargeable with two license fees, if the established fee were adopted as an arbitrary standard of damages. But I am of the opinion that while the license fee affords proper guidance in the ascertainment of the damages, yet regard should be had, also, to the qualifying circumstances of the case, to the end that the finding may be for the actual damages sustained by the plaintiffs, agreeably to the principles announced by the supreme court in *Birdsall* v. *Coolidge*, 93 U. S. 64. Now, the infringement here, it would seem, was not characterized by any bad faith, and it only lasted about six months, and this period included the winter season. It seems to me, then, upon much reflection, that the sum of $1,000 in full compensation of the damages sustained by the plaintiffs, would be a just and reasonable allowance. And now, June 9, 1890, the court finds in favor of the plaintiffs, and that the defendants infringed the first and third claims of the reissued letters patent sued on, and that as and for their damages the plaintiffs recover from the defendants the sum of $1,000. Let judgment be entered upon the finding of the court for the plaintiffs in the sum of $1,000, and costs.

AMERICAN SPLIT-FEATHER DUSTER CO. v. LEVY.[1]

(Circuit Court, E. D. Pennsylvania. June 13, 1890.)

1. PATENTS FOR INVENTIONS—FEATHER DUSTER—LACK OF INVENTION.
The patent was for a feather duster, suitable for use on fine furniture, composed of stiff hard feathers split and manipulated, to render them soft and pliable. The process of splitting and manipulating employed was old, though not previously applied to the particular kind of feathers used, and not carried to quite the same extent. Dusters made of soft feathers were also old, as was the idea of softening stiff feathers for this use by other means. *Held*, the patent was void for lack of invention, as the patentee has only substituted one known kind of soft feather for another. Following *Hollister* v. *Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717.

2. SAME—INVENTION.
That efforts to soften stiff feathers for dusters had previously been made by the application of oil and other substances does not show the patent called for an invention, since the result obtained was such as any one skilled in the art, and desiring a cheap pliable feather, would be likely to reach by common reason and observation.

Bill by the American Split-Feather Duster Company against S. Levy to Enjoin Infringement of Patent.

Watson & Thurston, for plaintiff.

Horace Pettit, *Frank M. Wirgman*, and *Alexander P. Colesbury*, for defendant, cited on the point decided, *Smith* v. *Murray*, 27 Fed. Rep. 69; *Guidet* v. *Brooklyn*, 105 U. S. 550; *Matress Co.* v. *Whittlesey*, 8 Biss. 23.

BUTLER, J. The suit is for infringement of letters patent No. 385,070, granted to Guilbert M. Richmond, June 26, 1888, for "improvement in feather dusters," the claims of which are as follows:

"*First.* As a new and useful article of manufacture, a soft light feather duster made of stiff heavy feathers reduced in weight, and rendered more pliable by splitting or shaving off their ribs, substantially as described. *Second.* As a new and most useful and perfect article of manufacture, a soft, light, and flexible feather duster, made of stiff heavy feathers, rendered soft, light, pliable, and elastic, by the removal of the ribs of their shafts, and withing the backs thereof, substantially as described."

The defense assails the patent on several grounds, the most serious of which is, probably, "want of patentable novelty." The history of the art shows that feather dusters have been made time out of mind, and of various kinds of feathers; that for fine dusters—used on cloth, furniture, etc.—the feathers must be soft and pliable, and that, prior to 1873, feathers for such dusters were obtained from the ostrich and South American vulture; that these feathers are, comparatively, scarce, and the brushes made from them expensive; that before and at the time of Mr. Richmond's alleged invention, efforts were made to find a substitute for these feathers, less costly, and experiments were made with the wing and tail feathers of turkeys. Being (comparatively) stiff and brittle in their natural state, unsuccessful attempts were made to remove this objection-

[1]Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

able feature, by the application of oil, and other substances; that a process for increasing the softness and pliability of feathers had long been employed, which consisted in splitting, scraping, and manipulating in various ways; that feathers so treated were used in the manufacture of tufts, plumes, and other similar devices. This much respecting the art is certain if not undisputed. The defendant further asserts that the coarse feathers of turkeys were so dressed, and used in making dusters, prior to 1873, and has produced some evidence in support of it. Whether he has proved the assertion need not be determined at present. Mr. Richmond, applied this process of dressing to the tail and wing feathers of turkeys,—carrying the manipulation a little further, probably,—and used them in the manufacture of dusters. By this means he obtained a soft, pliable article, which soon became popular, and thereby greatly reduced the price of fine dusters.

Does his art display patentable novelty? In other words, was invention required to do what he did? What constitutes patentable novelty or invention, as contemplated by the patent law, has been so fully and repeatedly discussed in the numerous cases in which the question has arisen, that further elaboration would be waste of time. Two-thirds, probably, of all suits brought to enforce patents, have involved it, and more time has been employed in its elucidation than has been expended on any other question of patent law. As is said by the supreme court in *Hollister* v. *Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717, a device which displays only the expected skill of the maker's calling, and involves only the exercise of ordinary faculties of reasoning, upon material supplied by special knowledge, and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work of the inventive faculty, and such as the constitution and patent laws aim to encourage and reward. It is something, as the court further says at page 72, which springs "from that intuitive faculty of the mind, put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision." In other words, it is a new thing produced by the exercise of the inventive or creative faculty, and not by the employment, simply, of common reason applied to existing and known facts.

In this view of the law did Mr. Richmond's act require invention? He had before him, as we have seen, feather dusters of various descriptions, embracing those made of soft pliable feathers. What he did, substantially, was to substitute one kind of soft pliable feathers for another. If the substituted feathers had been sufficiently soft and pliable in their natural state, he would hardly claim that the substitution required invention. His claim seems to rest on the fact that he dressed feathers so as to increase their softness and pliability and substituted these. If he had been the first to discover and employ the process of dressing, his claim would find support in that fact. But, as we have seen, he was not. He probably carried the process a little further than had previously been done, rendering the feathers a little more pliable; though this is disputed. If he did, it is unimportant. The most he can claim

is that he was the first to apply such dressed feathers to the manufacture of dusters. While this also is disputed, I will treat him as entitled to the claim. As dressed feathers were old, how does the substitution of them differ from the substitution of other suitable feathers in their natural state, (if such could be found?) It is true he did not use feathers dressed by others, nor dress the same kind others dressed. He used the coarse feathers of turkeys. If he had used those dressed by others, and found on sale, he would hardly claim that his act embraced invention, or novelty even. He would simply have substituted one soft pliable feather for another. Then did it require invention to apply the old process of dressing to other feathers, and substitute these, instead of the dressed feathers found on sale? Substantially this is all he did. He was not the first even, as we have seen, to conceive the idea of softening and applying coarse feathers to this use. The only problem, when he began, was how can such feathers be softened and rendered pliable. While others were experimenting with a view to its solution, he applied the old familiar process of splitting and manipulating.

With every disposition to sustain the patent, not only because of the presumption arising from its grant, but also and more especially because of the benefit which the patentee conferred upon the public, I am unable to find any patentable novelty in what he did. There does not seem to be anything like invention about it. What he accomplished was the result, simply, of common reasoning from existing known facts,—such a result as any one skilled in the manufacture of dusters, and desiring a cheap pliable feather, would be likely to reach. To say that others did not reach it is not an answer. An obvious result, attainable by observation and ordinary reason, is often overlooked for a time,—as in the case of the revenue stamp, involved in *Hollister* v. *Manufacturing Co.* The importance and value of the result there was greater than here. Nevertheless (and notwithstanding the ingenuity displayed by the patentee, and the fact that others had sought for and missed it,) the patent was declared invalid. A reference to the general remarks of the court in that case is sufficient to dispense with further observations on the subject here. As this view disposes of the controversy, an examination of other questions raised and discussed is unnecessary. A decree may be prepared dismissing the bill, with costs.

McCARTY *et al.* *v.* LEHIGH VAL. R. Co.

(*Circuit Court, E. D. Pennsylvania.* June 20, 1890.)

1. PATENTS FOR INVENTION—INFRINGEMENT—CAR-TRUCK BOLSTERS.
Metallic car-truck bolsters had been made, consisting of a straight lower bar and an arched upper bar, secured at the ends to the ends of the lower bar, and rigidly secured to the car-truck. Solid bolsters had been placed upon springs in the car-truck to secure a "floating" motion of the bolster, and were held in their place by guides permitting an up and down motion. *Held* no invention involved in adding to the rigid bolsters lower-bar flanges to secure the ends of the upper bar, and guide-plates to place wedge-shaped pieces between the bars, and to place this construction upon springs in the same manner as the solid bolster had formerly been placed.
2. SAME—EQUIVALENTS.
A lower bar of a car bolster, having its ends turned up and laid back to support the upper bar, is an equivalent of a flange attached to the lower bar for the same purpose.
3. SAME—INVENTION—TRUSS-RODS BETWEEN BARS.
Truss-rods between the bars of a metallic bolster are not invention, and had been moreover used in the Roberts bolster.

Bill in Equity by Harry C. McCarty and John F. Bickel to enjoin the infringement of patents 339,913 and 314,459, against the Lehigh Valley Railroad Company. No. 339,913, which was first applied for, contained truss-rods as an element of the combination, which were not contained in the other.

Jerome Carty, for complainants.

Andrew McCollum, for defendant.

BUTLER, J. The two patents in suit are for substantially the same combination, except that the last applied for (though first issued) omits the "truss-rods" described in the first application. While both are, in terms, for an "improvement in car-trucks," they are actually for an improvement in "truck bolsters" only. The improvement consists in forming a bolster of an upper and lower metal bar; the latter being straight and a little longer than the former, with the excess of length turned up, or "flanged," at the ends, to form a support for the other; the upper being arched from near the ends, which are straight, and rested against the "flanges," on the lower. The bars are secured in position by central upright columes, short intermediate wedge-shaped blocks, inserted near the ends, and by bolts where the ends unite. Under the ends of the lower bar "guide-plates" are fastened, to keep them in place over the springs, on which they rest. This relation to the springs imparts to the bolster a swinging, or "floating," motion on the truck. In the first application, (and the patent issued thereunder,) "truss-rods" are, also, called for. The defense assails the patent, (for lack of invention,) and also denies infringement.

The history of the art shows that "body bolsters" (so termed in contradistinction to truck bolsters) in form and general structure, similar to the complainants' bolster, had long been in use, and adapted and applied

[1] Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

to trucks, before the complainant's alleged invention. The "Naugatuck truck bolster" is of this description; and differs from the complainants' only in the absence of "flanges" on the lower bar,[1] the wedge-shaped blocks, and the "guide-plates." It was fastened rigidly upon the truck; the springs being placed over the journal bearings, imparting a swinging motion to the carriage on which the sides of the bolster rest. This history further shows that bolsters composed of single, heavy straight bars or beams, with the ends resting on springs (so as to allow them to swing,) and kept in place over the springs by guides, had long been used. Such were the "Diamond bolsters."

It is thus seen that what the complainant did was to transfer the "Naugatuck bolster" from its rigid situation to that of the "Diamond," and add flanges[1] and guide-plates to the lower bar, and the intermediate wedge-shaped blocks. Did this require invention? What constitutes invention, within the meaning of the patent laws, as has been said in *Duster Co.* v. *Levy*, *ante*, 381, (decided by this court at the present term,) has been so fully and completely discussed in the numerous cases in which the question has arisen, that further elaboration would be waste of time. Two-thirds, probably, of all suits brought to enforce patents, have involved it, and more time has been employed in its elucidation than has been expended on any other question of patent law. As remarked by the supreme court in *Hollister* v. *Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717, a device which displays only the expected skill of the maker's calling, and involves only the exercise of the ordinary faculties of reasoning, upon materials supplied by special knowledge, and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work of inventive faculty, and such as the constitution and the patent laws aim to encourage and reward. It is something, as the court further says, (at page 72,) which springs from an "intuitive faculty of the mind, put forth in the search for new results, or new methods, creating what had not before existed or bringing to light what lay hidden from vision." In other words, it is a new thing produced by the exercise of the inventive or creative faculty, and not by the employment, simply, of common reason, applied to existing and known facts. In *Hollister* v. *Manufacturing Co.*, the improvement involved exhibited great ingenuity, and was of much value, and yet the court held it to be without patentable novelty.

In this view of the law, does the complainants' improvement show invention? Surely the transfer of the "Naugatuck truck" to the situation of the "Diamond," did not require invention. The advantages of resting the bolster on springs had previously been discovered, and the method of doing it successfully been applied. All else the complainant did was to add the "flanges," the "guide-plates," and the wedge-shaped blocks. I am unable to see any especial advantage arising from the latter; addi-

[1] I also find, on closer inspection of the "Naugatuck" bolster exhibit, the equivalent, I think, of complainant's "flanges." The ends of the lower bar are turned up and laid back, so as to meet and support the ends of the upper, serving the same purpose as the "flanges." The latter must therefore be regarded as old.

tional columns or posts; or thickening the bar ends, would seem to answer the same purpose; and, besides, the respondent does not use them. The "guide-plates" do not materially differ from the old guides, nor serve any new purpose. They are intended to keep the ends in place over the springs. The suggestion that they afford support to the upper bar is without force. If such additional support were needed, it could as well be obtained by increasing the thickness of the ends of the lower bar, or adding an additional short bar or plate thereto; and, besides, some of the old guides measurably afford similar support. The flanges[1] are useful, as they serve to reinforce the bolts, and thus aid in maintaining the adjustment of the bar ends. But flanges are a very old and common device, and have long been applied to analogous uses. I think any mechanic of ordinary skill in such work, directed to reinforce the bolts, and add further security to the end adjustment, would do it as the patentee did, or by means of a simple box, (the plain equivalent of what he used,) as Mr. Montz, a rival patentee, did. Such would be the most obvious method of accomplishing it.

The truss-rods described in the earlier application, (but no longer employed,) are also old devices, and were in common use for similar structures long before the patentee employed them. If not previously used in bolsters,[2] their application to that purpose would not require invention. Such new use would clearly be analogous to the old. And, moreover, they are admitted to be immaterial by the abandonment of their use. With a predisposition to sustain the patent, because of the presumption arising from its grant, and because the patentee's work has some merit, I find myself unable to do so. Whether the parts of the bolster be considered separately or in combination, I cannot find patentable novelty in what the patentee did.

The doctrine of estoppel, to which complainant appeals, on account of Mr. Montz's application for a patent covering substantially the same combination, and the proceedings under it, does not apply. Without considering whether it would apply to Montz, it is sufficient to say that the respondent is not Montz, and is not bound by his acts. The circumstance that he was in its employment at the time is unimportant. He was not employed to represent it in the patent office. His application there, and all he did respecting it, were on his own account. A decree may be prepared accordingly.

[1] See foot-note on preceding page.

[2] On re-examination of the exhibits since the foregoing opinion was written, I find further that "truss-rods" are shown on the old Roberts bolster; and in Mr. McCarty's testimony, at page 26, he says he does not claim infringement of these rods.

YOUNG *et al. v.* JACKSON.

(Circuit Court, S. D. New York. July 31, 1890.)

PATENTS FOR INVENTIONS—NOVELTY—MACHINE FOR SAWING STONE.

Letters patent No. 222,720, issued February 17, 1880, to Hugh Young, for improvements in a machine for sawing stone, consisting of the combination with a reciprocating saw-gate of means for feeding and withdrawing the saw-blade towards or away from the guides governing its reciprocating motion, without impairing the parallelism of the saw-blade to the guides, are void for want of novelty, being merely such a combination of different inventions previously patented as to allow each to work out its own effect without contributing any new function or mode of operation to the other.

In Equity. Bill for infringement of patent.

Edwin H. Brown, for complainants.

George Whitfield Brown, for defendant.

WALLACE, J. The patent in suit, No. 222,720, granted February 17, 1880, to Hugh Young, covers improvements in a machine for sawing stone. The invention to which the first claim of the patent relates consists, as the specification states, "in certain novel constructions and combinations of parts, whereby a reciprocating saw-sash, moving along guides, has combined with it means for the feeding and withdrawing the saw toward or away from said guides." That claim, which is the only claim now alleged to be infringed, is as follows:

"In machines for sawing stone, the combination, with a reciprocating saw-gate or sash, of means for feeding and withdrawing the saw-blade toward or away from the guides governing its reciprocating motion without impairing the parallelism of the saw-blade to said guides, substantially as specified."

As described in the specification and illustrated in the drawing, the machine consists of a main frame and a secondary frame or saw-gate. The saw-gate or sash is the ordinary rectangular frame in which mill saws are stretched, formed of two ends, each of which is composed of two posts, and the ends are connected by a transverse bar. The ends of the saw-gate are supported by guides attached to the main frame, which allow the gate to be reciprocated on the line of the guides. The reciprocating motion is communicated by any suitable mechanism. The saw-gate carries a blade, which is set in a plane parallel to the guides, and is attached to carriers capable of being moved within the gate to and from the direction of the guides. The specification states:

"The blade is not carried directly by the gate, but by carriers, which are arranged so as to be capable of a synchronous movement within the ends of the gate, or, in other words, of a movement in direction at right angles, or thereabouts, to the reciprocating movement of the gate, to effect the feed and withdraw the blade, and this without affecting or interfering with the parallelism of the blade to the guides."

The arrangement of the carriers which permits this movement consists in part of the posts of the gate ends, which serve to guide the carriers, and allow them to play in a plane at right angles to the guides, and in part of the devices for actuating them simultaneously and on a perfectly

parallel line with one another. These actuating devices are preferably indicated in the specification as consisting of feed-screws, one threaded to each carrier, which are connected with one another, and controlled by a cross-shaft with spur-gear arranged on the transverse bar of the gate. In operation the blade is attached to each end of one of the carriers by tension buckles or straps, and the carriers are actuated by the screws to feed the blade to a position to abrade the stone to be sawed; the saw-frame is then reciprocated, thus reciprocating the blade; and, when the work is done, the blade may be withdrawn by the screws from the place of its reciprocation. The claim is a broad one for a combination of the saw-gate with the means for feeding and withdrawing the blade so that the blade will be constantly maintained parallel with the line of its reciprocating movement. The means for feeding and withdrawing the blade consist of those which hold or carry it, and those which control its transverse movements, and include carriers between which the blade can be strained or stretched, together with any suitable means to move the carriers synchronously, and maintain them constantly on a perfectly parallel line.

The question in the case is whether there is novelty in such a combination, in view of the prior state of the art as disclosed by earlier patents or publications. A machine is shown in the patent to Funk of January 28, 1873, which describes a saw-gate which is reciprocated on guides longitudinally, and having a blade reciprocated by the gate, and attached to carriers capable of being raised and lowered in the gate itself, so as to be fed and withdrawn from its work without moving the gate. In that machine the blade is stretched between the two ends or legs of the gate, and attached to carriers (or slides) in each leg, which play in guides. The blade is raised and lowered in the gate by a cord and windlass attached to the main frame of the machine, and connected with the carriers by a yoke depending above the gate, the arms of which are attached to the carriers. By turning the windlass the carriers are raised in the guides synchronously, thus raising the blade from the place of its reciprocation. By relaxing the windlass the carriers and blade drop to the place of reciprocation by gravity. A machine having all the elements of the claim except the independently adjustable blade with its holding devices is described in the patent of Young, Young & Hubert, of February 16, 1876. In that machine the blade is attached rigidly to the legs of the gate, and the gate itself is moved to and from the place of the reciprocating work, thus moving the blade, by feed-screws in each leg controlled from above by a shaft with spur-gear. The legs move simultaneously, and maintain the blade perfectly parallel at all times with the line of its reciprocating movement. The patent to Stearns of September 19, 1876, describes a machine in which the saw is mounted upon and reciprocated in the main frame of the machine, and fed to and withdrawn from the place of its reciprocation by feed-screws threaded in carriers in the legs of the frame, and rotated by a connecting shaft with intermediate gearings arranged on the transverse bar of the frame. The devices for actuating the blade transversely are the same as are described

in the patent in suit, and move both carriers simultaneously and on a perfectly parallel plane. The provisional specification of Graham & Graham, filed with the English commissioner of patents July 31, 1876, describes a sawing-machine having a novel method of mounting and actuating the reciprocating blade. They state:

"We employ a strong, rectangular frame, which reciprocates or runs upon pulleys in suitable guides in an outer frame, and within this frame we mount one or more blades for carrying the diamond cutters so as to be capable of being raised or lowered with respect to such frame in a perfectly parallel direction by a vertical screw at either end, geared together in order to adjust such blade to the thickness of the stone requiring to be cut, and which screws also serve to feed the blade as the cutting operation proceeds. We also employ a right and left handed quick-threaded screw at either end for the purpose of raising the blades and cutters from contact with the groove being cut in the stone during that portion of the stroke when the diamonds are not cutting. These screws are actuated by star wheels fixed upon their upper extremities."

None of the earlier patents describe a sawing-machine having a saw-gate distinct from the main frame, and reciprocating on guides, which is provided with carriers which permit the blade to be moved independently of the gate itself towards and away from the line of the reciprocating movement by devices which maintain the carriers in a positive and constant parallelism to the line of the guides, and actuate them synchronously. The Graham provisional specification is only valuable as indicating that Young was not the first to conceive the idea of mounting and actuating a blade in a reciprocating saw-gate so that it could be fed and withdrawn from the place of its reciprocating work, and held perfectly parallel during these operations, independently of the gate itself. The machine of the Funk patent does not contain the combination of the claim, because it does not have the devices which actuate the transverse movements of the blade, nor devices which perform the function of those of the claim. The carriers are not controlled or actuated by devices which maintain them in rigid parallelism with one another, but are controlled by a loose connection with the main frame. The windlass actuates the blade in one direction only, viz., away from the line of its reciprocating movement. The devices do not feed the blade towards the place of its reciprocation, nor maintain it in a positive and constant parallelism with the reciprocating guides. The machine of the Young, Young & Hubert patent does not have carriers which allow the blade to be moved transversely to its reciprocating movement, independently of the gates. The machine of the Stearns patent has no reciprocating saw-gate, and this patent is an anticipating reference only, because the devices which control and actuate the carriers towards and away from the place of reciprocation are the devices of the claim in controversy. But the Funk machine has all the elements of the claim in controversy, except those devices which maintain the carriers and actuate them in a positive and constant parallelism with each other, and the Stearns machine has these devices. It is manifest that these devices could be removed from the carriers in the Stearns machine and substituted for the

yoke, cord, and windlass in the Funk machine; and that to transfer them into the latter, and bring them into efficient co-operation with all the other parts, it is only necessary to thread the feed-screws to the carriers, and attach the intermediate bearing to the saw-gate, just as the screws are threaded and the gearing is attached in the Stearns machine. It would be patent at a glance to any competent mechanic, having the two machines before him, that the devices for controlling the carriers of the Stearns machine could be imported into the Funk machine, and substituted for the devices performing that function in that machine, by merely attaching them as they were attached before; and that, when this should be done, they would perform precisely the same functions in the Funk machine they do in the Stearns machine, and that the other devices of the Funk machine would perform their normal functions and no other. When the devices from both of these machines are thus brought together into juxtaposition they severally and conjointly do the same work they did before; the saw-gate reciprocates, the carriers hold the blade, and the actuating devices maintain the carriers in a positive parallelism, and move them synchronously with each other, just as they did originally. It is not invention merely to bring old devices into such a new juxtaposition as will allow each to work out its own effect without contributing any new function or mode of operation to the other. In reaching the conclusion that the Funk machine is the machine of the claim in controversy when the devices for controlling the carriers of the Stearns machine are substituted for its devices to do this work, the circumstance is not overlooked that in the machine of Stearns and Funk the blade is stretched in the carriers instead of being strained. If the claim in controversy includes devices for straining the blade in the carriers it is perfectly obvious that any competent mechanic would adopt the one mode or the other of hanging the blade according to the character of the work to be done and the thickness of the blade. The bill is dismissed.

BOWER BARFF RUSTLESS IRON CO. v. WELLS RUSTLESS IRON CO.

(Circuit Court, S. D. New York. July 30, 1890.)

1. EQUITY PLEADING—EXCEPTIONS TO ANSWER.
New matter set up in an answer as a substantive defense is not subject to exceptions.
2. SAME.
Exceptions which fail to state the charges in the bill to which the answer is addressed, and the exact terms of the answer, are too general to be considered.

In Equity. On exceptions to answer.

Blair & Rudd, for complainant.

Witter & Kenyon, for defendant.

WALLACE, J. The first five exceptions to the answer of the defendant for insufficiency are overruled because they relate to new matter set up in the answer by way of defense, and not to matter which is not sufficiently responsive to the interrogatories of the bill. A substantive defense, not responsive to the inquiries in the bill, but consisting of new matter exclusively, is not the subject of exceptions. Exceptions only lie to an insufficient discovery, or to scandal and impertinence. *Adams* v. *Iron Co.*, 6 Fed. Rep. 179; *U. S.* v. *McLaughlin*, 24 Fed. Rep. 823. The remaining three exceptions to the answer are taken in form and manner entirely too general. "The exception should have stated the charges in the bill and the interrogatory applicable thereto to which the answer is addressed, and then have stated the terms of the answer *verbatim*, so that the court, without searching the bill and answer throughout, might have at once perceived the grounds for the exception, and ascertained its sufficiency." *Brooks* v. *Byam*, 1 Story, 296. The exceptions are overruled.

KEMP v. BROWN *et al.*

(District Court, E. D. Louisiana. December 14, 1889.)

1. ADMIRALTY—DAMAGES ON DISMISSAL OF LIBEL—MALICIOUS PROSECUTION.
One who libels a ship in good faith and without malice, and fails in the suit, is not liable therefor in an action *ex delicto*.
2. SAME—PRACTICE—CROSS-LIBEL.
On dismissal of a libel, a cross-libel which is not so connected with the subject-matter of the libel as to be maintainable must also be dismissed.

In Admiralty.

E. W. Huntington and *Horace L. Dufour*, for libelant.

Bayne, Denegre & Bayne, for respondents.

BILLINGS, J. This is a suit for damages for an alleged seizure of a vessel, the steam-ship Clifton, which was owned at the time of seizure by

the North Atlantic Steam-Ship Company, Limited, of the estate of which libelant is liquidator. The facts attending the seizure, necessary to be considered, are as follows: Brown Bros. & Co., believing that certain drafts drawn by the master of the Clifton carried a lien upon the vessel, and that they were for necessary disbursements in a foreign port, libeled the vessel. They libeled her on the 28th day of March, 1888, and released her, and discontinued the suit, upon the 22d April. Four days after, it appeared by the master's testimony that the agents from whom Brown Bros. & Co. received the drafts, at the time they were drawn, had no need of funds, but were supplied with funds sufficient to enable them to make all necessary expenditures for the vessel. During all the time of detention after the disclosures made by the master in his testimony, the vessel was held by other libelants. On the day after seizure, Brown Bros. & Co. consented that an order should be made allowing the unloading of the vessel as if there was no seizure.

There are two questions presented by these facts. First, as to the liability of a party who, in good faith and without malice, comes into an admiralty court and libels ships or vessels, and fails in his suit. The practice and rules in admiralty require that all parties, except mariners, shall, before having admiralty process against a *res*, give a bond in the sum of $250, and further contain liberal provisions for the release of the vessel on bond. It has been urged very strongly by the proctor for the libelant that, notwithstanding this, even in the absence of malice, and with probable cause, he may recover actual damages. He relies upon the law of this state independent of admiralty rules and practice. But I understand the law in this state to be as stated by the supreme court in *Transit Co.* v. *McCerren*, 13 La. Ann. 214, where it is held that no action lies for bringing a civil suit, where plaintiff fails, unless it be alleged and shown to be malicious, and without probable cause. I think that, under the settled practice in admiralty, suits may be brought, and process issue in suits, in which the libelant fails to establish his cause of action; and the libelant, in good faith and without malice, will not be responsible *ex delicto*, but only upon his bond. This suit is brought, not upon any bond, but *ex delicto*. I think, therefore, this falls within the universal doctrine applying to all courts, admiralty and others, which is enunciated in *Stewart* v. *Sonneborn*, 98 U. S. 187, that advice of counsel, and an honest belief on the part of libelant that he was using rightful remedies, exempts him from a suit for a wrong. But it is urged with great pertinacity, and numerous cases are cited to sustain the rule of law, that where the court is without jurisdiction the plaintiff is a trespasser. But the court here had jurisdiction; for jurisdiction depends upon the issue presented by the pleadings, and the libel states a case where the court of admiralty had undoubted jurisdiction, viz., advances to the master upon the credit of the vessel, in a foreign port, for necessary disbursements. The failure of the libelant in the original suit was not from want of jurisdiction, but because the facts were different from what the vessel's agents made them appear to be. The great principle is that, in order to secure the administration of jus-

tice, and to make the determination of disputed rights possible in human tribunals, suitors should be allowed to come into court and prefer their complaints freely, and without any penalty in case of mistake, so long as they do this in good faith. Originally, all suits were commenced by the arrest of the person, or the attachment of the property of the debtor. The rule has always been that good faith exempted from liability for damages even when property was attached. In the common-law courts, attachments have by statute been restricted to specified cases, and then only upon a bond with surety. A similar requirement exists in the admiralty, which exacts an indemnifying stipulation before there can be any process *in rem*. A statute of congress further protects the owner or claimant of the vessel, by permitting immediate release upon bond which takes the place of the *res*. In the common-law courts and in admiralty, where arrest of property is permitted, any actual damage may be recovered under the statute, upon the bond or stipulation. But no suit except upon that statutory contract can be maintained unless malice is alleged and established. The rule is correctly stated in *Henderson* v. *Three Hundred Tons of Iron Ore*, 38 Fed. Rep., at page 41. In this last opinion are cited the early cases showing that the rule as to the right to recover for seizure under process in admiralty is the same as that adjudged, in *Stewart* v. *Sonneborn*, to be the general rule in courts as to the right to recover damages wrought through judicial process. In this case there can be no doubt of the good faith of the defendants. They commenced their suit under the advice of learned proctors. They consented to the seizure being qualified so as to do the seized vessel the least harm, and discontinued the suit very soon after it was disclosed by the testimony of the master that their obligation could not import any lien upon the vessel. The form of the obligation, and the usages of the master and agents of vessels, might easily have induced, and did induce, the belief on the part of Brown Bros. & Co. that the agents of the vessels were without funds, and that the drafts were drawn against the vessel. My conclusion, therefore, is that the libel must be dismissed.

The cross-libel is not so connected with the subject-matter of the libel as to be maintainable, and must also be dismissed.

THE MILDRED.

(Circuit Court, E. D. Michigan. July 23, 1890.)

MARITIME LIENS—MATERIAL-MEN.

The lien of a material-man does not attach to a wrecking outfit leased by the owner of a tug, not as a part of its general equipment, but for a special purpose, although a part of such outfit is attached to the hull and deck by timbers and bolts, and libelants supposed it belonged to the tug, and had never heard that a third person claimed an interest in it.

(Syllabus by the Court.)

In Admiralty. On petition of James M. McCormick for surrender of steam-pump and other wrecking outfit.

Petitioner set forth that he was the sole owner of a wrecking outfit, consisting of one Buffalo duplex fire-pump, 1,000 feet of hose, one steam syphon and hose connection; that in June, 1887, he leased the same to the owner of the Mildred, one Laura W. Shaw, for the sum of $98 per year, to be used upon the tug Fish, and afterwards upon the tug Mildred, of which Shaw was the owner; that said owner has no interest in such outfit except as lessee; that the marshal seized said outfit while the same was upon the tug as aforesaid, upon an attachment against the tug; that the same is no part of the general outfit of the tug, but is the individual property of the petitioner. These facts are not disputed, but certain affidavits produced by libelants tend to show that, during the season of 1889, the tug was engaged in towing upon Saginaw river, and in the business of a fire-tug under contract with mill-owners and others at Saginaw; that the fire-pump in question was firmly and permanently attached to the hull by heavy timbers and bolts, and was also attached by pipes to the boiler and to the sea-cock, and that one of the cylinders was firmly attached to the deck; that libelants supposed that the pump and connections belonged to the person who owned the tug, and never heard that any one else had or claimed an interest in the same, until after the libel was filed; that the tug is old, and of no great value, and that, in extending credit to her for the fuel for which this suit is brought, libelants relied upon the tug as a fire-tug with the said pump and connections attached thereto.

I. W. Finney, for the motion.

Simonson, Gillett & Courtright, for libelants.

BROWN, J. There is no question that under a bill of sale or attachment against a vessel, "her boats, tackle, apparel, and furniture," everything passes which is on board the ship, and used for the business in which she is engaged, if it belongs to the owners. 1 Pars. Shipp. & Adm. 78. The question in this case is whether the word "apparel" or "appurtenances" applies to property which has been hired for the use of the vessel. There is a singular want of authority upon this question, the one in point being that of *The Edwin Post*, 11 Fed. Rep. 603, in which it was held that a wrecking apparatus passed under an attachment, although not belonging to the owner of the vessel, if it was on board by the consent of its owners at the time the lien upon the vessel accrued, and thus furnished an inducement for the credit given to the vessel. The authorities cited by the learned judge in support of his opinion are not in point, except so far as they define as to what may properly be considered "appurtenances" under an attachment in an action for damages. In this case there was no satisfactory proof of the separation of the ownership of the ship and wrecking apparatus; the evidence rather tending to show that both the ship and apparatus were owned by a wrecking company which had voluntarily placed the material on board the ship, and furnished an inducement to the sailors to en-

list in the wrecking service. In the case under consideration, the proof is clear that the fire-pump and hose belonged to the petitioner, and had been leased to the owner of the vessel at a certain fixed sum per year. Now, while it is quite true that if an entire vessel be leased to a charterer, debts contracted by him for supplies furnished to such vessel would constitute a lien, I am not prepared to say that this rule would apply to property hired by him, not for the general outfit of the vessel as a vessel, but as an outfit for a special business or object. I am rather inclined to think that the common-law doctrine in relation to fixtures would be applicable to a case of this kind, and that, unless there was an intention on the part of the owner of the outfit that it should become a part of the permanent appurtenances of the vessel, he would be entitled to reclaim it. The tendency of modern authorities is to hold that the question, whether a piece of property has become a fixture or not, is one of intention as between the parties to the original contract; and that the courts will not hold such property to be a fixture unless it was the obvious intent of the owner that it should be so considered. *Crippen* v. *Morrison*, 13 Mich. 23; *Manwaring* v. *Jenison*, 61 Mich. 117, 27 N. W. Rep. 899; *Ferris* v. *Quimby*, 41 Mich. 202, 2 N. W. Rep. 9.

It seems to me that it would be throwing a needless obstacle in the way of maritime commerce to hold that a master could not hire, nor an owner lend, personal property for the use of a vessel except at the risk of its becoming a part of such vessel, and liable for its debts. In the salvage business, particularly, it is the constant practice of the owners of steam-tugs to hire a wrecking outfit for the rescue of vessels in distress, but it has never been supposed that such outfit was subject to the lien of the sailors for their wages, of the material-men for their coal and provisions, or of the owner of the salved vessel for the non-performance of its contract on the part of the tugs, whether such third parties knew that such outfit did not belong to the tug or not. In such case the question is not determined by their belief, but by the fact.

But, in order that the rights of the parties may be preserved pending an appeal, an order will be entered for a sale of the wrecking outfit separate from the tug, that petitioner be at liberty to bid, and that the property be delivered to the purchaser upon his executing a bond to the clerk to pay the purchase money into court whenever he shall be required to do so.

The Catalonia.

The Rebecca A. Taulane.

(District Court, D. Massachusetts. April 18, 1890.)

1. Collision—Fog—Negligence.
A steamer running at the rate of more than seven knots in a fog so dense that a ship can hardly be seen at the distance of a ship's length is guilty of negligence.
2. Same—Fog-Horn.
A sailing vessel which uses a fog-horn sounded by the breath instead of one sounded by a bellows, as required by article 12 of the sailing regulations, is guilty of negligence.

In Admiralty. Cross-libels for a collision between the Cunard steamer Catalonia and the schooner Rebecca A. Taulane.

George Putnam, for the Catalonia.

E. P. Carver, for the Rebecca A. Taulane.

Nelson, J. This collision happened about 30 miles north-east of Highland light, in a thick fog, on the morning of July 14, 1889. The Catalonia was bound on a voyage from Liverpool to Boston, and was heading due west for Boston light. The Rebecca A. Taulane was pursuing a voyage from Richmond, Me., to Philadelphia, with a cargo of ice. She was sailing on the starboard tack, close-hauled, steering a south-westerly course by the wind. At about 8:30 o'clock the sound of a fog-horn was heard on the steamer, and at the same moment the schooner was seen through the fog by the lookout on the starboard bow, and reported. The order was immediately given from the bridge to put the wheel to starboard, but before the order could be executed it was changed, and the wheel ordered hard a-port, and the engines reversed at full speed. The steamer struck the schooner on the port side, just forward of the main rigging, cutting into her half the width of the deck. The schooner was afterwards taken in tow by the steamer, but, the hawser parting, her men were taken on board the steamer, and she was abandoned. She was afterwards picked up by another steamer, and towed into this port. She has since been libeled for salvage. The iron plates in the stern of the steamer were broken and bent by the collision. The fog signals of the steamer were heard to leeward by the men on the schooner for some minutes before the collision. The schooner made no change of course.

Both vessels must be held in fault for the collision,—the steamer for not going at a moderate speed in the fog, and the schooner for not having on board, and for not sounding, a fog-horn of the class prescribed by the sailing regulations. The master of the steamer deposed that the steamer's speed did not exceed 5 or 6 knots, and it was argued that under the circumstances such a rate of speed was not immoderate. But the estimate of the master was disproved by the entries made at the time in the log kept in the engine-room. Full speed of the steamer was 12 knots, and according to the testimony of the engineer this was attained

with 60 revolutions of the propeller. The engineer's log shows that the ship was running with 44 revolutions, or at half speed, and it was testified that half speed was 7 knots. This must mean merely an estimated average half speed, since 44 revolutions would indicate nearly 9 knots. As the wind was light and the sea smooth, the ship was probably making much more than 7 knots. But if no more than 7 knots in a frequented part of the ocean, and in a fog so thick that a ship's hull and sails could not be seen hardly more than a ship's length distant, that was clearly excessive. *The Martello*, 34 Fed. Rep. 71.

Article 12 of the sailing regulations provides that a steam-ship, besides her steam-whistle, shall be provided with an efficient fog-horn, to be sounded by a bellows or other mechanical means, and that a sailing ship shall be provided with a similar fog-horn, and that a sailing ship under way shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack, one blast; when on the port tack, two blasts in succession; and when with the wind abaft the beam, three blasts in succession. The fog-horn on the schooner was a common horn, sounded by the breath. She did not have on board, and therefore did not blow, a fog-horn, sounded by a bellows or other mechanical means. The argument of the learned proctor for the schooner failed to convince me that the human lungs are an equivalent for the bellows. I have already decided in two cases before this that neglecting to sound the regulation fog-horn in a fog was a fault on the part of a sailing ship, unless it is shown with certainty that the omission could not have caused the collision. I quote, as applicable to the present case, the apt language of Judge LOWELL, in a case arising under the old rules, where a sailing ship omitted to show a torch:

"Congress has refused to relieve steam-ships of the burden of avoiding sailing ships, however difficult it may be for large steamers to be handled readily, and however easy for some light sailing craft; but they have imposed upon the latter the duty of giving notice of their presence by certain definite means. We are bound, therefore, to believe that the exhibition of a torch is useful under ordinary circumstances. Experts may perhaps be found to testify that a moderate speed is harmful, a fog-horn useless, and a torch actually misleading, but the statute must be obeyed. *The Hercules*, 17 Fed. Rep. 606."

In this case the schooner's fog-horn was not heard on the steamer until the very moment she came in sight. A regulation fog-horn, which must be supposed to give a louder blast, might, and probably would, have been heard sooner, and the accident have been prevented. It was argued for the schooner that the steamer should have held to her starboard wheel, and not ported, and for the steamer it is argued that the schooner should have come up into the wind when she heard the steamer whistle to leeward; citing *The Zadok*, 9 Prob. Div. 117. The disposition of the case upon other grounds renders it unnecessary to decide either of these points; but neither of them appears to have much force. Decree for libelant on both cases, damages to be divided.

THE SCHMIDT *v.* THE READING.[1]

THE READING *v.* THE SCHMIDT.

(District Court, E. D. Pennsylvania. March 28, 1890.)

1. COLLISION—BETWEEN STEAM AND SAIL.
A schooner, close-hauled on her port tack, heading nearly north, and making about five miles an hour, and a steamer heading eastward, and making about eight miles an hour, were approaching on converging courses, and held their courses until within five lengths of each other, when the schooner starboarded and the steamer ported, and the vessels collided. The night was clear, and the preponderance of evidence showed that the schooner's lights could have been seen from the steamer when the vessels were at least a mile and a half apart. *Held* that, though it was not entirely clear that a collision was inevitable if the schooner had held her course, the steamer was in fault for holding her course until the vessels were in such close proximity.

2. SAME—DUTY OF STEAMER.
A schooner on her port tack, making nearly north, and a steamer making east, were approaching on converging courses. When about five lengths apart, the steamer, having, according to her testimony, seen the schooner for the first time, ported, and stopped her engines to avoid collision. *Held*, the steamer was in fault for not also reversing her engines as well as porting.

3. SAME—CHANGE OF COURSE BY SAILING VESSEL.
A schooner and steamer were approaching on converging courses. The former, after a collision had become apparently inevitable unless a change of course was made, starboarded, to endeavor to pass astern of the steamer. At the same time the steamer ported, and might thus have cleared her if she had continued her course. *Held*, as the steamer had improperly continued her course until the schooner was in extreme danger of collision, and as the action of the steamer whereby she might have cleared her was, under the circumstances, improper, and could not have been anticipated by the schooner, the schooner was not in fault for changing her course.

In Admiralty.

Libel by the schooner Charles E. Schmidt against the steamer Reading, and cross-libel by the Reading against the Schmidt, for damages for collision. On the night of September 23, 1889, the libelant, a coasting schooner, with a cargo of ice from Gardiner, Me., to Philadelphia, when near the Cross Rip light-ship, eastward of Vinyard Haven, sighted the respondent, running on a course converging to her own at a distance of 1½ to 3 miles away. The channel at this point is about 2½ miles wide. The wind was near north-west, and brisk. The night was clear and fine, without a moon. The libelant was close-hauled on her port tack, heading nearly north. The respondent was heading eastward; was near the center of the channel, and under common speed, making about 8 miles an hour, while the schooner was making about 5. The vessels held their respective courses until within 5 lengths of each other, when the respondent ported, and the libelant starboarded, at about the same time, and directly came into collision. Each was injured, and each is in court claiming compensation of the other.

Curtis Tilton and *Henry R. Edmunds*, for the Schmidt, cited, as to the duty of the steamer: The steamer should leave a safe and ample margin of space. *The Laura V. Rose*, 28 Fed. Rep. 108; *The Garden City*,

[1] Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

38 Fed. Rep. 862; *The City of Brockton*, 37 Fed. Rep. 899; *The City of Springfield*, 29 Fed. Rep. 923; *The Ogemaw*, 32 Fed. Rep. 922; *Wells* v. *Armstrong*, 29 Fed. Rep. 218. The steamer must shape her course to avoid collision seasonably. *The Carroll*, 8 Wall. 306. As to the change of course of the schooner: A mistake *in extremis* is not to be imputed as a fault. *The Johnson*, 9 Wall. 154; *The Carroll*, 8 Wall. 306; *The Maggie J. Smith*, 123 U. S. 355, 8 Sup. Ct. Rep. 159; *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. Rep. 468; *The Cadiz*, 20 Fed. Rep. 157; *The Norwalk*, 11 Fed. Rep. 922; *The John Mitchell*, 12 Fed. Rep. 511; *The America*, 4 Fed. Rep. 337; *The Ella B.*, 19 Fed. Rep. 792; *The Farnley*, 1 Fed. Rep. 631; *The State of Alabama*, 17 Fed. Rep. 847.

John G. Lamb and *Thos. Hart, Jr.*, for the Reading, cited, as to the duty of a sailing vessel to keep her course: *The Free State*, 91 U. S. 200; *Steam-Ship Co.* v. *Rumball*, 21 How. 372; *The Illinois*, 103 U. S. 298. And as to the right of a vessel to deviate from her course when *in extremis*: *The Corsica*, 9 Wall. 630; *The Allianca*, 39 Fed. Rep. 476; *The Martello*, Id. 505; *The Clara Davidson* v. *The Virginia*, 24 Fed. Rep. 763.

BUTLER, J., (*after stating the facts as above.*) It was the respondent's duty to keep off; and, for holding her course as she did until so near the libelant, she was in fault, unless an excuse can be found for this conduct. The proximity was clearly dangerous. It alarmed the officers on both vessels, as their acts at the time show. Each sought by the most prompt and vigorous efforts to escape. The libelant's change of course may have increased the danger, in view of the respondent's sudden change, not then discoverable. Whether the collision would have been avoided if she had held her course, is not clear; indeed, I consider it very doubtful. Whether it would or not, however, the respondent was clearly in fault for approaching so near, unless she could not avoid it. She says she could not, and this is her only excuse; that the libelant's lights were not discoverable earlier; that she had a vigilant look-out, and changed her course the moment the lights came into view. I am satisfied that the libelant could and should have been seen much earlier. Her lights were burning brightly, and the night was favorable to seeing them at a distance. The respondent's lights were seen from the libelant when far away,—the witnesses say 3 miles; it is safe to say 1½ to 2 miles. Distances cannot be accurately measured under such circumstances. Why then did not the respondent see the libelant's lights earlier? The suggestion that the latter vessel had been running her southward tack, and turned just before she was seen, cannot be accepted. If she had been so running she should have been observed, and her turning must have been seen. The suggestion is based on inference alone, and it cannot stand against the positive testimony of the libelant's witnesses, who swear that the vessels were miles apart while she was running northward, and when the respondent was first seen from her deck, supported as they are by the probabilities of the case. Why should libelant shorten her southern tack by changing in mid-channel? The wind favored this tack, and she had every motive to pursue it to the south side.

On the other the wind was against her. I cannot doubt that the failure to see her resulted from negligence, notwithstanding the respondent's testimony respecting her lookout. She must therefore be treated as in fault for holding her course until the vessels were in dangerous proximity.

She was in fault also for not reversing, instead of simply porting. She was too close to rely upon the latter. It was unsafe. She might possibly have passed astern, if the libelant had held her course; but this, as before said, is quite uncertain. She should have considered the danger that libelant might falter and turn, as she did, under the circumstances in which she was placed. It was not unreasonable to suppose she would. To reverse was safe, and this the respondent should have done.

Was the libelant in fault for changing? She was required to hold her course until justified in believing that a change was necessary to avoid collision. She was not, however, required to incur greater risk,—to take the chance of a merely possible or hair-breadth escape. Did the circumstances justify a belief that the change was necessary? That she believed it necessary is clear; and she was in the best position to judge. Was her belief reasonable? She saw the respondent at a distance, and saw that she kept her course, as if ignorant of libelant's presence, or recklessly intending to cross her bows, until collision had become almost, if not quite, inevitable. A change of course in one if not both of the vessels was necessary. A continuance of the respective courses must result in immediate disaster. What was there to indicate that the respondent would change? It is no answer to say the fact that such was her duty indicated it. It was her duty to do this much earlier; but she did not. Her conduct indicated that she intended to pursue her course; that she was ignorant of the situation, or reckless of the consequences. Under the circumstances, the libelant's only chance of escape seemed to be in doing what she did. She could not anticipate the respondent's untimely and improper act. If the latter made any change at this time, it was reasonable to believe this would be by reversing and backing, for it alone was safe and proper. The libelant could have no warning of her attempt to turn as she did, until her head came around so as to exhibit her red light. Her change of course could not, therefore, be discovered until the vessels were virtually in contact. The libel is sustained, and a decree will be entered accordingly.

HAMBLIN *et al.* *v.* CHICAGO, B. & Q. R. Co.

(*Circuit Court, N. D. Illinois.* September 8, 1890.)

REMOVAL OF CAUSES—REMANDING—DECISION OF FEDERAL QUESTION.

After overruling a motion to remand a cause, which had been removed from a state to a federal court on the ground that a federal question was involved, the federal court sustained a demurrer to the special plea interposed by defendant, and thereby disposed of the only federal question presented for decision. *Held*, that a subsequent motion by plaintiff to remand the cause to the state court would be sustained under the act of congress of March 3, 1875, (section 5,) providing that if, in any suit commenced in or removed to a circuit court of the United States, it shall appear to the satisfaction of the court, "at any time" after such suit has been brought or removed thereto, that such cause does not involve a dispute within its jurisdiction, said court shall dismiss such suit, or remand it to the court from which it was removed.

At Law. Motion to remand.

F. S. Murphy and *Frederick A. Willoughby*, for plaintiffs.

Herrick & Allen, for defendant.

GRESHAM, J. The defendant charged and received from the plaintiffs for carrying live-stock from Galesburg to Chicago, over the defendant's railroad in Illinois, a higher rate of freight than was authorized by the schedule fixed by the railroad and warehouse commissioners. The statute which conferred upon the commissioners this authority was passed in 1873, (2 Starr & C. St. 1961,) and to recover the penalty for its violation this suit was commenced in the state court in March, 1882. The Chicago, Burlington & Quincy Railroad Company was formed by the consolidation of the Aurora Branch Railroad Company, the Central Military Tract Railway Company, the Peoria & Oquawka Railway Company, and the Northern Cross Railway Company, all of which were incorporated and consolidated prior to 1873. The general issue and a special plea were filed in the state court. The special plea set out the charters granted to the constituent companies, the statute under which they consolidated, the articles of consolidation, and other facts; and averred that the defendant succeeded to the rights of the constituent companies whose charters constituted contracts between them and the state, which could not be impaired by any law enacted by the state; that by these charters the defendant had the right to establish such rates of toll for carrying passengers and property on its road between Galesburg and Chicago, as it might determine from time to time by its by-laws; that the rates of toll charged in the declaration to have been demanded and received by defendant had been previously fixed by by-laws adopted by the board of directors as the regular rate; and that the legislature had no power to enact the statute under which the railroad and warehouse commissioners assumed the right to establish the rates against the defendant, as alleged in the declaration. On March 5, 1883, the defendant filed its petition for the removal of the suit to this court, and the state court entered an order allowing the removal. Besides the usual averments, the petition alleged that the defendant had a defense arising under the constitution

of the United States, viz., that the cause of action was based upon the statute of 1873, which violated section 10, art. 1, of the constitution of the United States by impairing the contract between the state and the defendant, growing out of the charters granted to the constituent companies, to which charters reference was made. A transcript of the record was filed in this court, and a motion by the plaintiff to remand was argued and overruled on the ground that the petition raised a federal question, which this court had jurisdiction to determine. Some months later, nothing further having been done in the case, the plaintiff demurred to the special plea which had been filed in the state court. The demurrer was argued, and on December 27, 1885, a judgment was entered sustaining it. The case remained in this condition until January, 1890, when the plaintiff again moved to remand on the ground that in sustaining the demurrer the court had decided adversely to the right asserted in the plea, and had thereby eliminated from the case the federal question.

In overruling the first motion to remand, the court simply decided that on the face of the record a federal question was presented for decision. It did not then decide that the defendant was entitled to the immunity asserted under section 10, art. 1, of the federal constitution. That question was not presented for decision, and until presented and decided the jurisdiction was clear. There is a wide difference between a motion to remand based upon the petition for removal, and a motion to remand after the court has determined, upon full presentation of the facts, as it did in this case, that the right asserted under the constitution or laws of the United States as a defense is unfounded. In disposing of the demurrer, the court decided that the state statute passed subsequent to the granting of the charters to the constituent companies did not secure to them or the defendant the right to control rates of fare and freight free from legislative interference, and that the state statute did not violate the constitution of the United States. It does not follow that, because this court had jurisdiction of the suit as it came from the state court, that jurisdiction may be retained after the sole federal question has been decided against the party that asserted its existence. A decision overruling a motion to remand is not conclusive on the question of jurisdiction. After such a motion has been overruled, the party who made it may plead to the jurisdiction of the court; and if, on issue joined, the plea is sustained, either on the ground that both plaintiff and defendant are citizens of the same state, (the jurisdiction depending upon citizenship,) or upon the ground that the right asserted under the constitution or laws of the United States is without foundation, the case will be remanded. The facts upon which the defendant asserted a right to protection under the constitution of the United States appeared in the special plea, and the action of the court on the demurrer left no other federal question for decision. Section 5 of the act of March 3, 1875, (18 St. at Large, 472,) reads:

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satis-

faction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss said suit, or remand it to the court from which it was removed."

It appearing from the judgment sustaining the demurrer to the special plea that the suit "does not really and substantially involve a controversy properly within the jurisdiction of the circuit court," the motion to remand is sustained.

GLENN *v.* NOONAN *et al.* SAME *v.* LOCKWOOD *et al.* SAME *v.* LUCAS *et al.* SAME *v.* DIMMOCK *et al.*

(*Circuit Court, E. D. Missouri, E. D.* September 20, 1890.)

EQUITY—PRACTICE—REHEARING.

Under equity rule 88, in a non-appealable case, a rehearing cannot be granted after the lapse of the term succeeding that at which the final decree was entered, although the petition is filed at the same term at which the decree was rendered.

In Equity. Motion for a rehearing. For former report, see 23 Fed. Rep. 695.

Thomas K. Skinker, for complainant.

Thos. C. Fletcher, for defendants Noonan *et al.*

Noble & Orrick, for defendants Lockwood *et al.*

W. H. Clopton and *Lee & Ellis*, for defendants Lucas *et al.*

John W. Dryden, for Dimmock *et al.*

THAYER, J. These cases are all alike. The record shows that at the September term, 1886, of this court, and at the March term, 1887, demurrers to the several bills were filed and sustained; that the complainant declined to plead further, whereupon a final decree was rendered and entered of record in each case, dismissing the bill, and at the same term petitions for rehearing were filed in the several suits. In some of the cases, the record recites that the petition for a rehearing "was continued until the next term," and in others, that the continuance was "until the further order of the court." No action has since been taken on the several petitions for rehearing, for the reason that, until recently, a cause has been pending in the United States supreme court involving the same question raised by the several demurrers, and the petitions, by tacit consent, as it would seem, have not been called up. At all events, neither party has hitherto insisted upon a hearing of the petitions. There is no stipulation of record, however, or on file, signed by the parties, consenting that action on the petitions might be deferred, which by any possibility can operate as an estoppel, and thus preclude the defendants from insisting, as they now do, that the court has no power at this time to disturb the several decrees. By the established rules of

chancery practice, a rehearing cannot be allowed after a decree is enrolled or entered of record. After enrollment or entry of record, a decree could not, as it seems, be disturbed or altered, except by appeal or a bill of review. *Brown* v. *Aspden*, 14 How. 25; *Clapp* v. *Thaxter*, 7 Gray, 384; 2 Daniell, Ch. Pr. 1019, 1475, 1476. But equity rule 88 modifies the practice in the federal courts to some extent by providing that—

"No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of court, in the discretion of the court."

This rule was, in effect, held to be mandatory in *Roemer* v. *Simon*, 91 U. S. 149. Chief Justice WAITE said in that case, with reference to a suit that was susceptible of appeal, and hence within the first clause of the rule: "The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule, 88."

It seems clear, therefore, that, by the lapse of several terms since the decrees in these cases were made and entered of record, the court has lost its power to grant the petitions for a rehearing. The defendants are practically out of court, with a decree in their favor which the court is powerless, at this time, to disturb on a petition for rehearing. The petitions for a rehearing must accordingly be denied, and the cases be taken from the docket. It is so ordered.

BOUND *v.* SOUTH CAROLINA RY. CO. *et al.*

(Circuit Court, D. South Carolina. August 4, 1890.)

ATTORNEY'S FEES—RECEIVER—RAILROAD MORTGAGE.

Where the holder of second-mortgage railroad bonds brings suit for the appointment of a receiver, and a receiver is therefore appointed with the consent of all interested parties, and to the advantage of all, the services rendered by the complainant's attorneys, being for the common benefit, should be paid for from the assets of the company.

In Equity.

Mitchell & Smith, for complainant.

S. Lord, for defendants.

Before BOND and SIMONTON, JJ.

PER CURIAM. This is an application for the payment of fees to the attorneys of the complainant for services in and about filing the bill, and procuring the appointment of a receiver. The bill was filed by the holder of second-mortgage bonds, after demand upon and omission by the trustees of the second mortgage to take action in that behalf. Upon the return of the rule issued, when the bill was filed to show cause why a receiver should not be appointed for the South Carolina Railway Company, the trustees of the first mortgage, a very large number of the holders

of the first-mortgage bonds, and the trustees and holders of the income bonds, came in, recognized the necessity for a receiver, and acquiesced in the appointment of Mr. Chamberlain. The trustees of the second mortgage made no objection except to the right of the complainant to sue. It thus appears that all parties in interest agreed that the course pursued by the complainant was for the good of all persons concerned in the property. When, at a subsequent period, it was proposed to sell the railway property, and wind up the receivership, all parties, trustees, and bondholders, representing the first mortgage, concurred in opposition to the proposed order for sale, and united in the opinion that it was for the benefit of the first-mortgage bondholders that the railway property remain in the hands of and be managed by the receiver. Up to this time the practical result of the receivership is a reduction of expenses and a large increase in the earnings of the property. It thus appears that the services rendered by the attorneys for the complainant were for the common benefit and the advantage of the fund in which all the creditors are interested. They should therefore be compensated out of that fund. The entire amount of this compensation we will not fix now. We prefer to follow the course suggested by Judge BREWER in *Central T. Co. v. Wabash, etc., Ry. Co.*, 23 Fed. Rep. 675, and set apart a sum for present purposes, to be supplemented in the future, the amount to be measured by the results of the case. It is ordered that the receiver pay to Messrs. Mitchell & Smith, complainant's solicitors, $6,000 on account of professional services.

WITTERS *v.* SOWLES *et al.*

(Circuit Court, D. Vermont. May Term, 1890.)

1. NATIONAL BANKS—PERSONAL LIABILITY OF DIRECTORS—EXCESSIVE LOANS.
Where the directors of a national bank assent to a loan, in excess of the limit prescribed by Rev. St. U. S. § 5200, and subsequently retire paper representing a part of this loan, by charging it against an illegal dividend, declared when the bad paper reckoned to make up an apparent surplus more than exceeds the capital stock, the transaction is invalid, and, for the amount of the paper thus retired, the directors are personally liable, as provided by section 5239, for damages sustained in consequence of excessive loans.

2. EQUITY—REPORT OF MASTER—CORRECTION.
Where the report of a master can be corrected from the facts that appear in the case, aside from the evidence taken before him, it should be done, and a re-reference is unnecessary.

In Equity.

Chester W. Witters and *Henry A. Burt*, for orator.

Albert P. Cross and *Willard Farrington*, for defendants.

WHEELER, J. This cause has now been heard on the report of the master, stating an account of the moneys of the bank, of which the defendants were directors and the orator is receiver, lost by excessive loans

assented to by the defendants Albert Sowles and Burton. The case shows, and the court had found, before the reference, that they assented to a loan of $36,000 of these moneys to Edward A. Sowles, without security, which was $26,000 in excess of the limit prescribed by section 5200 of the Revised Statutes of the United States. They were made personally liable, by section 5239, for all damages sustained in consequence. The money was then taken, and damages to the extent of the excess immediately accrued to the bank, for which they then became chargeable. What this had been reduced by payment or satisfaction of the loan was referred to the master. 31 Fed. Rep. 1, 5. The report shows that $6,000 of the loan was paid soon, and that the remaining $30,000 became represented among the assets of the bank by three lines of paper, of $10,000 each. This is correct. What was said in the former opinion about $10,000 being paid, and $6,000 represented by draft on H. E. Lewis, (Id. 4,) is erroneous. The report further shows that one line of the paper was retired on January 8, 1883, by being charged in separate amounts each,—to Edward A. Sowles, $8,640; Albert Sowles, $940; Merritt Sowles, $140; Mary A. Hardy, $140; and Mrs. E. S. Leach, $140; that another was paid by securities of Margaret B. Sowles, wife of Edward A. Sowles; and that the other was satisfied down to $290.30, May 22, 1888, by foreclosure of mortgages. No question is now made in respect to the latter. Margaret B. Sowles has been made a creditor of the bank for the amount of these securities, by a decree of this court. 39 Fed. Rep. 403, 40 Fed. Rep. 413. This decree was in evidence before the master. The question whether it shows failure of satisfaction of the debt to which her securities were applied is raised. As between her and the bank, represented by the orator, it does so show conclusively; but these defendants were not parties to that suit, and are not bound by that decree. To show in this suit that so much of the debt was in fact paid by those securities, and the damages mitigated to that extent, was open to them. No evidence as to that is in this case, except what was taken by the master, which presented a question of fact to him. It is returned with the report, and is somewhat different from that in her case. No adequate reason is shown, and no reason besides that decree is urged, for disturbing his conclusion upon it.

The case shows that the persons to whom the other line of paper was charged were the same to whom a dividend of 10 per cent. on the stock of the bank, declared just previously, was credited, and in the same amounts, so that this line was retired by that dividend. The case also shows clearly and indisputably that, although the bank then had an apparent surplus of $55,948, its bad paper reckoned to make up this surplus and as a foundation for that dividend would wipe out more than all its capital stock. It really belonged to its depositors and other creditors, and had nothing to divide among its shareholders. The dividend could not be lawfully declared or paid, but this paper was taken to pay it with. In effect, the shareholders gave the paper out of the assets of the bank to Edward A. Sowles; it was not paid. The statute made these defendants holden for the damages, in consequence of this

unlawful loan, not only to the bank and its shareholders, but to any other person. Section 5239. The orator, as receiver, represents the depositors and creditors. The question is not one of discharging sureties, nor of liability for declaring the dividend, but whether the bank as such in its entirety got back any part of the money so unlawfully lent to Edward A. Sowles, or its equivalent. Clearly it did not. The damages to it were not, by this transaction, at all lessened or mitigated. The report is to be taken as it is applicable to the case as otherwise made. In connection with these plain facts already in the case, it shows the loss to the bank, as represented by the orator, in consequence of this excessive loan, to have been the amount of that paper at the time when it was retired, which was $10,000, with interest to now, which is $4,580, in addition to the $290.30 reported by the master, with interest from May 22, 1888, which is $5.04,—in all, $14,875.34. As these facts, outside of the report, appear from the case, aside from the evidence before the master, the correction of the amount reported should be made without sending the report back to the master. *Kelsey* v. *Hobby*, 16 Pet. 269; *Parks* v. *Booth*, 102 U. S. 96. Exceptions overruled, report accepted and confirmed, and decree thereupon, and upon the pleadings and proofs, that the defendants Albert Sowles and Burton do pay to the orator $14,875.34, with costs, and that the bill be dismissed as to the other defendants, without costs.

DUDEN *v.* MALOY.

(*Circuit Court, E. D. New York.* June 14, 1890.)

1. RES ADJUDICATA—DECISION OF STATE COURT.
Where, on exceptions to a master's report in a partnership accounting, it appears that, since the filing of the report, a state court having jurisdiction has, in an action between the parties to try title to real estate, decided that it was partnership property, this will be conclusive, though the master has found to the contrary.

2. INTEREST—USURY.
A New York firm, having no money with which to buy, entered into an agreement in Belgium, with a Brussels firm, by which the latter agreed to ship goods to the New York firm, on the express condition that, in addition to the invoice price, they should receive 7 per cent. interest from the date of invoice. *Held*, that as the Belgium law allowed any stipulated rate of interest, and as this was rather a mode of fixing the share of the Brussels firm in the joint venture, there was no usury in the agreement.

In Equity. On exceptions to master's report.

Bill by Herman Duden against Michael F. Maloy for an accounting of the partnership affairs of the firm of Duden & Co. For motion to make the Associated Lace-Makers' Company a party to the suit, see 37 Fed. Rep. 98.

Howard Y. Stillman, for complainant.

J. M. Lyddy, for defendant.

LACOMBE, Circuit Judge. The master has found, upon conflicting evidence, that the factory business was not a partnership enterprise, and that the land, buildings, and appurtenances formed no part of the assets of Duden & Co. of New York, at the close of the partnership. Under these circumstances, his finding, which also seems in accord with the weight of testimony, would ordinarily be sustained. *Mason* v. *Crosby*, 3 Woodb. & M. 258; *Celluloid Manuf'g Co.* v. *Cellonite Manuf'g Co.*, 40 Fed. Rep. 476. Upon the hearing, however, of the exceptions to the master's report, the defendant presented a judgment of the supreme court of the state of New York, Westchester county circuit, rendered June 29, 1889, subsequent to the filing of the master's report, in an action wherein the defendant herein was plaintiff, and the complainant herein was a defendant. That action was brought to try the title to the real estate upon which the factory stood, and the issue raised therein was the same as that before the master. Of such an action that court undoubtedly had jurisdiction; and that the complainant here (a defendant in that suit) was properly served, and had opportunity to protect his interests, is not disputed. The court adjudged that the land, factory, and appurtenances at Williamsbridge were partnership property, and assets of the firm of Duden & Co. of New York, at the time of its dissolution. That judgment is conclusive evidence in this suit of the facts established thereby. *Krekeler* v. *Ritter*, 62 N. Y. 372. This may be unfortunate for the complainant, who evidently could not have presented to the supreme court the same case as he did to the master. If, however, he failed to do so, through his neglect, he should suffer the consequences, and, if the disastrous termination of his litigation in the state court resulted from causes which would entitle him to relief, his remedy is by application to that tribunal for a retrial. The assets representing this particular partnership property—viz., the real estate, and its appurtenances, the money due from the insurance companies for the buildings which were destroyed by fire, and the good-will, if any, which will follow the factory into whosesoever hands it may come—are not in the possession of the complainant. The state court has impounded them pending the trial and final disposition of the Westchester suit. There is nothing, therefore, to be charged against the complainant on this accounting, by reason of this reversal of the master's finding. The state court receiver will no doubt hold the property until after final decree on this accounting, and will thereupon dispose of the same, in conformity with the rights of the parties as found by such decree. The master, however, in stating the accounts between the parties, upon the theory that the factory at Williamsbridge was an enterprise distinct and apart from the business carried on by the parties as Duden & Co. of New York, and that complainant alone was interested therein, has charged to the complainant personally, or to the firm of Duden & Co. of Brussels, all the money paid out for land, factory buildings, machinery, appurtenances, labor therein, etc. It now appearing that the factory was a partnership enterprise, all these items should be charged to Duden & Co. of New York, instead of to Duden & Co. of Brussels, or to the complainant.

Whatever profit or loss there was from the factory business should also be included with the other accounts of the firm. This disposes of the first and second exceptions.

The third exception deals with the good-will of the New York store. The witnesses who testified to its value seem to have been in some confusion as to the identity of the business firm, whose good-will they were estimating. Therefore, without now passing upon the two points suggested in the opinion which the master has filed with his report,—viz., that, by continuing in the lace business on his own account, the defendant has in fact secured his share of the good-will, and that the articles of copartnership preclude him from claiming anything except a share of the profits, not including therein anything for good-will,—the case is sent back to the master to take such additional testimony as either party may offer within 30 days, and to report specially upon the whole case, in answer to these questions: *First.* What, if anything, was the value of the good-will of Duden & Co. of New York, on the day the defendant joined it? *Second.* What, if anything, was the value of the good-will of Duden & Co. of New York, on the day the defendant left it? Upon the filing of that special report, to which either party may present exceptions, the points raised by the third exception will be disposed of.

The master has found that defendant is indebted to the partnership firm $4,268.67, and that the said firm owes Duden & Co. of Brussels $371,470.97. To these findings the defendant has excepted. (Fourth and seventh exceptions.) The master's decision was reached upon conflicting testimony, and with the witnesses before him. No sufficient ground is shown for setting it aside. *Mason* v. *Crosby*, 3 Woodb. & M. 258; *Bridges* v. *Sheldon*, 18 Blatchf. 507, 7 Fed. Rep. 17. The fourth and seventh exceptions are therefore disallowed; but the master will report what modification, if any, should be made in these figures by reason of the circumstance that the factory has now been adjudged to be a partnership enterprise.

The fifth exception is disallowed. The reasoning of the master in support of his finding as to the payment to the book-keeper is conclusive.

The sixth exception is disallowed. It is in no sense an exception to the report.

The master has found Duden & Co. of New York, of which both parties were members, indebted to Duden & Co. of Brussels, of which complainant only was a member, in the amount of $371,470.97, which includes $111,021.86, referred to as interest charges. To this defendant excepts, insisting either that there should not be allowed anything by way of interest to Duden & Co. of Brussels, or that they should not be allowed interest at the rate of 7 per cent. during the years 1880–1883. He further contends that interest has been charged upon interest and upon profits. The origin of this item is as follows: According to complainant's story, Duden & Co. of New York had no capital with which to buy goods. An oral agreement was therefore made in Belgium between the Brussels house and the New York house, complainant and

defendant being the contracting parties, by the terms of which it was provided that the Brussels house should ship to the New York house goods of their own in stock; goods from the stock of their branch houses elsewhere in Europe; goods to be manufactured by them expressly for the New York market; and also goods bought elsewhere in Europe for the New York house, and paid for by the Brussels house. These shipments were to be made upon the express condition that they should receive, in addition to the invoice price of the goods, 7 per cent. interest from the date of invoice. The Belgian law allowed parties to stipulate for any rate of interest, but, even if it did not, such an agreement would not be usurious. The 7 per cent. was not properly interest, but only a mode of fixing the share of Duden & Co. of Brussels in the joint adventure. From the earliest dealings between the two houses, interest at this rate was charged upon all invoices, and interest at the same rate was allowed to the New York house on all its remittances, and balances were carried over at stated periods. Balance-sheets and accounts current showing these facts were regularly sent from the Brussels to the New York house. The defendant, who denies that he ever approved such charges, avers that he does not remember such accounts, and insists that he had in New York no means of verifying them, was the partner who, by the terms of the copartnership agreement, was charged with the duty of having "kept by himself, or under his supervision, just, true, and correct books of account, in which books all the transactions of such copartnership shall be properly entered." There being a direct conflict of testimony as to this oral agreement, the master's finding, which is in accord with the complainant's story and with the accounts, will be sustained. See cases cited *supra*. The eighth and ninth exceptions are therefore disallowed.

The tenth and twelfth exceptions are disallowed. They seem to be, not exceptions to the master's report, but to the mental processes by which he reached his conclusion.

The eleventh exception is also disallowed. It does not appear, in defendant's argument, upon what ground the decision of the master is claimed to be erroneous. In stating the assets, he has deducted from the cash in hand the sum of $701.20, being the amount of a payment made, after dissolution, of additional duties upon goods imported before dissolution. As the goods themselves, or their proceeds, figure among the assets, the allowance of the master seems to be correct.

The thirteenth exception is disallowed. It reads as follows:

"(13) For that the master has found contrary to the preliminary requisitions and objections of defendant to his proposed draft report, and which requisitions and objections he here repeats, and contends that fresh evidence should be taken thereon."

The practice of this circuit does not warrant the presentation of any such general objection. The party who excepts to a master's report must make his objections specific. The case may go back to the master solely for the purposes above indicated.

COGGSWELL v. BOHN.

(Circuit Court, D. Minnesota. September 18, 1890.)

MALICIOUS PROSECUTION—ADVICE OF COUNSEL.

Where one states fully to his counsel his claim, and is advised that he has a case, and under such advice commences suit, he is not liable for malicious prosecution.

Motion for a New Trial.

Suit for malicious prosecution by C. A. Coggswell against Conrad Bohn.

Warner, Richardson & Lawrence, for plaintiff.

Stringer & Seymour, for defendant.

NELSON, J. This case was fairly tried at the June term, and resulted in a small verdict for the plaintiff. There is nothing to indicate that the jury did not give the case due consideration, and if the plaintiff was entitled to a verdict it was given for an amount large enough. I think the jury was right in not giving this plaintiff, who was under a large salary, anything for loss of time. The jury undoubtedly thought $1,500 too large attorney's fees in the suit of *Bohn* v. *Coggswell*, but allowed a fair compensation, and also a just sum for traveling and expenses in Minnesota preparing his defense. If the defendant in this case stated fully to his counsel his claim in the suit against Coggswell, and was advised that he had a case, and the suit was commenced under such advice, his defense was complete, and the plaintiff was entitled to nothing. Evidently, the jury did not believe he did. The law was correctly given on this branch of the case, and, as the testimony of himself and counsel was not in entire harmony, I cannot say that the jury erred. Motion for a new trial denied.

COFFIN *et al. v.* CITY OF PORTLAND.

(Circuit Court, D. Indiana. September 20, 1890.)

1. CONDITIONAL CONTRACTS.

Plaintiffs wrote to the mayor of defendant city: "We will take your * * * bonds * * * at par, you to furnish us written opinion of your city attorney as to legality of bonds," etc. *Held*, that the proposition was conditioned on an opinion of the city attorney that the bonds were valid, and therefore the city was not bound by its acceptance.

2. MUNICIPAL CORPORATIONS—ORDINANCES.

Under Rev. St. Ind. 1881, § 3039, requiring that "on the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken and entered on the record," the taking of a vote by yeas and nays is a condition precedent to the validity of an ordinance or resolution of a city council.

On Demurrer to Amended Complaint.

Claypool & Ketcham, for plaintiffs.

John W. Smith and *J. W. Headington*, for defendant.

WOODS, J. This is an action for damages for breach of contract. The plaintiffs, citizens of New York, claim to have made a contract with the defendant, a city of Indiana, whereby the city agreed to issue its bonds for $14,000, which the plaintiffs agreed to take at par; and that, after the contract was made, the city not only failed to perform, but repudiated the agreement, by a rescinding resolution of its common council, and issued and sold the bonds to another party on better terms for the city. If there was a binding contract it is evidenced by the proceedings of the common council, a transcript of which is made an exhibit in the complaint. It shows: That on the 7th day of June, 1886, the common council of the city in regular session "adopted, by a unanimous vote," an ordinance for the issue of 14 bonds of the city, each for $1,000, for the purpose of funding the debt of the municipality at a less rate of interest and paying indebtedness which was about to become due; that afterwards, on the 28th of the same month, at a regular session of the council, "the following proposition, which is on file, but not a matter of record, was presented and accepted:"

"INDIANAPOLIS, IND., June 26, 1886.

"*Hon. J. J. M. La Follette, Mayor Portland, Ind.*—DEAR SIR: We will take your fourteen thousand six per cent. bonds, to be issued under section 3230, Rev. St. 1881, at par, you to furnish us written opinion of your city attorney as to legality of bonds, certified copy of council proceedings and ordinance, certified statement of your city debts, assessed value of your taxables, probable real value, the amount of your debt, and your present (approximate) population.

"Respectfully submitted, COFFIN & STANTON,
"By S. P. SHERRIN."

—That afterwards, on the 12th day of July, 1886, in regular session, the council resolved "that the contract with Coffin and Stanton of the city of New York for the sale of $14,000 worth of city bonds, at par, drawing 6 per cent. interest, and running from 2 to 15 years, be and the same is hereby rescinded, and be it hereby resolved that the proposition of M. Rosenthal to take the same bonds at a premium of 5 per cent. be and is hereby accepted." On the adoption of this resolution the vote is shown to have been taken by yeas and nays.

In behalf of the city it is contended that the proposition of the plaintiffs to take the bonds was not absolute, but upon the condition that the city should furnish them a written opinion of the city attorney as to the validity of the bonds; and that the acceptance of the proposition by the city was impliedly upon the condition that the city attorney should give the required opinion, and that until that was done there was no contract between the parties, but only a negotiation. On the other hand, counsel for the plaintiffs contend that their proposition was not conditional, and that by accepting it the city undertook to furnish the opinion, bound itself to do so, just as it bound itself to furnish a "certified copy of council proceedings and ordinance," a "certified statement of their city debts," "assessed value of taxables," etc.

I think it the clear meaning of the proposition of the plaintiffs that they should have an opinion of the city attorney to the effect that the proposed bonds were valid, and that if an opinion to the contrary had been offered them, with the bonds, they would not have been bound to accept and pay for them. But while the statute (Revision 1881, § 3078) requires the city attorney to "advise the council upon all matters of law which may be submitted to him in reference to the action of such council," the council has no authority to dictate what the opinion in any case shall be, and consequently has no power or right to enter into a contract whereby it will be bound to furnish an opinion of that officer of a prescribed character; and, if this contract requires that interpretation, it is void. It is more reasonable to regard the proposition of the plaintiffs in this respect as being conditional, and the acceptance of it as being upon the same condition. This being so, the plaintiffs of course have no right of action.

The complaint is obnoxious to another objection quite as fatal. The statute (section 3099) requires that "on the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken and entered on the record;" and in the case of *City of Logansport* v. *Crockett*, 64 Ind. 319, the supreme court of the state has held this provision to be mandatory. But neither upon the passage of the ordinance for the issue of the bonds nor upon the adoption of the resolution for the acceptance of the plaintiffs' proposition was the vote taken by yeas and nays. If, therefore, the city attorney had given an opinion on the subject, it would doubtless have been to the effect that the ordinance for the issue of the bonds had not been properly passed.

It is to be observed further that the plaintiffs' proposition is dated at Indianapolis, and presumably was sent by mail to the city clerk of Portland. It is not averred in the complaint that the plaintiffs were present in person or by agent when it was accepted by the council, nor is it shown that the plaintiffs had been notified or had knowledge of the acceptance of their proposition before the rescinding resolution was passed, and the bonds were issued and sold to another party: Query, whether, if the proceedings had been in all respects regular, the council had not a right to rescind its action, so long as it had not been communicated or in some way brought to the knowledge of the plaintiffs. See *Gunn's Case*, L. R. 3 Ch. 40. The demurrer is sustained.

UNITED STATES *v.* ST. LOUIS, A. & T. R. Co. *et al.*

(*District Court, E. D. Missouri, E. D.* July 8, 1890.)

NAVIGABLE WATERS—OBSTRUCTION—FAILURE TO REMOVE.

Notice was served on a railroad company under Act Cong. Aug. 11, 1888, requiring it to alter its bridge over a certain river so that it would not obstruct navigation. Before the time allowed for the purpose had expired, the company was dispossessed of its property, including the bridge, and receivers thereof were appointed, in judicial proceedings instituted by mortgage bondholders. The notice not having been complied with, an action was brought against the receivers and the company to recover the fine imposed by the statute in such cases. *Held*, that the receivers would not be held liable, as no notice had been served on them in their official capacity, though prior to their appointment they had notice that the company had been notified to alter the bridge, as the statute required the notice to be served on the person or corporation owning or controlling the objectionable structure; and that the company was not liable, as the fact that it had been dispossessed of its property by judicial proceedings was a sufficient excuse for its non-compliance with the notice.

At Law.

This is an action of debt founded on the nineth and tenth sections of the appropriation act of August 11, 1888, (25 St. at Large, 424, 425.) The declaration shows that on February 23, 1889, notice was served on the St. Louis, Arkansas & Texas Railroad Company by the honorable secretary of war requiring it to alter its bridge over the St. Francis river by September 1, 1889, so that it would not be an obstruction to navigation; that on June 24, 1889, the defendants Fordyce and Swanson were appointed receivers of the St. Louis, Arkansas & Texas Railway Company in the suit to foreclose certain mortgages on the property of the railroad company brought by mortgage bondholders, and that as such receivers they immediately took possession of the St. Louis, Arkansas & Texas Railroad, including the bridge in question, and have since continued to operate the road under the orders of this court; that the alterations were not made as required by the order of the honorable secretary of war, and in consequence of such default a penalty of $500 per month, as declared by the statute, is demanded. The action is brought against the receivers, Fordyce and Swanson, as well as against the railway company, and all of the defendants have demurred to the declaration.

Geo. D. Reynolds, U. S. Dist. Atty.

Samuel H. West, for defendants.

THAYER, J., (*orally, after stating the facts as above.*) The receivers clearly are not liable for the penalty imposed by the statute, because they have never been notified by the secretary of war to make any alteration in the bridge. It is wholly immaterial that the receivers had notice, prior to their appointment and acceptance of the office, that the railway company had been notified to make alterations in the bridge. The statute on which the prosecution is based requires notice to be served on the person or corporation owning or controlling the objectionable structure, before such person or corporation can be held liable to a fine, and it is not pretended that the secretary of war caused any notice to be served on

Fordyce and Swanson in their capacity as receivers; hence they cannot be held liable in this proceeding. The court is also of the opinion that the railway company is not liable for the penalty herein sued for. By virtue of the law under which the secretary of war acted, the railway company had until September 1, 1889, to alter the bridge. They were not in default until that time arrived. The fact that the company was dispossessed of its property, including the bridge in controversy, by judicial proceedings instituted by the mortgage bondholders, on June 24, 1889, and was for that reason unable to comply with the order of the secretary of war, is, in my judgment, a sufficient excuse for non-compliance with the order. It may be conceded that, if the railway company had assumed by private contract to alter the bridge on or before a given date, it would be no excuse for the non-performance of such contract that within the time limited it had been dispossessed of its property. But there is a marked distinction between duties assumed by contract and duties imposed by operation of law. A party is sometimes excused for the non-performance of duties of the latter class, when he would not be excused for the non-performance of duties assumed by contract. The duty imposed on the railroad company in this instance was a duty imposed against its will by operation of law, and it is, in my judgment, a sufficient excuse for the non-performance of that duty that it was deprived of the means of executing the order of the secretary of war by judicial proceedings taken against it by the mortgage bondholders. The fact that it was dispossessed of its property, not voluntarily, but against its will, by decree of a court of competent jurisdiction, must be held to be a valid excuse for non-compliance with the order of the secretary of war. If the honorable secretary had caused the fact to be brought to the attention of the court that the bridge was an obstruction to navigation, and that the railway company had been ordered to alter it, it would clearly have been the duty of the court to have ordered an alteration of the structure, by its receivers, out of the income received by them from the operation of the road. But no such action has been taken by the government in behalf of the public. For the reasons thus briefly indicated, I conclude that neither the receivers nor the railway company are liable for the penalty sued for, and the demurrers to the declaration are accordingly sustained.

SOCIETE ANONYME DE LA DISTILLERIE DE LA LIQUEUR BENEDICTINE DE L'ABBAYE DE FECAMP *v.* WESTERN DISTILLING CO.

(Circuit Court, E. D. Missouri, E. D. September 8, 1890.)

TRADE-MARKS—FALSE REPRESENTATIONS—INJUNCTION.

The fact that complainant, the manufacturer of a cordial made according to a recipe obtained from the Benedictine monks, attaches to the bottles labels and advertisements bearing Latin and French phrases, which translated are, "Genuine Benedictine Liquor of the Benedictine Monks of the Abbey of Fecamp," does not preclude relief against one who manufactures and puts upon the market a cordial in such form and guise as to clearly indicate that it is the identical article sold by complainant; such phrases not being representations that the Benedictine monks are still engaged in its manufacture at Fecamp, but that it originated with them, especially where one of the advertisments shows that the cordial is manufactured by complainant, a corporation.

In Equity. On bill for injunction.

Chas. Bulkley Hubbell and *Frederick N. Judson*, for complainant.

Rassieur & Schnurmacher, for defendant.

THAYER, J. This case, upon the evidence, presents the following state of facts: The complainant is a French corporation, located at Fecamp, Normandy, in France, and is engaged in the manufacture and sale of a cordial or liquor called "Benedictine," for which there is a large demand in the United States, as well as in France and in many other foreign countries. The liquor is made of a decoction of herbs that grow on the heights of Normandy and the best cognac, according to a secret recipe, formerly belonging to the order of Benedictine monks, who founded and for several centuries maintained an abbey at Fecamp. Complainant's distillery for the manufacture of the cordial is located on lands formerly belonging to the Benedictine monks, appurtenant to the abbey in question. After the dissolution of the monastic orders and the sequestration of their property by the first republic of France, the book containing the recipe for Benedictine, as well as many other recipes, by gift of one of the monks of the abbey of Fecamp, passed into the possession of the maternal grandfather of A. Le Grand, Sr., the present *directeur general* of the complainant company. Some time prior to the year 1863 the book, by inheritance, became the property of Mr. Le Grand himself, and in that year he began the manufacture of the liquor or cordial at Fecamp, according to the formula of the monks. The formula has been kept secret in his family, and is known only to Mr. Le Grand and his two sons, who are subdirectors of the complainant. Since the year 1866 the liquor has been sold under the name of "Benedictine," and is widely known by that name, and has been put on the market in peculiar shaped bottles, provided with labels, seals, wrappers, etc., of a distinctive character; the labels, seals, etc., so in use have also been filed and registered in the proper offices as a trade-mark, both in France and in this country. Mr. Le Grand appears to have conducted the business of manufacturing and selling Benedictine at Fecamp until 1876, when a corpora-

tion (the present complainant) was duly organized under the laws of France to continue the manufacture at the same place. To the company so organized Le Grand assigned the formula for concocting Benedictine, all trade-marks, labels, real estate, and property of every kind used in connection with the manufacture, receiving in exchange therefor the capital stock of the company, and becoming its director general, which position he still holds. The business in question has in the mean time grown to large porportions, and has become very lucrative; the annual profits ranging from 350,000 to 500,000 francs. Shortly before the filing of the bill in this case, the Western Distilling Company began the manufacture and sale of a cordial called "Benedictine," at the city of St. Louis, Mo. For the obvious purpose of promoting the sale of the article, the distilling company caused it to be put up and placed on the market in bottles with labels, seals, and wrappers, all made in exact imitation of those in use by the complainant for putting up Benedictine by it manufactured. Even a *fac simile* of the signature of A. Le Grand, *aine*, and the initials of his name A. L. under the words "*Le Directeur*," both of which appear on labels used by the complainant, were appropriated by the distilling company, for use on the same labels on its own bottles. It is unnecessary, however, to go into further details. It is sufficient to say that the cordial manufactured by the defendant, and by it termed "Benedictine," was placed on the market in such guise that it could not be distinguished by careful inspection from the cordial prepared by the complainant, and that it was also put up in such form as to indicate clearly that it was manufactured at Fecamp, France, and not in this country. Under the circumstances, but one conclusion is admissible; and that is that the defendant intended, by putting up its cordial in the manner described, to deceive the public, and to deprive the complainant of a portion of its patronage by representing its own goods to have been manufactured by the complainant. In the light of these facts it is not very material whether complainant has an exclusive property in the word "Benedictine," as applied to its cordial, or has or has not a technical trade-mark, entitling it to protection under treaty stipulations, as in any event the law will not permit a person to disguise goods of his own production as those of some other manufacturer, for the purpose of purloining the latter's custom and deceiving the public, although he may make use of no words or symbols except such as, standing by themselves, and in an ordinary relation, are common property. *McLean* v. *Fleming*, 96 U. S. 254; *Avery* v. *Meikle*, 81 Ky. 73; *Croft* v. *Day*, 7 Beav. 84; *Newman* v. *Alvord*, 51 N. Y. 192; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 512; *Sawyer* v. *Horn*, 4 Hughes, (U. S.) 239; *Carson* v. *Ury*, 39 Fed. Rep. 779. Yet, this is precisely what the distilling company seems to have done, and still threatens to do. It could have had no possible motive for representing its goods to be of foreign manufacture, and for adopting the same dress, down to the minutest detail, that complainant's goods have long worn, unless it was to profit by the reputation of complainant's goods, and enable it to make a successful inroad upon complainant's trade.

According to the view which the court takes of the case, the only question deserving of serious consideration, is whether the complainant is not precluded from obtaining equitable relief by certain representations which it makes to the public concerning the manufacture of its own liquor. It is claimed by the defendant that the *societe* by its labels, seals, advertisements, etc., represents that the Benedictine by it sold is manufactured by Benedictine monks; and, if this contention is sustained by the evidence, it must be conceded that complainant is without right to equitable relief. *Medicine Co.* v. *Wood*, 108 U. S. 220, 2 Sup. Ct. Rep. 436; *Siegert* v. *Abbott*, 61 Md. 286. The contention is based on the fact that the Latin words "*Liquor Monachorum Benedictinorum Abbatiæ Fiscanensis*" appear on a label pasted around the neck of all of the *societe's* bottles; that an advertisement printed in French is also wrapped up with each bottle, with the following heading: "*Veritable Benedictine Liqueur des Moines Benedictins de L'Abbaye De Fecamp;*" and that the wax seal on the cork of each bottle has impressed thereon the figure of a monk, and that one of the labels on the body of the bottle bears the cabalistic letters "D. O. M." I attach no weight to the suggestion of counsel that the pictures of complainant's manufactory, distributed by it by way of advertisement, represent the manufacture to be carried on in an abbey, for the reason that no one liable to become a purchaser of Benedictine would be apt to mistake a modern distillery or workshop, such as the cut represents, as the abode of a religious order. I think it manifest that the language above quoted from the label and the advertisement falls short of a representation that it is the order of Benedictine monks who are now engaged at Fecamp in the manufacture and sale of Benedictine, even if the literal translation of the language be adopted, for which counsel contend, and even if the court disregards the idiomatic meaning of the particle "*des*," which those familiar with the French language assert should be given to it, when used as in the above-mentioned advertisement. If the phrase found in the advertisement be read as follows: "Genuine Benedictine Liquor of the Benedictine Monks of the Abbey of Fecamp," that does not necessarily imply that the liquor was made by, or that it belongs to the Benedictine monks of the abbey of Fecamp, because one of the approved and ordinary uses of the preposition "of" is to indicate origin, and sometimes to indicate use, as well as to signify possession or ownership. Hence, without giving any unusual meaning to the words, a person reading the label and advertisement in question might understand the representation to be that the article referred to is a liquor of the very same kind that was originally compounded by the Benedictine monks of the abbey of Fecamp, or that it was the genuine article at some time or other used by the monks of that abbey, and distinguished for such use. Evidently the phrase, "Liquor of the Benedictine Monks," etc., is one that may be interpreted in several ways without doing violence to the ordinary use of language; and I am of the opinion that people of ordinary intelligence would generally regard it as a representation that the liquor in question is compounded according to a formula invented or heretofore used by the monks of the abbey of Fecamp,

rather than as a representation that the monks of that abbey are still engaged in the manufacture, and that the article is of their production. This opinion is reinforced by other representations made by complainant's labels and advertisements. One of the advertisements clearly shows that Benedictine is manufactured at Fecamp, France, by the complainant, and that it is a French corporation with a capital of 2,500,000 francs, and has commercial agencies in various countries. One of the labels invariably placed on complainant's bottles, as heretofore mentioned, has a *fac simile* of the signature of "A. Le Grand, *aine;*" another bears the initials of his name under the words "*Le Directeur;*" and a third label states, in substance, that every bottle of genuine Benedictine put on the market bears a *fac simile* of the signature of "A. Le Grand, *aine, Directeur General.*" The words "*Directeur General*" certainly do not suggest the head of a religious order, but rather the manager of a trading or manufacturing establishment. In view of these facts it seems evident that no person of average intelligence, who, with ordinary care, consults complainant's labels, advertisements, etc., with a view of ascertaining who is the manufacturer of Benedictine, would be liable to conclude that it was manufactured by a society of monks, and buy the article on the strength of such belief.

In support of the same defense now under consideration it is further suggested that Benedictine is not made, according to a recipe of the monks, from herbs grown on the fallows of Normandy, and that the representation to that effect in complainant's advertisements is false. It is no doubt true that the Benedictine put upon the market by defendant is not made according to such recipe, or of such herbs, although its circulars contain a representation substantially to that effect. But there is no evidence in the case that the representation is false as applied to the foreign article actually manufactured at Fecamp; on the contrary, there is in the record the statement of A. Le Grand, Sr., supported by strong corroborative facts, that the representation is in every respect true; and the court would not be warranted in rejecting his testimony merely because Le Grand refused, on his cross-examination, to publish the formula.

Finally, it is urged that complainant is guilty of such misrepresentation as precludes equitable relief, because the fact is not disclosed by its labels or wrappers that the business conducted by A. Le Grand, Sr., up to 1876 has since then been conducted by a corporation,—the present complainant. This contention appears to the court to be without merit, for the following reasons: One of the advertisements of Benedictine, circulated by the complainant, does show, as before noted, that the liquor is manufactured at Fecamp, by a business corporation,—the "*Societe Anonyme de la Distillerie,*" etc. And with respect to the labels and wrappers on the bottles, in use prior to 1876 and since, it may be said that they never did represent Mr. Le Grand, Sr., to be the sole party in interest in the manufacture of Benedictine. The substantial representation conveyed by the labels on this point has always been that Le Grand was *directeur* or *directeur general* of some concern (whether partnership or

corporation is not stated) that was engaged at Fecamp in the manufacture of Benedictine. Furthermore, the change that took place in the business in 1876 was of such character that no dealer in Benedictine would probably regard it as of any importance. Mr. Le Grand retained the ownership of the bulk of the stock of the company, and became its executive head or manager. The liquor was thereafter produced under the supervision of the former manufacturer, and mainly for his profit, at the same place, at the same distillery, and according to the same formula. I fail to discover in the last contention of defendant's counsel any valid ground for refusing equitable relief. Therefore my conclusion upon the whole case is that defendant should be restrained from making use of complainant's labels, wrappers, circulars, etc., in the manner heretofore done, and that it should be compelled to account for whatever profits it has realized from such unlawful use. It will be so ordered.

ENOCH MORGAN'S SONS CO. *v.* WENDOVER *et al.*

(*Circuit Court, D. New Jersey.* September 23, 1890.)

TRADE-MARK—INFRINGEMENT.

Complainant had a trade-mark in the word "Sapolio," used to designate a particular kind of soap. When persons called at defendant's store and asked for "Sapolio," their salesman would, without explanation, pass out a soap called "Pride of the Kitchen," on which these words were plainly marked, and receive the customary price. The wrappers used on the two soaps were entirely different, and the size and shape of the cakes also differed. *Held* that, though there was no use of the word "Sapolio" on the soap, and no resemblance in the packages, the transaction amounted to an infringement of plaintiff's trade-mark, and would be enjoined.

In Equity. On bill for injunction.

Rowland Cox, for complainant.

Riker & Riker, for defendants.

GREEN, J. This is a suit in equity to restrain the unlawful use of the trade-mark or symbol, "Sapolio." The bill alleges that the complainant is the assignee of the originators of the word "Sapolio," a word used to designate a scouring soap, which has for many years been widely known and recognized by the public as the trade-mark or trade-name of the complainant; that the complainant has a right to the exclusive use of this word-symbol in every lawful way; and that such exclusive use has been upheld by the courts, and admitted by all. The defendants are charged with selling publicly a scouring or sand soap, under, as, and for Sapolio, which is not Sapolio, and is not the manufacture of the complainants. The facts proved are that, on three or four occasions, certain agents of the complainant went to the store of the defendants, in Newark, N. J., and asked for Sapolio. The salesman of the defendant immediately delivered to the purchaser a cake of soap called

"Pride of the Kitchen," without explanation, and received the customary price. It is this class of transactions which the complainant insists constitutes infringement of its trade-mark or symbol. It is admitted that the soap designated as "Pride of the Kitchen" is enveloped in a wrapper wholly different from that used to envelop Sapolio, and that the shape and size of the cake also differs from the usual size of a cake of Sapolio. It is further admitted that the words "Pride of the Kitchen" are plainly printed in large and legible type across the wrapper enveloping that soap. Upon the argument, I expressed some doubt whether the proofs did anything more than show a case either of deception as between the buyer and the seller, or of an acquiescence, on the part of the purchaser, in the open substitution of the one soap for the other by the salesman; but, upon reflection, I am of opinion that the transaction constituted an infraction of the property rights of the complainant, and is actionable. It is perfectly well settled that a "trade-mark" is property. If so, any use of it by others than the owner or rightful possessor, if unauthorized, is unlawful. The property of the complainants in this trade-mark or symbol is not only not disputed, but clearly admitted, by the answer, and is as clearly established by the proofs. The law, then, is bound to protect the owner of this property in the use, and the exclusive use. Now, what did the transaction in the store of the defendants, as disclosed in the proofs, amount to? Simply this: When asked by the complainant's agent for a cake of Sapolio, the defendant's agent, in response, delivered a cake of Pride of the Kitchen, which, in effect, was an assertion that the cake delivered was Sapolio, the very identical soap which had been asked for. In other words, the act of the defendant's salesman was a sale of a soap not made by the complainants, as and for the soap of the complainant known as "Sapolio," and thereby constituted an assertion on his part that it was Sapolio. If acts speak louder than words, then this assertion was more positive and emphatic than if it had been spoken aloud. The result is that an article manufactured by A. has been successfully palmed off upon an innocent purchaser as an article manufactured by B., and as the article for which the purchaser made inquiry; and this has been accomplished by a deception arising from and based upon what must be held to be an unlawful use of a trade-mark or word-symbol, the right of property in which belongs solely to the complainant. That the act of the salesman in offering "Pride of the Kitchen" in response to a demand for "Sapolio" is, though done silently, a positively unlawful act, is clear. Its unlawfulness consists in an attempt to steal away the business of the complainant for the benefit of the manufacturers of "Pride of the Kitchen." It is clearly the object of the law of trade-marks to prevent this. In *Celluloid Manuf'g Co.* v. *Cellonite Manuf'g Co.*, 32 Fed. Rep. 97, Mr. Justice BRADLEY uses this language:

"It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good-will. Fair competition in business is legitimate, and promotes the public good; but an unfair appropriation of another's business, by using his name or trade-mark, or an

imitation thereof calculated to deceive the public, or in any other way, is justly punishable by damages, and will be enjoined by a court of equity."

The words, "unfair appropriation of another's business * * * in any way," are quite comprehensive enough to include the act which, in effect, represents Pride of the Kitchen to be the article demanded when Sapolio is asked for. Any act or thing done to induce the belief that the one article is in fact the other is unfair, and indeed unlawful; and this is the true meaning and intent of the acts of the defendant's salesman complained of. The case falls clearly within the principle that equity should prevent a party from fraudulently availing himself of the trade-mark of another, which has already obtained currency and value in the market, by whatever means he may devise for that purpose. The defendants had no right to represent, by word of mouth or by act, directly or indirectly, that Pride of the Kitchen was Sapolio, and yet this is what the acts of their agents amount to. Such acts should be restrained. They constitute false representations, which tend to mislead the public, and divert custom from the one manufacturer to the other. Let an injunction issue, as prayed for. The question of costs is reserved.

WARD *v.* RICHMOND & D. R. CO.

(Circuit Court, D. South Carolina. August 26, 1890.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.

Plaintiff attempted to drive over defendant's track at a street crossing, without stopping to look or listen, and was struck by a passing train, which he could easily have seen before he went on the track. The train was two hours behind the schedule time. Plaintiff's witnesses testified that they heard the whistle either at a crossing 500 yards distant, or at one 500 yards further; while defendant's witnesses, passengers on the train, testified the whistle was sounded at all the crossings, and the engineer testified to the same effect. *Held*, that a verdict in plaintiff's favor would be set aside.

On Motion for New Trial.

Benet, McCullough & Parker and *John G. Capers*, for plaintiff.

Wells & Orr, for defendant.

SIMONTON, J. The plaintiff, a farmer, residing a few miles from Greenville, and whose business took him into that city very frequently, had spent the day in town, and was returning to his home between 7 and 8 o'clock in the evening. He was driving in his wagon on West street, one of the streets of Greenville, and was in the act of crossing the track of the defendant at the West-Street crossing. Above this place, about 500 yards, is the Buncombe-Street crossing, and beyond that again is another crossing generally known as the "Mountain-Road Crossing," some 500 yards further. Just as defendant was in the act of crossing, a locomotive drawing a train of seven coaches came in collision with his wagon, knocked him out, and injured him. One approaching the West-Street

crossing can, for 300 yards, get occasional views of the railroad track in the direction from which the train was approaching on this occasion; and, for 50 yards from the crossing, the railroad track is visible for over 300 yards, partially obstructed by small bushes. In his examination the plaintiff admitted that he had been drinking on that day, and at the time of the accident was neither drunk nor sober. He approached, and went on the crossing without looking for, or listening for, any approaching train. The one which collided with him was a passenger train, two hours behind schedule time. Witnesses for plaintiff, resident in that locality, heard the whistle of the train either at the Mountain-Road crossing, or at the Buncombe crossing. Those for the defendant, all of them, but one, passengers on the train intending to get out at Greenville, and that one waiting for the coming train, say that the whistle sounded for all the crossings, followed by the long whistle for the station, in the act of crossing Buncombe street, and then by the cattle signal. The engineer, who testified that he blew all the crossing signals, said that he saw the wagon of the plaintiff when he was about 65 yards from it; that he blew the cattle signals, and put on his air-brakes, stopping his train just beyond the crossing, but too late to avoid collision. The train was well equipped. The case was submitted to the jury, notwithstanding the motion that they be instructed to find for the defendant. Two questions were submitted to them: Was the defendant negligent? If this were answered in the affirmative, was there contributory negligence on the part of the plaintiff? They were carefully instructed as to the law of the case. There were no exceptions to the charge. The verdict was for plaintiff, $1,100. The defendant moves for a new trial.

The general rule is that every one approaching a railroad crossing, at any time, must exercise ordinary care in the use of his sense of sight and of hearing in order to discover and guard against any approaching train. See Beach, Contrib. Neg. p. 191, § 63, and cases quoted; *Schofield* v. *Railway Co.*, 114 U. S. 617, 5 Sup. Ct. Rep. 1125. The statute law of South Carolina goes beyond this general rule. It requires a locomotive approaching a crossing like the one in this case to ring a bell or sound the whistle at the distance of at least 500 yards from the crossing, and to keep up the ringing or whistling until the locomotive has crossed the highway. Gen. St. S. C. § 1483. Section 1529 of the same chapter provides that, if one be injured in person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by that chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless it be shown that, in addition to mere want of ordinary care, the person injured was, at the time of collision, guilty of gross or willful negligence, or was acting unlawfully, and that such gross or willful negligence, or unlawful act, contributed to the injury. Under these provisions of the statute law of South Carolina the jury were instructed to inquire if the signals, herein provided for, were given. Their verdict answers this question in the negative. They were also instructed to inquire if the plaintiff was

guilty of negligence, gross or willful, which contributed to the injury. They were told that these terms were not synonymous; that gross negligence implied carelessness, want of apprehension of danger; willful negligence was recklessness, notwithstanding knowledge of danger. The one is passive, the other active. The verdict answers this question in the negative also. If the verdict is the solution of conflicting evidence, it will not be disturbed. Our inquiry then is, was there enough of undisputed testimony in the case to induce the conviction that the verdict on this point was against the evidence? It is difficult, if not impossible, to formulate a definition which will cover every case of gross negligence. The surrounding circumstances will always control the character of the act. What might be only a want of ordinary care under some circumstances would be gross carelessness under others. In *White* v. *Railroad Co.*, 9 S. E. Rep. 96, the supreme court of South Carolina say: "Gross negligence is the absence of that kind of care which even the most careless and indifferent would be expected to exercise under the existing circumstances." In the case before us the plaintiff, after dark, was approaching a railroad crossing with which he was perfectly acquainted. A train of cars was rapidly approaching. Although it did not give the continuous signal required by statute, it did give notice of its approach. The witnesses for plaintiff heard it whistle, either at the Mountain-Road crossing or at the Buncombe-Street crossing. Those for the defendant heard it whistle at both of these crossings, and then give the long whistle for the station. The first set of witnesses were residents of the locality, with no special interest in the arrival of the train. The other set were specially interested in the approach and arrival of the train at Greenville, and more on the alert for the signals. Notwithstanding this, the plaintiff continued on his course, got on the track, and was crossing it when the train was a little over 65 or 70 yards off, and easily visible, certainly, from that distance, taking no sort of precaution, using neither his eyes nor his ears. Had he listened, he must have heard the whistle, or the roar of the coming train. Had he looked, he must have seen its lights. It is impossible to avoid the conviction that, although he was neither drunk nor sober, nevertheless the drinks he had taken had induced a frame of mind which made him "careless and indifferent to consequences," and had led to "the absence of the care which a sober man, however careless and indifferent, would have exercised under the circumstances." Had he used his senses, he could have stopped. In not stopping, he contributed to his injury. The jury was fully advised as to the principles of law to which these facts would apply. Their verdict would indicate either that they mistook the principles or that, through bias or prejudice, they misapplied them. The frank admission by the plaintiff of the controlling fact that, in the act of crossing, he used neither his sight nor his hearing was entirely overlooked by the jury. Their verdict cannot stand. *Thurston* v. *Martin*, 5 Mason, 497. The case of *Petrie* v. *Railroad Co.*, 29 S. C. 303, 7 S. E. Rep. 515, resembling this case so much in its facts, does not conflict with this opinion. The supreme court do not deny that going upon a railroad track so cov-

ered up as to render hearing or sight impossible would be gross contributory negligence. The error for which they sent the case back was the expression by the circuit judge of his opinion on the facts; the rule in this state being that a judge cannot, by word, and perhaps by voice or gesture, by countenance or emphasis, aid the jury in their exclusive province,—the decision on the facts. In *Schofield* v. *Railway Co.*, *supra*, the supreme court of the United States sustained the trial judge in his instruction to the jury to find for the defendant, under circumstances very similar to those of the case at bar. Enter an order for a new trial.

MITCHELL *et al.* *v.* MURPHY.

(Circuit Court, W. D. Pennsylvania. August 5, 1890.)

1. TRUSTS—IMPLIED TRUSTS.
A deed from B., M., and P. to Joseph Pennock for a tract of land contained the recital: "And whereas, the said land is intended to be for a residence for William Murphy and his family, and the said Joseph Pennock pays towards the purchase money $1,200, and Isaac M. Pennock * * * pays $500, and Archibald Paull * * * pays $500." The conveyance was to Joseph Pennock, "in trust, as well for the said Isaac M. Pennock and Archibald Paull as for himself, in the proportions the amount paid by each bears to the whole purchase money." These persons put Murphy into possession for no defined period. *Held*, that there was no implied trust in favor of William Murphy and his family, and his possession was that of a mere tenant at will.

2. ADVERSE POSSESSION.
Murphy, with his family, remained in possession of the land until his death, and thereafter his widow continued in possession for more than 21 years. *Held* that, as her husband's possession was in subordination to the title of the rightful owners, her continued possession was of the same character, and that, in the absence of evidence that she had renounced the privity between her and the rightful owners, or by some unequivocal act had severed it, she could not avail herself of the statute of limitations.

Ejectment.

In pursuance of a written stipulation this case was tried by the court without the intervention of a jury. The following facts, therefore, are found by the court:

(1) The title to the piece of land described in the writ in this case being in Isaac Beeson, George Meason, and Charles Peach, these persons, by their deed dated March 27, 1851, for the stated consideration of $2,200 therein acknowledged as having been paid by Joseph Pennock, Isaac M. Pennock, and Archibald Paull, conveyed said piece of land to said Joseph Pennock in trust as follows, namely: "To have and to hold the same, with the appurtenances thereunto belonging, unto him, the said Joseph Pennock, his heirs and assigns, in trust, as well for the said Isaac M. Pennock and Archibald Paull as for himself, in the proportions the amount paid by each bears to the whole purchase money." The said deed, after reciting the chain of title from the commonwealth of Pennsylvania down to said Peach to several tracts of land of which the piece here in question is a part, contains this recital just before the conveying clause, namely: "And whereas, the said Peach has sold fifty acres of the same to Joseph Pennock, of the city of Pittsburgh, in trust, as hereinafter stated; and whereas, the said land is intended to be for a residence for

William Murphy and his family, and the said Joseph Pennock pays towards the purchase money twelve hundred dollars, and Isaac M. Pennock, of the city of Pittsburgh, pays five hundred dollars, and Archibald Paull, of the city of Wheeling, Va., pays five hundred dollars." (2) The said Joseph Pennock and Archibald Paull had each married a sister of said William Murphy. The latter, at the date of said deed, was in ill health, and he continued an invalid until his death. (3) In the year 1851, soon after the date of said deed, said Joseph and Isaac M. Pennock and Archibald Paull put said William Murphy into possession of said piece of land, and he resided thereon with his wife, Sarah Murphy, the present defendant, and their children, until his death, in 1860, holding the land during his occupancy in subserviency to the title of said Pennocks and Paull. (4) After the death of her husband, the said William Murphy, the defendant remained in the possession of said piece of land, residing thereon with her children, and her possession thereof has been continuous from her husband's death down to this time. (5) On July 2, 1866, said Joseph and Isaac M. Pennock executed a written lease, whereby they let and demised to the defendant said piece of land for the term of 15 years from April 1, 1866, for the use of herself and the children of William Murphy and herself, at a nominal rent, and on July 6, 1866, she executed and delivered to the agent of said Pennocks an instrument of writing of which the following is a copy:

"I, Sarah Murphy, widow of William Murphy, deceased, for myself and the children of the said William, hereby acknowledge and declare that as to 12-22 and 5-22 parts of the tract of land on the Connellsville road, in N. Union township, Fayette county, Pennsylvania, containing about fifty acres, on which we now reside, and have resided since April 1st, 1851, we hold and have held the same under and as tenants at will of Joseph Pennock and Isaac M. Pennock in connection with Archibald Paull, and according to his last will; we now accepting a lease of said interest from said Joseph and Isaac, for the term of fifteen years, from April 1, 1866, dated July 2nd, 1866, upon the rent and terms therein stated. Witness my hand and seal this sixth day of July, A. D. 1866. SARAH B. MURPHY. [Seal.]

"Test: JOHN COLLINS."

(6) The said Archibald Paull died in the year 1854, and all the right, title, and interest in and to said piece of land which he acquired under the aforesaid deed of March 27, 1851, by virtue of his last will and otherwise, became vested in the plaintiffs before the date of this suit, viz., the 6th day of September, 1888. (7) When the writ in this case was served on the defendant she was residing on said piece of land with one daughter, a child of William Murphy and herself, and a granddaughter, the minor child of a deceased daughter, and this child and grandchild still live with her on the land. (8) The taxes on said piece of land were paid by William Murphy, or by the defendant, during his life-time and occupancy, and since his death by the defendant. The land was assessed in the name of Joseph Pennock from 1851 down to 1867, and since then has been assessed in the defendant's name.

J. M. Stoner and *Edward Campbell*, for plaintiffs.
S. L. Mestrezat, for defendant.

ACHESON, J. Upon the facts here appearing, I am quite unable to see how the defendant can successfully resist a recovery by the plaintiffs. Two grounds of defense are relied on. In the first place, the defendant sets up title under the statute of limitations. But undeniably her husband, William Murphy, entered by the permission of Joseph and Isaac M. Pennock and Archibald Paull, and his possession never ceased to

be in subordination to their title. It is well settled that when the original possession by the holder of land is in privity with the title of the rightful owner, nothing short of an open and explicit disavowal and disclaimer of holding under that title and assertion of title in himself brought home to the other party will enable such holder to avail himself of the statute of limitations. *Cadwalader* v. *App*, 81 Pa. St. 194; *Zeller's Lessee* v. *Eckert*, 4 How. 289. But William Murphy never disavowed the title of those who put him into possession, nor did he ever indicate in any manner an intention to hold adversely. And, as his possession was in subserviency to the title of the rightful owners, the continued possession, upon his death, of his widow, the defendant, was of the same character. *Bannon* v. *Brandon*, 34 Pa. St. 263. In that case it was held that the widow of a tenant for life, who continues in possession without any contract between herself and the owner of the land, holds in subordination to the title of the latter, and not adversely. Having entered by right under her husband, when the right ceased and she held over, she was at least a tenant by sufferance. Id. Now it is not shown that the defendant ever renounced the privity between her and the rightful owners, or by any unequivocal act severed that privity. That she paid the taxes was nothing more than her plain duty, since she had the full and free use and enjoyment of the premises. Without regard, then, to the transaction between the Pennocks and the defendant in the year 1866, the lease executed by them, and "the declaration of tenure" executed by her, the conclusion cannot be avoided that the defense of the statute of limitations set up against the plaintiffs has no foundation to rest on.

The other and totally different ground of defense taken by the defendant is that the right of possession to the land is in the surviving family of William Murphy "for a residence," such right being evidenced by the recital in the deed from Beeson and others to Joseph Pennock, viz.: "And whereas, the said land is intended to be for a residence for William Murphy and his family," etc., and the intention executed, by putting him into possession. But William Murphy was not a party to that deed. Neither did he contribute aught to the consideration paid. The purchase was altogether *res inter alios acta*. The deed contains an express trust declared in very apt words in favor of Isaac M. Pennock and Archibald Paull, but none declared in favor of William Murphy. Evidently the deed was drawn by one learned in the law, and if it had been intended to create any trust for the benefit of William Murphy and his family the intention would have been expressed, and not left to doubtful inference. When read in connection with the whole deed, we find that the manifest purpose of the particular recital, in which William Murphy's name appears, was to explain the transaction as between Joseph Pennock, Isaac M. Pennock, and Archibald Paull, and define their respective interests in the land. Their expressed benevolent intention to provide a place of residence for William Murphy and his family imposed no legal obligation upon them, and clothed him with no enforceable right. And when they voluntarily gave him possession for no defined period he became, at the most, a mere tenant at will.

That the plaintiffs have the legal title upon which to found an action of ejectment cannot be doubted. The trust in Joseph Pennock under the deed of March 27, 1851, was a dry trust. The statute, therefore, executed the use, and the legal title to the undivided five twenty-second parts of the land passed to Archibald Paull. *Moore* v. *Shultz*, 13 Pa. St. 98; *Eckels* v. *Stewart*, 53 Pa. St. 460; *Webster* v. *Cooper*, 14 How. 488.

And now, August 5, 1890, the court finds in favor of the plaintiffs, and that they do recover the undivided five twenty-second parts of the piece of land described in the plaintiffs' *præcipe* and the writ, and six cents damages, and costs.

Let judgment be entered upon the finding of the court in favor of the plaintiffs at the end of four days *sec. reg.*, unless, in the mean time, a motion for a new trial should be made.

WARNOCK *v.* MITCHELL.

(Circuit Court, W. D. Tennessee. August 26, 1890.)

CRIMINAL LIBEL—ACTION FOR DAMAGES—SENDING LETTER.

The Tennessee Code (Mill & V. § 5552) has not changed the common law that while the sending of a sealed letter which is libelous to the plaintiff, without any other act on the part of the defendant towards making its contents known to a third person, is punishable criminally, it is not a publication sufficient to support a civil action for defamation.

At Law. On demurrer to the declaration.

Taylor & Carroll, for plaintiff.

Sterling Pierson, for defendant.

HAMMOND, J. The two counts of this declaration, to which the demurrer has been limited by the submission in argument, aver no other publication, either generally or specially, of the alleged libel, than the receipt by the plaintiff of the private letters in which the defamation was contained. It is conceded by the plaintiff's counsel that this is not a sufficient publication, unless the rule of the common law has been changed by the statute. It will aid us in determining the disputed scope of the statute to consider somewhat the rule of the common law on the subject. The counsel for the defendant has stated correctly, as we find, the reason why the mere delivery of a private letter to the plaintiff is not, in a civil action, a publication of the libel, and yet, in a criminal indictment, amounts to a publication. In the civil action, the law in theory allows no compensation for wounded feelings alone, but only when that injury is accompanied with an impairment of one's reputation with others; as, in other cases of tort, where there must be some damage to the person or property, which may be aggravated by the mental suffering attending the injury. But when the public undertakes to

redress its own wrong in the premises by the criminal proceeding, it punishes not so much for the defamation of the prosecutor as for the somewhat distinct offense of inciting, by the defamation, to a breach of the peace. Perhaps, in strict thought, it may be that it is a misnomer to call the criminal proceeding a prosecution for libel at all, for all authorities are agreed that the indictment or information must allege an intention to break the peace by incitement thereto. Yet it will be found perhaps that, after all, the distinction comes of an extreme solicitude to punish the culprit for mere *private* defamation,—a solicitude which is not so intense when the public itself becomes, by its indulgence in the liberties of free speech, a sharer in the offense of open defamation, and through its public press, and other organs of public opinion, delights to degrade a man by libel and slander because of his social, religious, or political sins, in their sight, or for the mere barbaric enjoyment of the sensation of seeing a good reputation destroyed, the destroyers hypocritically professing sympathy with the victim meanwhile. Most of the legislation on the subject of libel has been, therefore, in aid of the public freedom in this behalf; but when it does touch upon the seemingly less venial offense of mere private defamation, it is in the other direction of more severe laws for its suppression. It might be well enough urged, therefore, that the legislature intended by any given statute to enlarge the civil remedy by placing it upon an equality with the criminal proceeding in the matter of publication, and that which it takes to constitute it; for all the cases show that the courts are very astute to lay hold of any circumstance appearing in the case to sustain publication in aid of the civil action in regard to mere private transactions, and in the criminal proceeding do not require it at all. Nevertheless, quite reluctantly, I conclude that the Tennessee legislature had not any intention to enlarge the civil remedy in the statute we have before us.

In the leading case of *Sir Baptist Hicks*, Hob. 215, Poph. 139, as stated by the last-cited reporter, the reasons for the rule of the criminal law are somewhat diversely given by the judges; none of them saying, however, that it was because of a provocation to a breach of the peace, as reported by Hobart, and generally accepted by subsequent cases. One of them said that such a letter as was written in that case concerned public matter, and was an offense against piety, charity, and justice, because Sir Baptist's benefactions, which were derided, were given to a church, to a hospital, and to a public building, and the giving of such gifts should not be discouraged, even by private derision. Another said that if the defamatory letter had related to only private concerns, and did not thus affect the public interest, it could not have been punished. Lord COKE curtly said only that he had been instructed as attorney to file an information in such a case, which, however, was not filed, for reasons stated by him, and that it was resolved in *Edwards* v. *Wooton*, 12 Coke, 35, to that effect. But Lord Chancellor BACON said "that the reason why such a private letter shall be punished is because it in a manner enforceth the party to whom the letter is directed to publish it to his friends to have their advice, and for fear that the other party would publish it, so that

this compulsory publication shall be deemed a publication in the delinquent." This reason, it is apparent, applies to make the sending of the letter a publication in the civil action as well as in the criminal prosecution, but it did not seem to take root in the subsequent cases, and they follow the statement in *Edwards* v. *Wooton*, *supra*, that "for the writing of a private letter to another, without any other publication, the party to whom it is directed cannot have an action upon the case, for this: that no action lies; but that the said infamous letter, which in law is a libel, shall be punished, although it was solely written to the plaintiff without any other publication, for it is an offense to the king, and is a great motive to revenge, and tends to the breaking of the peace and great mischief; and for that reason it was necessary that it should be punished by indictment to prevent such occasions of mischief." And so one of the very latest cases examined repudiates Lord Chancellor BACON'S reasoning in a case where the addressee of the letter was illiterate, and had his wife read it to him, which was held not to be a publication by the defendant. *State* v. *Syphrett*, 27 S. C. 29, 37, 2 S. E. Rep. 624. All the authorities seem to support this distinction quite uniformly, and to require in the civil action a publication to some third person, though very slight circumstances will be taken to be a publication in support of the suit. *Queen* v. *Adams*, 22 Q. B. Div. 66; *Wennhak* v. *Morgan*, 20 Q. B. Div. 635, —where it is said: "The uttering of a libel to the party libeled is clearly no publication for the purposes of a civil action." *Phillips* v. *Jansen*, 2 Esp. 624; *Barrow* v. *Lewellin*, Hob. 62, and note; *Darcy* v. *Markham*, Id. 120*a*; *Wenman* v. *Ash*, 13 C. B. 836; *Lyle* v. *Clason*, 1 Caines, 581, and note; *Broderick* v. *James*, 3 Daly, 481; *McIntosh* v. *Matherly*, 9 B. Mon. 119; *Sheffill* v. *Van Deusen*, 13 Gray, 304; *Spaits* v. *Poundstone*, 87 Ind. 522; *Mielenz* v. *Quasdorf*, 68 Iowa, 726, 28 N. W. Rep. 41; Add. Torts, 980; Cooley, Torts, 193; Gilb. Ev. 641; Townsh. Sland. & Lib. § 93; 2 Starkie, Sland. & Lib. 13; Odgers, Sland. & Lib. 150, 383; *Seller* v. *Montgomery*, 28 Amer. Law Reg. 276, and note, 413, note. Notwithstanding a seemingly uniform support of this distinction between the civil and the crimina action in the matter of treating the uttering of the libelous or slanderous writing or words to the plaintiff himself only as a publication, so accurate an author as the annotator of Saunders' Reports, in his note to *Lake* v. *King*, 1 Wms. Saund. 132, states the law to the contrary, and says that the sending of a sealed letter to the party himself only is in a civil action a publication, although it had been formerly held otherwise; for which he cites *Buldwin* v. *Elphinston*, 2 W. Bl. 1037, and *Weatherston* v. *Hawkins*, 1 Term R. 110; and another learned annotator adopts this statement in his note to *Phillips* v. *Jansen*, 2 Esp. 624, (Day's Ed. 1808;) but still another annotator of the leading case of *Lyle* v. *Clason*, 1 Caines, 581, with becoming deference, of course, points out that the two cases cited by Serjeant Williams do not sustain his note, as they certainly do not. He probably mistook the statement of Wood, counsel for the plaintiff in *Weatherston* v. *Hawkins*, *supra*, —that, "as to publication, it never has been doubted but that the mere writing of a letter is a sufficient publication, even though it be written to the party himself," —for an opinion

of the court. Certainly the court did not decide that proposition, although Lord MANSFIELD does say that "the general rules are laid down as Mr. Wood has stated;" for the letter in that case was not addressed to the plaintiff at all, but to a third person, one Collier. Also, Bacon's Abridgment, tit. "Libel," B, states that "it seems to be a matter of doubt whether the sending an abusive letter, filled with provoking language, to another, will be an action as for a libel, because here is no publication." But the cases indicate that perhaps this doubt, and the statement of Mr. Wood above referred to, are confused with that other doubt which was mooted in the famous case of *King* v. *Burdett*, 3 Barn. & Ald. 717, 4 Barn. & Ald. 95, 314, and not decided, whether, namely, the mere writing of a libel, without more, is not in the criminal law an indictable offense. 2 Starkie, Sland. & L. 229.

It will be found, so far as I am advised, that the law of libel, both civil and criminal, stands in Tennessee substantially as at common law. In 1805, following the lead of some of the other states, we passed an act placing the criminal prosecution upon an equality with the civil action in the matter of permitting the truth of the defamatory words to be shown in defense of the indictment, but with that exception our legislation has been remarkably free from any interference with the common law of libel or slander. Act 1805, c. 6, Caruth. & N. St. p. 439. When we came to make the Code of 1858, the commissioners charged with that duty added to the legislation four sections, or, more accurately, three sections, the other being the mere repetition of a constitutional requirement that the jury should be judges of both the law and the facts, in all prosecutions for libel. Const. art. 1, § 19; Thomp. & S. Code Tenn. § 4764. The first of these sections defines "a libel" in language which might be applicable to either the criminal or the civil offense, and the next extends the definition to include the defamation of the memory of the dead. Id. §§ 4760, 4761. Then comes the section which is brought into the dispute in this case, defining "publication;" and the next section is the act of 1805, before referred to, relating to the truth of the matter charged in the indictment as a defense. Id. §§ 4762, 4763; Mill. & V. Code, §§ 5550–5554. The section here in dispute concerning the "publication" of the libel is as follows:

"4762. No printing, writing, or other thing is a libel without publication; but the delivery, selling, reading, or otherwise communicating a libel, or causing the same to be delivered, sold, read, or otherwise communicated, to one or more persons, or to the party libeled, is a publication thereof." Mill. & V. Code, § 5552.

Were it not for the circumstances to be presently mentioned, I should be inclined to construe this general language (also that of the two preceding sections defining "libel") as applicable to both the civil and the criminal remedy; for, after all, the reason for denying the civil remedy, when the defamatory words have been spoken or delivered only to the plaintiff, is technical, and highly artificial, as plausible as it appears to be. No injury in fact to the victim's reputation is really required to support the civil action, but only in theory, since the action lies, although

the third person hearing the words does not believe them to be true, or knows them to be false; it being sufficient if from their nature they are calculated to do him the injury, (*Hubbard* v. *Rutledge*, 52 Miss. 581; *Markham* v. *Russell*, 12 Allen, 573; *Marble* v. *Chapin*, 132 Mass. 225;) just as in other torts the slightest physical pain, or none at all, if the blow be given in fact, or other trespass be actually committed, will support the action for damages. Wherefore it would seem not unreasonable for the legislature to place the civil remedy on an equality in this regard with the criminal offense, and make the mere sending of the letter to the plaintiff alone a publication, thereby making unnecessary all that judicial astuteness we find in the cases which lay hold of almost any circumstance beyond the plaintiff to constitute the required "publication." But, prior to these superadded sections of the Code, the decisions in Tennessee had held closely to the common law, both as to civil remedy and as to the criminal prosecution; there being substantially no other law on the subject. In *Swindle* v. *State*, 2 Yerg. 581, placing the letter sealed under the bed of a third person, who was likely to open it, although addressed only to the plaintiff, was held a publication within the purview of the criminal law of libel. It was a publication in fact. The court quotes Gilbert approvingly, and the case is instructive as to our local law on this subject. In *Hodges* v. *State*, 5 Humph. 112, the court seems, *obiter*, to decide that the receipt by the plaintiff of the letter through the mail was not a publication, and, as that was a criminal case, it might inferentially appear that the court decided that, even in a criminal case, the delivery to the plaintiff only is not a publication; but clearly the court did not so decide, because the case failed only because the indictment was fatally defective in not averring an intention to provoke a breach of the peace. If that had been averred, the court would have sustained the conviction, and the law in Tennessee remains in harmony with the general law and the leading case in this country of *State* v. *Avery*, 7 Conn. 266, and the latest case of *Queen* v. *Adams*, *supra*, in England, and the others already mentioned.

Such being the state of our decisions and the general law, it seems difficult to determine why the makers of our Code felt it necessary to insert these merely declaratory sections in the criminal part of their Code, where they are comparatively useless, and while if applied to the civil action they would have meant something of importance, unless it may be that they wished to settle the other doubt before mentioned, whether or not the bare writing of libelous matter, without more, is punishable criminally. Possibly this section was intended to settle that it should not be, however the point may be ruled at common law or elsewhere. However this may be, these sections are not found, as they should be if applicable to the whole body of our law, in that chapter of the Code containing general definitions, (Thomp. & S. Code, §§ 40–59; Mill. & V. Code, §§ 41–57,) but only in the chapter on "Crimes," and in the regular catalogue of crimes under the title of "Libel;" and, general as the language is, since the legislature was not treating of the civil remedy in that place, and no express words are used, nor fair inference

may be drawn, to show that they had in mind that branch of the law of libel, this section of the Code should be confined to the criminal prosecution, and we cannot extend it, as we are asked to do in this case, to the civil remedy.

Demurrer sustained.

UNITED STATES v. CURTAIN.

(District Court, W. D. South Carolina. August 12, 1890.)

FALSE PRETENSE—WHAT CONSTITUTES.

In order to convict a defendant indicted under Act Cong. April 18, 1884, for obtaining money or other valuable thing by falsely assuming to be an officer or agent of the United States, it is necessary for the jury to find that he assumed to be the officer mentioned in the indictment; that such assumption was false; that he made such false assumption with intent to defraud; and that he carried out such intent.

At Law.

A. Lathrop, U. S. Dist. Atty., for plaintiff.

T. H. Cooke, for defendant.

SIMONTON, J., (*charging jury.*) The defendant stands indicted under the act of congress of April 18, 1884. The testimony for the government is to the effect that he, alleging that he was a post-office inspector, visited one Crane, a postmaster, and charged him with illegal sale of stamps; that Crane admitted the charge, whereupon defendant received from him $150, giving him a receipt in full for stamps illegally used, signing it post-office inspector. The defendant, the only witness on his own behalf, admits the main facts. He insists, however, that the sole purpose of his assumption of the character of post-office inspector was to obtain information, for which some newspaper would pay him.

The act of congress, under which he is indicted, creates two offenses. The one is where, with intent to defraud the United States, or any person, any one falsely pretends to be an officer or employe, acting under the authority of the United States, or any department or any officer thereof, and takes upon himself to act as such. The other is where one, falsely assuming such pretended character, shall demand or obtain from any person, or from the United States, or any department or officer thereof, any money, paper, document, or other valuable thing. The defendant is indicted under this last subdivision of the act. In order to convict him, you must answer these questions in the affirmative: (1) Did this defendant assume or pretend to be a post-office inspector, acting under the authority of the department? (2) Was such assumption or pretense false? (3) Did he make this false pretense or assumption with intent to defraud Crane, the postmaster? (4) Did he carry out this intent, and did he in this, his assumed or pretended, character, or because of his false assumption or pretense, defraud, or attempt to defraud, Crane?

ROBBINS *v.* AURORA WATCH CO.

(*Circuit Court, N. D. Illinois.* July 31, 1890.)

PATENTS FOR INVENTIONS—WHAT CONSTITUTES INFRINGEMENT.

Claims 1 to 4 of patent No. 325,506 to Charles P. Corliss for "a stem winding and setting watch" are for a device which prevents a watch movement when taken out of the case from falling into the hands-setting engagement, and keeps it in the winding engagement. The shifting engagements are obtained through a rising and falling pinion, and the hands-setting engagement is rendered inoperative while the movement is in the case by a short lug pressing against the case and on the spring which tends to throw the watch into the hands-setting engagement. When the movement is taken from the case, this pressure on the spring is released, and it becomes wholly inoperative to hold the watch in the hands-setting engagement, while the winding engagement remains operative. *Held*, that this claim was not infringed by a device which accomplishes the same result as to the hands-setting engagement, but in which the shifting mechanism consists of a vibrating yoke carrying the pinions at either end, for the purpose of the winding and setting engagements, with its parts so arranged by means of adjusted springs that when the movement is taken out of the case the winding and setting pinions are both thrown out of engagement, so that neither the hands-setting nor winding engagement is operative.

In Equity.

Prindle & Russel and *L. Hill*, for complainant.

Bond, Adams & Jones, for defendant.

BLODGETT, J. The bill in this case seeks an injunction and accounting by reason of the alleged infringement of the first four claims of patent No. 325,506, granted September 1, 1885, to Charles P. Corliss for "a stem winding and setting watch." The feature of the patent involved in this case is:

"So much of the device as provides that when a watch movement which is normally in engagement with the hands-setting mechanism is removed from the case, the mechanism for throwing the watch into hands-setting engagement will become inoperative, and the watch will remain in the winding engagement."

The claims now in question are:

"(1) As an improvement in stem winding and hands-setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding-wheel by the movement of a stem-arbor, and is normally in engagement with the dial-wheels only when the movement is in a case, substantially as and for the purpose specified. (2) As an improvement in stem winding and setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding-wheel, by the movement of a stem-arbor, and is held normally in engagement with the dial-wheels, by a spring which is operative for such purpose only when the movement is in a case, substantially as and for the purpose shown. (3) As an improvement in stem winding and setting watches, the combination, with a winding and hands-setting train, of a spring which operates to hold said train normally in engagement with the dial-wheels when the movement is in a case, and is inoperative for such purpose when said movement is removed from its case, substantially as and for the purpose shown and described. (4) As an improvement in stem winding and setting watches, a winding and hands-setting train which, when the movement is cased, is normally held in engagement with the dial-wheels, and when said movement is removed from its case

is automatically relieved from constraint and free to engage with the winding-wheel, substantially as and for the purpose specified."

The defenses of want of patentable novelty and non-infringement are relied upon, and have been much discussed, in the testimony and arguments of counsel, but I propose to consider only the question of non-infringement.

The Corliss watch, as described in the patent now under consideration, is a stem-winding and stem hands-setting watch, where the shifting mechanism is a rising and falling pinion, and the descriptions in the patent of the device now in question apply to a mechanism where the shifting engagements are obtained through a rising and falling pinion. The defendant manufactures a stem-winding and stem-setting watch, where the shifting mechanism consists of a vibrating yoke carrying the pinions at either end, for the purpose of the setting and winding engagements. In the patent in question the spring which tends to throw the watch into the hands-setting engagement is rendered inoperative by means of a short lug, or fin, upon the back of the spring, which passes outside of the movement, and abuts against a portion of the case, so that when the watch is in the case this fin puts the spring under constraint, and causes it to operate as I have stated; but when the movement is removed from the case, the pressure of the side of the case upon this fin being released, the spring becomes wholly inoperative, and, the spring which operates to keep the watch in winding engagement being operative, the watch is held in winding engagement. The defendant's watch, having a shifting mechanism carried upon a vibrating yoke, has its parts so arranged as that when the movement is taken out of the case the winding and setting pinions are both thrown out of engagement, and remain intermediate, between the winding and setting engagement. This is accomplished by the adjustment of the springs, which throw the watch into the different engagements, being so balanced against each other that, when the pressure of the stem-arbor is removed, the yoke is at once thrown into the intermediate position of which I have spoken, where neither the winding nor setting pinions are in engagement. This seems to me an entirely different organization from that of the Corliss watch, and to have no operative parts in common with the operative parts of the patent, so far as the device in question is concerned. The claims of the patent which I have quoted are most cunningly and artfully drawn, and seem to me to have been intended, if possible, to cover, not the device which is described in and shown by the patent, but the results of the action of this device; but, in my opinion, the only manner in which these claims can be supported and the patent held valid at all is by holding that the claim is limited to the device described in the specification.

Guided by an examination of the description given in the specifications of the device now in question for relieving the watch of its normal tendency to go into the setting engagement, when removed from the case, we find that it is organized solely to operate in connection with the rising and falling pinions by which the shifting engagements are obtained, and we find nothing that suggests the mechanism used by the defendant.

Corliss had the undoubted right to cover his own device, if new, by a patent, but not the right to take possession of and hold the whole field against all subsequent inventors who reach the same result he does but by different devices. And it is not claimed in this case that defendant uses any of the instrumentalities used or suggested by Corliss, except that the stem-arbor of defendant's watch holds the shifting yoke in the setting position when the movement is in the case, and it is argued that the stem-arbor is a part of the case, but in the defendant's watch the stem-arbor acts on a different element in the organization, and hence, as it seems to me, does not make out the claim of infringement. It is true that complainant has introduced in evidence, as exhibits, complainant's watch No. 2 and complainant's watch No. 3, where the fin-backed spring of the patent is applied to the vibrating yoke carrying the winding and hands-setting pinions; but the proof also shows that Corliss himself so far understood that his invention covered by the patent now under consideration did not cover these two watches that he took out a patent, in July, 1886, substantially covering the application of the fin-backed spring to this vibrating yoke. The application for and obtaining of this patent, I think, is a clear admission on the part of Corliss that he did not consider the mechanism covered by this subsequent patent as covered by his patent of September, 1885, and, if Corliss is concluded by this admission, it seems to me the complainant, as the assignee of Corliss, is also thereby concluded. I do not, however, intend to place the decision of this case upon the fact that Corliss obtained a new patent for a device applicable to the vibrating yoke, stem-setting and stem-winding arrangement, but prefer to rely upon the fact of non-infringement, as it seems palpable to me that a watch movement like the defendant's, which is neither in the hands-setting nor stem-winding engagement when out of the case, is not an infringement of the Corliss patent on which this suit is brought. A decree may therefore be prepared finding that the defendant does not infringe, and dismissing the bill for want of equity.

HARMON *et al.* *v.* STRUTHERS *et al.*

(Circuit Court, W. D. Pennsylvania. August 18, 1890.)

1. PATENTS FOR INVENTIONS—PATENTABILITY.
Letters patent No. 248,277, granted to Frank L. Bliss, October 18, 1881, for an improvement in reversing gear for steam-engines, show an invention especially applicable to engines for drilling and operating oil-wells, consisting in the combination of an elbow lever, a lifting-bar having a slotted connection with the lever, and a stop on the engine frame for supporting the lever, whereby the lever is relieved from all jar or vibration due to the movement of the reversing link. *Held*, that the invention was one of great merit and of a primary character, and the patent should be liberally construed, and the patentee accorded the full benefit of the doctrine of equivalents.

2. SAME—INFRINGEMENT.
In the defendants' device, instead of a stop on the engine frame, the end of the horizental arm of the elbow lever is provided with a downward projection or appendage, which engages the engine frame, and, in lieu of a slot in the lifting-bar, whereby Bliss' slotted connection is made, the upper end of the defendants' lifting-bar is reduced in diameter, and passes loosely through a hole in a swiveled eyebolt attached to the horizontal arm of the lever, and thus has free vertical play for the purpose of taking up the vibration and relieving the lever of all jar when resting on the engine frame. *Held*, that the defendants' device infringed the Bliss patent.

3. SAME—PUBLIC USE.
More than two years before his application for a patent, the inventor, Bliss, without profit to himself, and solely for the purpose of testing the efficiency of his invention by practical use in the oil-field, placed his device, then in the form of a push reverse, upon engines manufactured by his employers, who sold all those engines to a brother-in-law of one of the vendors, on exceptional terms, the substantial purpose being with a view to experimental use. *Held*, that this was not a public use or sale, within the meaning of the patent law.

4. SAME.
The push reverse embodied the combination described in and covered by the patent, but the experimental use in the oil-field proved that, as an operative reversing gear, it was not a practical success; and thereupon, after further experimenting, Bliss changed the device so as to convert it into a pull reverse of the form described in his specification and drawings. *Held*, that the two-years prior public use, under the statute, did not begin to run until he had thus made his device practically efficient.

In Equity. Bill to restrain infringement of patent.
W. Bakewell & Sons, for complainants.
D. F. Patterson, for defendants.

ACHESON, J. The defendants are charged with the infringement of letters patent No. 248,277, for an improvement in reversing gear for steam-engines, granted to Frank L. Bliss, October 18, 1881, upon an application filed March 8, 1881, the title to which letters patent became vested in the plaintiffs by assignment from the patentee, dated January 22, 1887. The specification states that the invention is especially applicable to engines employed in drilling and pumping oil-wells. These engines, the proofs show, are operated under peculiar conditions. The engine is necessarily located at a distance, usually about 70 feet, from the derrick, where the operator is required to be. In practice, an engineer is not employed, but the driller standing in the derrick handles the engine. It is very important that the engine should be at all times under his ready control, as it is often necessary that it be instantly stopped, or its motion reversed. In oil operations, such engines are moved from place to place, and they do not sit upon permanent or solid

foundations. The foundation commonly used consists of bottom mud-sills with cross-timbers laid thereon, and the engine block resting on and keyed to the cross-timbers. The engine is run at a high rate of speed, which causes considerable longitudinal vibration of the engine upon its unsubstantial foundation. These conditions practically preclude the employment in oil-well engines of such reversing gear as is used on locomotives, not to speak of the excessive cost of the latter, which, of itself, would forbid its use. By reason of its rigid connecting mechanism and locking device, such a reversing gear would cause a distortion of the valve. In oil practice it would be impossible to keep such reversing gear in adjustment. Hence the only reversing device for oil-well engines in practical use before Bliss' invention consisted of a cord attached to the upper end of the reversing link, and passing up, over an overhead pulley, and thence to the derrick. To reverse the engine, the driller pulled this cord, and drew the link up; but when the cord was released the link often failed to drop, and, to prevent the engine from running wild, on the happening of this event, it was the general practice to employ a man to stand at the engine, and "tramp down" the link. The evidence establishes that, before Bliss' invention, many attempts were made, but without success, to provide an efficient reversing gear for oil-well engines. Charles M. Young, a witness of experience in these matters, testifies:

"I suppose there have been more time and money spent on reverse gears for oil-engines, which seemed to be the easiest thing to make, but seemed to be the hardest thing to accomplish, of any machinery in the oil territory."

This is by no means an overstatement. The problem was not solved until Bliss perfected his reversing gear, the great merits of which are now universally recognized by oil operators. Bliss' invention permits the use of a rod, or other positively acting instrumentality, operating from the derrick to start, reverse, stop, or slow the engine, and yet obviates all the objections incident to a rigid connecting mechanism, and dispenses with all locking devices. To this end, he employs an actuating lever, in the form of an elbow, or letter L, placed on the engine-bed. This lever and the reversing link are not rigidly, but flexibly, connected. The lever rests on a stop on the engine bed, and is joined to the link by a slotted lifting-bar, so that the continual vibration of the link is not transmitted to the lever, but is taken up as loose or idle motion by the slot. The slotted connection and stop take all jar or vibration from the lever when at rest on the stop. The reversing link is then practically disconnected from the lever. In other words, when the reversing gear is not in actual use, it is practically disconnected from the engine. The specification of the patent describes a rod, which may be composed of sections of gas-pipe coupled together, connected with the upright arm of the actuating lever, and extending to any desired point, for enabling the operator to control the reversing gear at any required distance from the engine. "Under this arrangement," says the specification, "it will be seen that the link, D, can be given a positive movement in either direction, whether for reversing the engine or for throwing it out of action, by bringing the link midway of its throw upon the swiveling block, and thus

stopping the movement of the valve." The slotted lifting-bar, above spoken of, is called in the patent a "link." The patent has a single claim, viz.:

"The elbow lever and link having a slotted connection with the link, D, in combination with the stop, or set-screw, for relieving the lever from the vibration due to the movement of said link, D, substantially as described."

Before proceeding to the question of infringement, and the defense of non-infringement, three other defenses made to this suit will be considered in their natural order.

1. It is alleged by the defendants that reversing gear, which embodied the invention claimed in the patent in suit, was in prior public use in the year 1878, on the steam-boat Shirley Belle, a small boat which plied the upper waters of the Allegheny river at or near Warren, Pa., for a few months, but which was blown up by the explosion of the boiler in the fall of that year. To sustain this defense, the defendants examined three witnesses, all of whom speak from mere memory, after the lapse of 11 years, and who differ among themselves very much in their recollection. The principal one of these witnesses is Robert Mackey, the defendants' foreman, under whose patent, granted in 1888, they manufacture the alleged infringing devices. He states that there were two engines on the Shirley Belle, and that he made two sets of reversing gear for the boat, and that one was placed on each engine; but who assisted him in the work or applied the devices to the boat he cannot tell. They were put on, he thinks, about a month or six weeks before the boat blew up. He produces a sketch, recently made from memory, for the purposes of this case, which shows a construction almost identical with what is disclosed in Bliss' patent, as illustrating the reversing gear he made for the Shirley Belle. The other two of said witnesses, however, testify positively that the boat only had one engine and one set of reversing gear, and this contradiction of itself tends to the discredit of Mackey's testimony. Fred Shirley, the defendants' second witness under this head, acted both as fireman and engineer on the boat until the day before the explosion; and, according to his recollection and description of the reversing gear, the elbow lever and lifting-bar had neither slot nor stop, and the lever vibrated. Anson H. Shirley, the defendants' other witness upon this point, describes the slot as in the lifting-bar, and not in the elbow lever, as Mackey states it was, and he neither describes, nor mentions at all, a stop. He does speak (and he alone of all the witnesses) of a little plate on the top of the steam-chest, "to hold the lever when it was to work;" but, according to Mackey, the stop was bolted on the frame of the engine bed, and, as we have already seen, the stop is used as a rest for the lever when not at work. These three witnesses otherwise differ in matters of detail, and, upon the whole, their testimony is unsatisfactory, and inconclusive. On the side of the plaintiffs, Moses B. Shirley, who was a fireman on the Shirley Belle at the time of the explosion, and for several months before, squarely contradicts Mackey, and also Anson H. Shirley, as to the construction and mode of operation of the reversing gear used on the boat; and, according to a

sketch made by him, neither a slotted connection or stop, nor yet an elbow lever, was used, and he is corroborated by another witness. In *Cantrell* v. *Wallick*, 117 U. S. 689, 695, 6 Sup. Ct. Rep. 970, it is laid down that the defendant, in a suit for the infringement of a patent for an invention, who sets up prior use and want of novelty as a defense, not only has the burden of proof upon him to establish the facts set up, but every reasonable doubt is to be resolved against him. Applying to the case this standard of proof, I have no hesitation in overruling this defense.

2. It is contended by the defendants that, in view of the prior state of the art, there was nothing patentable in the combination described and claimed in Bliss' patent; but, under the proofs, this proposition is altogether inadmissible. The several elements in themselves may have been old, but the combination was absolutely new, and productive of novel and highly beneficial results. Each of the elements is essential to the efficiency of the device, and the new and useful results are due to their co-operation. So far from the combination being an obvious one for attaining the proposed results, it is shown that numerous unsuccessful experiments had been made, covering a long period of time, to produce a reversing gear having the advantages which Bliss' device possesses. His invention, indeed, met a long-felt want in the oil trade, and the utility and great importance of his device are not to be gainsaid.

3. Again, the defendants allege and set up as a defense that the patented device was in public use and on sale for more than two years prior to the application for the patent. I find the material facts bearing on this defense to be as follows: The firm of Harmon, Gibbs & Co., composed of C. G. Harmon, George H. Gibbs, and Lewis L. Bliss, was formed in the spring of 1877. Frank L. Bliss was an employe of the firm. The primary purpose for which the firm was formed was to build an engine for oil-wells with a reversing gear actuated by steam, the invention of George H. Gibbs. This reversing device consisted of a miniature cylinder placed on top of the main steam-chest, the piston of which was connected with an elbow lever having a connection with the reversing link, and was designed to operate it by direct steam-power. It is not necessary more particularly to describe this device. It is enough to say that it did not embody Bliss' invention. It is most clearly established, by the correspondence of the firm and otherwise, that the first engine of any kind which Harmon, Gibbs & Co. ever built was not completed until the month of December, 1877; and that engine was equipped with the steam reversing gear just mentioned. Therefore, when H. H. Argue, the defendants' witness, states that in the month of October, 1877, an engine built by Harmon, Gibbs & Co., and equipped with the push reverse, (of which particular mention will soon be made,) was used in drilling an oil-well at Derrick City, on the Carter lease, he is undoubtedly mistaken. The first engine built by that firm, and which, as already stated, was equipped with Gibbs' steam reverse, was bought by his brother-in-law, J. J. Carter; and in February, 1878, it was put in the field at an oil-well on Carter's lease, at Derrick City, to test its efficiency. As tried in

the shop, the steam reversing gear gave a great show of success, but, when put to practical work, it proved to be a failure. Frank L. Bliss was sent to the well to overcome the difficulties, and this he attempted. He put on a heavy brass link and a rope, and afterwards attached a spring pole to the bottom of the link to pull it down. These expedients failing, and after making other experiments, he devised, in the month of March, 1878, a reversing gear, designated a "push reverse." The first one was "a crude affair," and, it would seem, was made for the engine at Carter's well, upon which Bliss had been experimenting, to take the place of the steam reverse. In this push reverse, an elbow lever was pivoted to the steam-chest of the engine, and attached with a slotted connection to the lifting-bar of the reversing link; and there was a stop to arrest its downward motion located on the valve-stem box, and the link was raised by pushing a rod which extended from the engine to the derrick. During the spring and summer of 1878, Harmon, Gibbs & Co. built and sold several oil-engines, upon each of which this push reverse was placed. Frank L. Bliss was then without means to thoroughly test the device himself, and he testifies, and I have no doubt truly, that he put the device on those engines in order that it might have "a good working test." He derived no profit from this use of his device, for he made no bargain with Harmon, Gibbs & Co. until after he applied for a patent, on March 8, 1881, when it was agreed that the firm should pay the cost of patenting, and, in consideration of the same, should have a shop right. The evidence, I think, fairly warrants the conclusion that all the engines having Bliss' reversing device thereon which were sold or in use during the year 1878 and the early part of 1879 were purchased by Mr. Carter, the brother-in-law of George H. Gibbs; and, if any of them went into the hands of other persons, it was through Carter, and in furtherance of his purpose "to demonstrate the quality" of the engine. Mr. Carter testifies that he told Gibbs "the only way to determine the quality of his engine was to put it on a drilling well, and let it stand or fall on its merits," etc. Carter also states that all the engines he took from Harmon, Gibbs & Co. during that time were bought for that purpose, and because of his relationship to Gibbs. He further testifies that the price he was to pay Gibbs for these engines was $350 each, "but the experiments conducted in perfecting them brought down the price he received on the first engine to $225; * * * and like reductions, though not in all cases as large as this, were made on the price of the other engines." The push reverse did not work effectively, and there was a general complaint by the users. Carter reported to Bliss that it was a failure, and that he could not handle the engine with it. The main difficulty was in the bending of the rod when pushed by the operator to raise the link. Bliss endeavored to remedy the defects in the push reverse, but failed, and he then conceived, and, after experimenting, adopted, the present form of device. He took the elbow lever off the steam-chest, and turned it around, and bolted it to the guides of the engine, so that the link might be raised by pulling, and he straightened the lifting-bar, which had been in a bent shape, so as to get a direct pull

from the connection from the bottom of the link to the lever, and made some other modifications, and eventually completed the reversing gear in the form described in his specification and drawings. George H. Gibbs died in September, 1878. There were then a number of unfinished engines in the shop, some having the steam reverse on and some with the push reverse. These engines were turned over to Gibbs' estate, and Mr. Carter, acting in behalf of the estate, employed Bliss to finish them. Bliss explained his new ideas to Carter, and, by his directions, proceeded to change the reversing gear on those engines to the present form. There is satisfactory evidence to show that this work was done in the month of February, 1879, and that the engines were not ready to leave the shop until after the 4th of March. They were the first engines equipped with the device as patented. It is not shown that any of them were shipped, or in public use, two years before the application was filed for the patent in suit. It is true that David B. Dingman fixes June, 1878, as the time when Bliss' pull reverse was used at the well on one of Carter's leases, but he does not speak with great positiveness, and, assuredly, his recollection is at fault. In oil practice the engine is first used in drilling the well. In this work the revolutions are mainly forward, and the reversing gear is not much used. After the drilling is completed, the engine is used, with more or less frequency, and sometimes with long intervals of rest, in pumping the well or drawing the casing; and the evidence indicates that it requires considerable time, and a number of engines working in the field, to make a satisfactory test of the practical efficiency of a new reversing gear. The proofs disclose that in this regard there had been many previous failures where success seemed achieved. These facts were known to Bliss, and he testifies that they induced him to thoroughly test his device, and get it right, before applying for a patent, and that the test was not complete before late in the fall of 1879. It is urged by the defendants that the combination described in and covered by the claim of the patent in suit was embodied in the pushing reverse which Bliss devised and put on Harmon, Gibbs & Co.'s oil-engines in the year 1878. But, conceding this, was the thing patented in public use or on sale for more than two years before his application for a patent, within the meaning of the statute? I think not. In the first place, the sales by Harmon, Gibbs & Co. to Carter, in all their circumstances, were out of the ordinary course of trade, and in fairness must be regarded as made for the purpose of testing the engine. *Innis v. Boiler-Works*, 22 Fed. Rep. 780. All the dealings between Carter and the firm were with a view to experiment. That was the substantial purpose. Then, as respects the inventor Bliss himself, the transaction, from first to last, and in all its incidents, was purely experimental. If he could not test the efficiency of his device by putting it on his employers' engines, and sending it out into the oil-field for practical use, he could not test it at all; and, under the evidence, I am of the opinion that the test was reasonable, both as regards its extent and duration. These conclusions, I think, are in accordance with the rulings made and the principles declared by the supreme court in

the cases of *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, and *Manufacturing Co.* v. *Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122. But then, again, the device in its original form of a push reverse was imperfect, and the invention was incomplete. As an operative reversing gear, it was not a practical success, and much less was it successful in a commercial sense. The defects were serious. The device had been condemned by those who had used it. If a remedy had not been applied, it would never have come into general use, but would have been abandoned as worthless. The changes which Bliss made may appear now to have been simple, but at the time they required reflection and experiment; and the result was a great success where there had been failure. The right principle, indeed, was in the push reverse, but Bliss had not yet discovered a satisfactory mode of applying that principle to effect the desired object. In its original form, the device lacked patentable utility, and Bliss was not ready to go into the patent-office with his application until he had made it practically efficient.

4. We are now brought to the consideration of the question of infringement. Prior to the filing of the bill, the defendants were, and they still are, engaged in manufacturing and selling engines for drilling and pumping oil-wells having an unbalanced slide-valve, with a reversing gear to be connected with and operated from the derrick by a rod. In their device the defendants employ the usual reversing link, a lifting-bar, and an elbow lever pivoted to the engine frame. Instead of a stop on the frame or bed of the engine to serve as a rest for the elbow lever when it is down, the end of the horizontal arm of the lever is provided with a downward projection or appendage, which engages the engine-bed and performs the precise function of the stop of the Bliss patent. In effect, it is the Bliss stop inverted. Then the lifting-bar and elbow lever are flexibly connected in this manner, viz.: Near the end of the horizontal arm of the lever is a swiveled eyebolt, with a vertical hole through its side, and the upper end of the lifting-bar is reduced in diameter, and passes loosely through this hole, and is provided with shoulders a little distance above and below the same, so as to permit to the lifting-bar free vertical play for the purpose of taking up the vibration, and relieving the lever of all jar when resting on the engine bed. This is practically the slotted connection of the Bliss patent. It is used for the same purpose, and with the same effect. Without enlarging upon the subject, I content myself with saying that a careful comparison of the models of the two devices, with the aid of the explanatory testimony, has brought me to the conclusion that the changes which the defendants have made are differences in form merely, and not in substance. The two devices do the same work in substantially the same way, and accomplish exactly the same results. Therefore, in the sense of the patent law, they are the same devices, notwithstanding the differences in name, form, or shape. *Machine Co.* v. *Murphy*, 97 U. S. 120, 125; *Cantrell* v. *Wallick*, *supra*.

I cannot agree with the learned counsel for the defendants that the patentee limited himself to an adjustable stop. The specification, I

think, discloses no indication of any such intent. In its lucid statement of the combination, the language touching this element is, "a rest or stop for said lever, whereby, through the slotted connection with the reversing link, all jar or vibration is removed from the actuating lever;" and the claim itself contains no such express limitation as is suggested. The set-screw mentioned is rather to be regarded as one of the forms of stops contemplated by the patentee.

As already intimated, the Bliss invention was one of unusual merit. He was not a mere improver of an old mechanism. No pre-existing reversing gear met the needs of oil-well operators. Bliss' device, and his only, did so. With reference to the particular field of industry for which it was devised and to which it is especially applicable, his reversing gear was not only altogether original, but was of immense value. It met new conditions and new wants. He accomplished results much sought after, which no one before him had been able to achieve. He was the first to devise means whereby the driller, standing at a distant point, can give a positive movement in either direction to the reversing link, while, upon the release of the actuating lever, the reversing gear, by means of the stop, will automatically adjust itself to a disconnected position. Bliss' device first made it possible to use, in drilling and pumping oil-wells, an unbalanced slide-valve, thereby avoiding a waste of steam, and promoting economy in the consumption of fuel. The invention, then, was really one of a primary character, and the patent well deserves to be liberally dealt with, both in the matter of construction and in giving to the patentee and his assignees, in full measure, the benefit of the doctrine of equivalents. *Consolidated, etc., Valve Co.* v. *Crosby, etc., Valve Co.*, 113 U. S. 157, 5 Sup. Ct. Rep. 513; *Machine Co.* v. *Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299. Let a decree be drawn in favor of the plaintiffs.

THE LA CHAMPAGNE.[1]

SEWALL *et al.* *v.* THE LA CHAMPAGNE.

COMPAGNIE GÉNERALE TRANSATLANTIQUE *v.* SEWALL *et al.*, (two cases.)

(*District Court, S. D. New York.* July 31, 1890.)

COLLISION—MUTUAL FAULT—SUPPOSED PILOT-BOAT—NOT SLOWING—LIGHTS MISTAKEN AND DEFECTIVE.

The steam-ship La Champagne, while on one of her regular voyages from Havre to New York, and when about 25 miles south of Shinnecock light, on the Long island coast, at about 5 o'clock A. M., collided with the schooner Belle Higgins, bound from a southern port to Bath, Me. The evidence for the schooner was to the effect that she first made the steamer's white light on her starboard bow, then the red light nearly on the starboard beam. Thereupon she showed a torch-light to the steamer, and then another, and afterwards fired a gun, notwithstanding which the collision ensued. The steamer's testimony was that, when the schooner's torch was seen

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

ahead, or a little on the steamer's port bow, they supposed it to be the signal-light of a pilot-boat; and, wishing a pilot, the steamer exhibited a torch in reply, and altered her course a point to starboard, but without slackening speed of 13½ knots. At the time when the schooner's gun was heard, a faint green light became visible for the first time, whereupon the engine was reversed, and the helm put hard a-port, but too late to avoid collision; and a low intermittent white light was said to have been also seen a little above the torch-light. *Held*, that the steamer was not justified in mistaking the schooner for a pilot-boat; but, if so, it was still her duty to check her headway nearly to a stop, and that her continued high speed of about 13½ knots was a fault; and that, as to the schooner, the supposed angle of collision in the night-time is uncertain evidence, and that the weight of evidence was that the steamer was coming up within the range of the schooner's green light, and not astern of that range; but that the green light was so dim as not to be visible to the steamer within the distance necessary to avoid her; and for this fault the schooner was liable. The damages were therefore divided, including towage services supplied by the steamer.

In Admiralty. Suits for damages by collision.

Owen, Gray & Sturgis, for Sewall *et al.*

Coudert Bros., (*E. K. Jones*, of counsel,) for the La Champagne.

BROWN, J. The above libels grow out of a collision which occurred a little after 5 o'clock of the morning of the 25th of February, 1889, in the Atlantic ocean, about 25 miles south of Shinnecock light, between the French steamer La Champagne, and the three-masted schooner Belle Higgins. The stem of the steamer struck the schooner on her starboard side forward of the forerigging, and cut off the starboard bow, so that she filled in a few minutes. Being loaded with lumber, the schooner did not sink; and was left adrift until a tug was sent by the steamer to her assistance, by her master's request, as the steam-ship claims, for whose towage service the steam-ship company afterwards paid. The third libel is to recover for this payment. The other libels are for damages to the respective vessels, the owners of the schooner claiming $40,000 for the schooner, cargo, freight, personal effects, and the salvage expenses; the steam-ship company claiming damages to the amount of $35,000. At the time of the collision the weather was tolerably clear. It had been foggy during the night previous, and the steamer was going at a somewhat reduced speed,—about 13½ knots, under 45 revolutions, instead of 54, her full speed. She was on one of her regular trips from Havre to New York; and, on taking soundings off Long island, while on a course of west true, about 3 o'clock A. M., the instrument having unexpectedly indicated but 16 fathoms of water, her commander ordered her headed one point more to port until half past 5. The schooner was bound from Darien, Ga., to Bath, Me., and was sailing N. N. E. magnetic; the wind, as she claims, being light from the S. W., giving her a speed of about three knots. Her contention is that the steamer's white light was first seen well off on the starboard bow, several miles distant; afterwards the steamer's red light, nearly on her starboard beam; that, as the steamer continued to approach, showing no change, the mate in charge of the schooner, being in doubt whether the steamer was in range of his green light, exhibited a torch-light on the starboard side of the mainsail, which illuminated all her sails; that, the steamer's red and green lights having become visible, and no change appearing in her course, the master was called on

deck, and another torch-light shown, both colored lights of the steamer being then visible, and alleged to be aft of the range of the schooner's green light; and that a gun was soon afterwards fired, but that the steamer continued following up the schooner apparently under a port helm, and, very soon after the firing of the gun, struck her as above stated; that the schooner made no change in her course, and that her side lights were properly burning; and that the collision was caused by the negligence of the steamer in not properly observing the schooner, and keeping out of her way. The case made by the steamer is that, while going as above stated, with competent officers on the bridge, and three competent and attentive persons on the lookout, the first notice of the schooner was a torch-light, seen either ahead or a little on the port bow, and at times an intermittent white light a little above the torch-light; that no green light on the schooner was seen or was visible; that the officers of the steamer supposed the torch-light shown to be that of a pilot-boat, and, being in want of a pilot, they exhibited a torch-light in reply, which was followed by another torch-light shown by the schooner, which was interpreted by the steamer as an agreement that the pilot would come aboard; that the white light, being seen not much above the torch-light, and intermittent, was supposed to be a considerable distance off; and that the steamer's head, in order to facilitate the pilot in boarding her on her port side, was put one point more to starboard, but without slackening speed. A while afterwards the discharge of the gun was heard, the flash of which showed the schooner very near, and about the same time a faint glimmer of a green light was seen. When the gun was heard the engine was reversed full speed, and the helm put hard a-port. The collision occurred soon thereafter, the steam-ship changing her head meantime two or three points to starboard. The distance of the vessels apart, when the gun was fired and the engine reversed, is variously estimated by the witnesses at from 100 meters to half a mile. From the amount of the steamer's change to starboard, the distance, I think, could not be less than from 1,000 to 1,500 feet. The weight of testimony is that at the moment of collision the steamer was heading towards the bow of the schooner, and forwards, at an angle of from 3½ to 6 points.

1. In my judgment the evidence does not show facts on the steamer's part sufficient to justify her in taking the Belle Higgins to be a pilot-boat at a long distance off, and in therefore continuing on at the unabated speed of 13½ knots until she was so near as to render collision unavoidable. If the bearing of the pilot-boat when the torch-light was seen was a point on the steamer's port bow, as the steamer's officers say, no doubt the schooner's green light ought to have been seen distinctly. But a torch-light without any colored light was not sufficient to indicate a pilot-boat. In the absence of a white mast-head light, the torch would mean only that the steamer was overtaking another vessel astern of the range of her colored lights. There was no light on the schooner that could possibly present the appearance of the white mast-head light required of pilot-boats by the rules of navigation.

The low, faint, and intermittent light said to have been seen by some of the steamer's witnesses a little above the torch-light was so different in brightness and in position from the light required to be carried by pilots at the mast-head that it was itself an indication of the need of caution in approaching, instead of a justification for continuing on at almost full speed. The only white light possible to have been seen by the steamer was the cabin light, visible, if at all, through the schooner's sky-light. The low, faint glimmer of such a light, familiar to seamen, cannot be deemed to have been justifiably confounded with a pilot's mast-head light, without a total discredit of the propriety of the eleventh and nineteenth rules of navigation,—a discredit which I am not prepared to admit. But if the schooner was justly mistaken for a pilot-boat, the steamer cannot be justified for her continued high speed. As I have said, the absence of the usual high bright light was of itself an indication of the need of caution. Her distance could not be exactly known. The pilot-boat might desire to cross the steamer's bow, and come up round her stern, as is sometimes done; and it was the duty of the steamer to check her headway nearly to a stop, and let the pilot-boat do the rest. *The City of Washington*, 92 U. S. 38–41, 11 Blatchf. 487, 6 Ben. 140; *The Columbia*, 27 Fed. Rep. 704, 708. It was this failure to check her speed that directly brought about the collision. In the *Case of the Wisconsin*, where a similar mistake was made in regard to a supposed pilot-boat, it was found by the court (25 Fed. Rep. 284) that, "when the steamship was at a safe distance from the bark, her engines were stopped, and her headway was substantially overcome while waiting for the pilot to come along-side in his boat." Had the Champagne's engines in this instance been "stopped when at a safe distance, and her headway substantially overcome," there would certainly have been no collision with the Belle Higgins. The Champagne, on the contrary, for a very considerable time after the flash-light had been twice seen, continued on at the speed of 13½ knots,—four-fifths of her full speed,—until a gun was fired, scarcely a quarter of a mile distant,—her officers estimate the distance much less,—when it was impossible to avoid collision. In this respect I must hold the Champagne to blame.

2. Whether the green light of the schooner ought to have been visible to the steamer depends on whether the steamer was approaching her within range of that light or astern of it. Considerable stress has been laid on the supposed small angle of collision, as sustaining the schooner's contention on this point. But I do not think any great weight can be attached to this evidence, both because the amount of the angle is so likely to be mistaken in the night-time, and on account of the changes in the steamer's heading, and, possibly, in the schooner's heading. Although the wheelsman of the Belle Higgins testifies that her course was held unchanged, it is quite probable that, during the last few moments before collision, her head would be turned to port by the almost irresistible impulse of self-preservation. I find it impossible to reconcile the testimony of her witnesses on this point with the possibilities of the collision. All agree that the steamer was first seen forward of abeam. The

pleadings say, "on the starboard bow." With that simple fact, and with the steamer's speed of 13½ knots, and a course such as to expose her red light only, I find it impossible for the steamer to have got two points astern of the schooner's beam, so as to be out of the range of the schooner's green light, as the witnesses of the latter testify she was. Such a course of approach by the steamer, moreover, would be some three or four points more northerly than the course the steamer testifies she was pursuing, and would also direct her sharply towards the Long island shore. Now, although it is not in itself incredible, considering the previous circumstances, that the steamer might have been heading towards the land for the purpose of making the shore lights, which she had not yet seen, yet all her officers testify in the most explicit terms that they had not taken that course. There are no circumstances to justify suspicion of falsification as to the course that the steamer was going. The reasons for the course taken are stated with a minuteness of detail that carries credit on their face. This course is totally incompatible with the schooner's contention that the steamer came up astern of the range of her own green light after being seen "on the starboard bow," unless the schooner, contrary to her testimony, changed her own course to port, so as to bring the steamer astern of that range by her own action. My conclusion on this head leaves no alternative but to find, as in the *Case of the Wisconsin*, that the schooner's green light was so dim as not to be visible within the distance necessary to avoid her. Had it been visible, it must have been seen by the special watch kept on the steamer. It is not necessary here to decide whether the exhibition of a torch-light to attract attention by a vessel not being overtaken is a breach of the existing rules, —a point on which opposite decisions have been made. *The Merchant Prince*, 10 Prob. Div. 139; *The Algiers*, 38 Fed. Rep. 526; *The Nessmore*, 41 Fed. Rep. 437. The new proposed rules would, if adopted, expressly permit (article 12) the exhibition of such a light. But for an insufficient green light the schooner must be held to blame, and the damages and costs, therefore, apportioned. The same disposition is made of the claim for moneys paid out by the owners of the Champagne for the towage services of the tug sent down to the assistance of the schooner. This was done with the knowledge and consent of the master of the schooner, if not at his express request, and he accompanied the tug. It was a proper and necessary act and expense under the circumstances as understood at the time, and it was a direct consequence of the collision, and should therefore be divided, like the other damages.

UNITED STATES v. LOUGHREY et al.

(*Circuit Court, W. D. Michigan, N. D.* August 22, 1890.)

JURISDICTION—ACCEPTANCE OF SERVICE.

Acceptance of service, being merely equivalent to personal service in the district, does not prevent a defendant from moving to dismiss the suit because brought in a district in which he does not reside.

At Law. On motion to dismiss.

L. G. Palmer, Dist. Atty., for the United States.

Webster & Wheeler, for defendants.

SEVERENS, J. In this cause a motion is made to dismiss upon the ground that the defendants are citizens and inhabitants of the state of Wisconsin. It appears that due service of process was accepted by the attorney for the defendants, within the district, by his indorsement to that effect upon the declaration, by which and a rule to plead the suit was originated. This was done to save the trouble and cost of personal service on the defendants, who were within the district, but wished to leave the state, and had actually left Marquette before the papers were ready for service. For convenience the acceptance of service was apparently understood as a substitute for personal service. It also appears that there was an oral agreement between the attorney for the United States and the attorney for defendants that it was a condition of the agreement thus to accept service that the cause should not be brought to trial at the next term of the court. By the third special common-law rule of the courts in the districts of Michigan it is provided that no private agreement between the parties or their attorneys respecting the proceedings in a cause shall be binding unless it be in writing. This rule would render null the oral agreement above referred to, and leave the matter in the same situation as if it had not been made. The question would then arise whether the acceptance of service would be equivalent to a submission to the jurisdiction of the court. Without such submission, the defendants could not be sued in this district, the suit not being one in which the jurisdiction is founded on the diverse citizenship of parties. Act Aug. 13, 1888, § 1. I am of opinion that the objection was one which could be waived by the defendants, the provision in the act referred to having regard only to the place where the suit should be brought and tried. Jurisdiction is given by a former provision in the same section. In the circumstances of this case I do not think the acceptance of service amounted to more than a personal service of process made in the common course. The waiver, to be binding, ought to be clearly manifested, and the court ought not to hold the defendants for trial here upon a strained construction of the action and conduct of the parties. If any forward step or valid stipulation looking to further proceedings had been made in the case the result would be different; but there having been none, my opinion is that the case must be dismissed.

The proper order must be entered accordingly.

MERRIAM *et al. v.* HOLLOWAY PUB. CO.

SAME *v.* DAN LINAHAN PUB. CO.

SAME *v.* FRANK *et al.*

(Circuit Court, E. D. Missouri, E. D. September 26, 1890.)

1. TRADE-MARKS—INJUNCTION—PLEADING—DEMURRER.
The complaint alleged that defendants had appropriated, and were using on their advertisements, circulars, letter heads, etc., relating to their publication, the device of an open book which complainants had, theretofore, been in the habit of using for like purposes; that defendants used the words "Webster's Dictionary" placed in the same relation to their publication that complainants place it; that the date of defendants' publication on the title-page was given as of the year 1890, when, in fact, the book was a reprint or photolithographic copy of the edition of 1847. *Held* that, as there might be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary published by complainants, and as the public might possibly be deceived to complainants' damage in consequence of the facts averred, a demurrer to the complaint would be overruled.
2. SAME—WHAT WILL BE PROTECTED—WEBSTER'S DICTIONARY.
The copyright of Webster's Dictionary having expired, no one has any special property in the title.
3. EQUITY—PLEADINGS—DEMURRER.
A demurrer to a whole bill must be overruled if the bill taken altogether entitles complainant to some kind of relief.

In Equity. On demurrer to bills.

Charles N. Judson and *Judson & Reyburn*, for complainants.

James H. Peirce and *Paul Bakewell*, for defendants.

MILLER, Justice, *(orally.)* We have the same difficulty in these cases in regard to the Webster's Dictionary controversy that we had in the case of *Stephens* v. *Overstolz*, *post*, 465, (just decided.) The difficulty is that the parties demur to the whole bill, and of course if there is any one thing in the bill that is good,—that is to say, if the bill taken altogether entitles the complainant to some kind of relief,—the demurrer should be overruled. If a party in chancery or in a law case wants to demur to a particular part of a bill or declaration, he should not frame his demurrer as is done in this instance, so as to call the whole bill in question.

I am not clear but what there may be a right of action growing out of the alleged fact that the defendants have appropriated the device of an open book, which device the complainants have hitherto been in the habit of using on their advertisements, circulars, letter heads, etc. This device of the open book, as we understand it, is also used by the defendants on their letter heads, circulars, etc. That device so appropriated by defendants may not be a trade-mark; but I can see no good reason, no honest reason, why the defendants should use the same mark or device on their letter heads, advertisements, and circulars, which the complainants are using. It looks as though there might be enough in this fact stated in the bill, to prevent the court from sustaining a general de-

murrer. It may be necessary to ascertain, by taking proof, whether the use of the device in question in fact operates to deceive people, by leading them to suppose that the Webster's Dictionary sold by the defendants is printed and put on the market by complainants, and whether the adoption of the device in question by the defendants was intended to have that effect.

I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired, may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark, or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. I may be the first to announce that doctrine, but I announce it without any hesitation. If a man is entitled to an extension of his copyright, he may obtain it by the mode pointed out by law. The law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book.

There is some hesitation among my brethren and myself, as above indicated, whether, taking the bill as a whole, and considering all of its averments, a general demurrer ought to be sustained. The defendants use the words "Webster's Dictionary" or "Webster's Unabridged Dictionary," placed in the same relation to their publication that the complainants place it. The date of defendants' publication on the title-page is given as of the year 1890, when, in point of fact, the book that they are publishing is a reprint or a photolithographic copy of the edition of Webster's Dictionary of 1847. The defendants also use the device of an open book on advertisements and circulars, relating to their publication, as before alluded to. Now, taking all of these allegations together, there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing, and it may possibly be that, in consequence of the facts averred, the public are deceived, and that the complainants are damaged to some extent. We think, therefore, that this is one of those cases where, as the facts are stated in the complaint, the interests of justice would be best subserved by requiring the defendants to answer, so that there may be a full and fair investigation of the law and facts upon a final hearing.

The demurrer in this case, as we understand it, is not to special portions of the bill or particular allegations, but goes to the whole bill, and asserts that it contains no averments warranting equitable relief of any sort. We are unable, at this time, to fully assent to that view; but, at the same time, we do not wish to be understood as declaring definitely that the complainant is entitled to equitable relief. I will say this, how-

ever, that the contention that complainants have any special property in "Webster's Dictionary" is all nonsense, since the copyright has expired. What do they mean by the expression "their book," when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book.

It does not appear that the complainants have asked for a preliminary injunction in this case, and we have less reluctance, on that account, in overruling the demurrer. The case is not one in which we would grant a preliminary injunction, if one was asked, on the present showing.

MILLS *et al. v.* SCOTT *et al.*

(Circuit Court, S. D. Georgia, S. D. June 28, 1890.)

1. INJUNCTION—JUDGMENT—APPEARANCE BY ATTORNEY.
   A judgment against a defendant who was never served with process, and whose appearance in the action was entered by an attorney without his knowledge or consent, may be enjoined, though such defendant does not show that he has any defense to the claim sued on.

2. SAME—EQUITY PLEADING—AMENDMENT.
   Where a bill to enjoin such judgment alleges that said defendant was not legally served with process, and that he never appeared in the action, either in person or by attorney, an amendment thereto alleging that said defendant never acknowledged service of process in said action, either in person or by attorney, and that the acknowledgment of service which had been made by an attorney was made without his authority, does not change the character of the bill.

3. SAME—PRESUMPTION.
   Where such amendment is proposed and allowed at the hearing in open court, in the presence of both parties, it will be presumed that it was made upon sufficient evidence, and not for the purpose of vexation or delay.

4. TRUSTS—VALIDITY AS AGAINST CREDITORS.
   Where a trustee, who has in his possession money belonging to the trust fund, buys land, and takes title in his own name, but declares at the time that he buys the land with the trust funds, and afterwards records a written declaration of trust before the levy of any execution on such land, such declaration of trust is valid as against the trustee's creditors.

In Equity.

Chisholm & Erwin, for complainants.

James Atkins, for defendants.

PARDEE, J. This is a suit commenced August 18, 1877, seeking to enjoin a judgment rendered January 6, 1877, in an action at law that had been instituted in this court in the name of John O. Ferroll, ordinary of Chatham county, Ga., for the use of Levi H. B. Scott, against Thomas R. Mills, Jr., as principal, and Thomas R. Mills, Sr., as security, on the bond of said principal, as the administrator of the estate of one George Hall, deceased. The original bill sets forth that certain lands in

Spalding county, Ga., which the marshal had at that time levied on and advertised for sale as the property of Thomas R. Mills, Sr., one of the defendants in said judgment, to satisfy the execution issued thereon, are not, and never were, the property of said Thomas R. Mills, Sr., in his own right, but were, in fact, purchased by him with trust funds belonging to his two sons, John B. and James M. Mills, having come into his hands as their trustee from the estates of two deceased persons by the name of John B. Tufts and Louisiana Tufts, and that, therefore, said lots of land were in reality, though in his own name, held by him in trust for his two sons, John B. and James M. Mills; that on January 30, 1877, prior to the levy in this case, and before any lien had attached by reason of said judgment, said Thomas R. Mills, Sr., had, by deed duly executed and recorded in the proper county, declared the said trust; that the said property was purchased by him with trust funds belonging to said John B. and James M. Mills, and was held by him solely as their trustee, and contracting to convey to said John B. and James M. Mills whenever demanded. Said bill further sets forth that said judgment at law against Thomas R. Mills, Sr., is utterly null and void, and no writ of *fieri facias* can legally issue thereon, because at the time the said suit was begun which culminated in said judgment, and for two years prior to that time, and all during the progress of said suit and since, the said Thomas R. Mills, Sr., was, had been, and is a resident of the northern district of Georgia, and therefore could not be sued in said southern district, unless found therein, and service of the writ effected upon him personally; that no such service was so effected upon him, and no legal service was effected upon him at any time of said writ; and that said Thomas R. Mills, Sr., never in any way, either in person or by attorney, appeared in said court to answer said writ, nor did he, either in person or by attorney, plead to the same, or take any notice thereof; and, further, that he did not know of any such proceedings in said court. A temporary injunction was granted August 20, 1877. Afterwards one of the defendants filed his answer to said bill. Still later on one of the complainants, Thomas R. Mills, Sr., died; so also did Amos T. Akerman, one of the defendants. Another of the defendants, W. H. Smythe, United States marshal making the levy, went out of office. At a still later time the case was dropped from the docket or dismissed by mistake, but was afterwards reinstated, and the heirs of Thomas R. Mills, Sr., were, after his death, made parties in his stead by proper bill of revivor. Thereafter the pleadings were perfected to issue joined, and the case came on for hearing. Afterwards, at a hearing commenced January 23, 1888, the defendants objected to the reading of the answers to interrogatories of Thomas R. Mills, Jr., wherein he testifies about the acknowledgment of service indorsed upon the writ in the said action at law, and they moved to exclude them as evidence in the case for lack of allegations in the bill suitable to let them in, and defendants' said motion to exclude said answers to interrogatories appears to have been sustained. Thereupon the complainants moved to amend their bill by inserting at the proper place as follows:

"That Thomas R. Mills, Sr., never appeared in said suit either in person or by attorney; that he never acknowledged service of the said suit either in person or by attorney; that the acknowledgment of service, which appears indorsed on the declaration in said action of debt on bond, was made without any authority from said Thomas R. Mills, Sr.; that he never ratified the act of Thomas R. Mills, Jr., and never knew anything about it, and about the said action of debt on bond, until the marshal levied the *fi. fa.* sought to be enjoined."

The defendants objected to the amendment on the ground that, after issue joined and under the circumstances, it should not be allowed. The court allowed the complainants to file their proposed amendment, subject, however, to the defendants' rights to be heard, before the trial should proceed in opposition thereto. At this state of the case the further hearing was suspended, and the cause continued for the term. The case has now been fully heard, and is submitted upon all the questions of the case.

The *first* point to be decided is with regard to the amendment allowed by the court in January, 1888. It appears that when the suit at law was commenced against Thomas R. Mills, Jr., and Thomas R. Mills, Sr., personal service was made upon Thomas R. Mills, Jr., who at the same time indorsed upon the writ the words and figures following, to-wit: "Service of the within acknowledged, and copy waived, this 1st of March, 1876;" signed, "THOMAS R. MILLS. Per T. R. MILLS, Jr., Atty at Law." It appears, further, that said Thomas R. Mills, Jr., was an attorney at law, residing at the place where the court was held, and that he was the son of Thomas R. Mills, Sr.; but the evidence clearly establishes that he was not authorized by Thomas R. Mills, Sr., to represent him in any way in said case, to accept service for him of any writ, or to enter any appearance for the said Thomas R. Mills, Sr., in said cause. The objections now made to the said amendment are that there has been no compliance with equity rule 29, and, further, that the amendment changes the character of the bill by shifting the ground for the relief of Thomas R. Mills, Sr. I do not think that either of these objections are good. Equity rule 29 prohibits amendments after replication filed, except upon a special order of a judge, upon motion or petition, after due notice to the other party, and upon proof by affidavit that same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not, with reasonable diligence, be sooner introduced in the bill. The amendment in this case was proposed and allowed in open court in the presence of the parties, and, it is to be presumed, upon sufficient evidence that it was not made for the purpose of vexation or delay, etc. It seemed to be, under the ruling of the court, a proper amendment in order to do justice in the case pending. I do not see how it shifts the ground for the relief of the complainant Thomas R. Mills, Sr. His bill attacks this judgment as absolutely null and void. He states sufficient in his bill to so declare it, if sustained by evidence. The amendment attacks the judgment as null and void. The additional grounds set forth therein are in line with, and, properly speaking, are only a complement to, the case

made in the original bill. It does not appear in any way that the defendants have been surprised or vexed or injured by the allowance of the amendment.

Second. The proof in the case clearly establishes that the acceptance of service by Thomas R. Mills, Jr., of process against Thomas R. Mills, Sr., was wholly unauthorized, and was never ratified. It is not contended that otherwise than as by said acceptance of service was Thomas R. Mills, Sr., bound by the proceedings in the court. The judgment, therefore, as against Thomas R. Mills, Sr., was a nullity, because the court never acquired jurisdiction of him, and he never had his day in court. It is not necessary to go over and consider the conflicting authorities with regard to the effect of an unauthorized appearance in the case by one of the regular attorneys of the court. If we concede that this acceptance of service amounted to an appearance on the part of Thomas R. Mills, Jr., as an attorney for Thomas R. Mills, Sr., which is doubtful, then on the authority of *Shelton* v. *Tiffin*, 6 How. 163, still Thomas R. Mills, Sr., was not bound. "This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the court. Had the entry been that L. P. Perry came personally into court, and waived process, it could not have been controverted; but the appearance by counsel, who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages, but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property." See *Shelton* v. *Tiffin*, *supra*.

It was contended in the argument that whether the judgment was binding or not upon Thomas R. Mills, Sr., he could have no relief in a court of equity to enjoin the execution of the judgment until he set forth in his bill that he had or has some defense to the claim made in the action at law against him. The authorities cited in support of this proposition, so far as I have examined them, are all cases in which there was an undisputed appearance by the party, or else such notice taken of the suit as rendered the judgment not void, although perhaps voidable. It seems to me that, where a court at law has been led into the error of rendering a judgment against a party over whom the court had no jurisdiction, such error or mistake presents sufficient equity for the interference of a court of chancery for the purpose of preventing the forced sale of property for the satisfaction of such void judgment.

Third. The evidence shows that Thomas R. Mills, Sr., was the trustee of John B. Mills and James M. Mills; that as such trustee he had possession of large sums of money belonging to his said wards. Whether he kept it separate and distinct from his own property does not appear, but it does appear that prior to the institution of the suit against him on the bond of his son, administrator as aforesaid, he invested certain funds

in the lands in controversy, declaring at the time that he was purchasing with trust funds, and for his said wards, taking the title in his own name, to hold until said wards should arrive at majority. It further appears that before the levy of the execution issued on the said judgment at law, by proper deed, he declared the said trust, and that the said lands in controversy had been purchased with trust funds as a part of the trust-estate, and belonged, in fact, to the *cestuis que trustent*. This declaration of trust, regularly witnessed, acknowledged, and recorded, established and fixed the property as trust property, even if it was not, in fact, a conveyance of the property. It is contended by the defendants in this case that said deed was fraudulent, as made without consideration, and the declarations therein not true in fact; but this defense is not sustained. There can be no doubt under the evidence that at the time of the declaration of trust the said Thomas R. Mills, Sr., was indebted to his said wards for a sum of money exceeding largely the value of the lands declared to be trust property. He had the right, even if it was not his duty, to pay or secure the said indebtedness; and to accomplish such result he had the right to convey, in satisfaction of or to secure such claim, any property that he possessed; and the giving in payment or a declaration of trust, under such circumstances, cannot be declared fraudulent in a court of equity. It seems to me to be clear that the complainants' bill should be maintained, and the injunction herein issued be perpetuated. A decree to that effect will be entered.

GILMER *v.* MORRIS *et al.*

(*Circuit Court, M. D. Alabama.* June 24, 1890.)

1. LIMITATION OF ACTIONS—PLEDGE.
   Where a pledge made to secure future advances is repudiated by the pledgee, the statute of limitations will begin to run against the pledgeor's right to recover the pledged property from the time such repudiation takes place.
2. EQUITY—LACHES—PLEDGE.
   A delay of more than five years in bringing suit to redeem pledged property does not constitute laches, where it appears that the pledgee has been guilty of breach of trust, that he still holds the pledged property, which has largely increased in value, and that complainant had previously brought suit to redeem, which had been decided against him.

In Equity. On demurrer to the bill.

W. A. Gunter, for complainant.

H. C. Tompkins, for defendants.

PARDEE, J. The bill alleges, in substance, that complainant, Gilmer, about the year 1870, being a subscriber to the capital stock of the Elyton Land Company, a corporation under the laws of Alabama, for 120 shares, of the par or nominal value of $100 per share, but issued at 50 cents

on the dollar, made an agreement with the defendant Morris that he should advance the money ($6,000) necessary to pay for said stock as required by said company, and wait upon complainant for re-payment, and hold said stock as a pledge for said repayment; that defendant Morris did pay for said stock the sum of $6,000, and the same, in pursuance of said agreement, was placed by complainant with said Morris as a pledge for the repayment of said advance, and was, to make said pledge effectual, transferred by indorsement of the certificate of stock, issued in complainant's name, to the said Morris; that shortly afterwards defendant Morris, under the direction of complainant, Gilmer, sold 60 shares of said stock for $6,000, which sum was paid to defendant Morris on the amount due him for money advanced as above stated; that the certificate for 120 shares was surrendered, and two certificates were issued, one for 60 shares, to the purchaser, and the remaining one, for 60 shares, to the complainant Gilmer; that the latter was transferred by indorsement to Morris, and placed with him, in pursuance of the original agreement, as a pledge to secure the payment of the balance of the original purchase money; that matters remained in this situation until March, 1875, up to which time defendant Morris had never transferred the stock on the books of the company to himself, when said stock was levied on as complainant's property by the sheriff to satisfy an execution against complainant on a judgment amounting to $233.60; that, upon the levy being made, he made an agreement with said Morris that he (Morris) should pay the debt and discharge the levy, and that thereupon the stock should be transferred to him on the books of the company, and he should hold the same as a pledge for payment of balance due on the original purchase, the sum to be paid to discharge the levy and all indebtedness which Gilmer or any other of the firms with which he was connected in business might incur in the future either to Morris or to the banking house of Josiah Morris & Co., of which said Morris was a member; that Morris consented to this agreement, and paid the judgment, and the 12th of July, 1885, the amount was paid to the firm of Gilmer & Donaldson, of which Gilmer was a member; that the stock was transferred on the books of the company to Morris' name prior to that date, but after said agreement was made; that prior to 1875 Gilmer had kept a bank account with the firm of Josiah Morris & Co., and in the early part of 1877 he and one Donaldson formed a partnership, and desiring to continue his banking account with Morris & Co., and to obtain from them accommodations, he arranged and agreed with Morris that the said stock should be held by him to secure the indebtedness which the firm of Gilmer & Donaldson might incur to him (Morris) or to his banking firm; that under said agreement, and up to the death of Donaldson, in 1876, the banking account of said firm was continued with the banking firm of Morris & Co., and loans and discounts were made to Gilmer & Donaldson, and at the death of Donaldson there was due to Morris & Co., and to the firm, the sum of $2,303.03; that this balance was secured, not only by the pledge of the stock, but by other security and stock deposited by Donaldson for that purpose; that,

from the securities and stock so deposited by Donaldson, Morris realized the sum of $975 on the 11th of March, 1880, which was placed to the credit of the said account, leaving a balance, which is still due and unpaid; that, after the death of Donaldson, Gilmer continued to do business, in the name of J. N. Gilmer & Co., with said Morris, until the 30th of May, 1879, when he formed a partnership with one Clanton; that during the time he carried on business in the name of Gilmer & Co., on the faith and credit of the stock held as a pledge by Morris, Josiah Morris & Co. made small advances, and, at the time of the formation of the firm of Gilmer & Clanton, there was due to the firm of Josiah Morris & Co. by Gilmer the sum of $222.43, which was afterwards paid, as follows: $230 by deposit June 8, 1881, and $52.33 by a note given on 31st day of May, 1883, and paid on the 3d of October, 1883; that after ceasing to do business with Morris & Co., under the name of J. N. Gilmer & Co., the firm of Gilmer & Clanton opened a new business and banking account with Morris; that afterwards Clanton sold out his interest to one Merritt, and a new firm, under the name of Gilmer & Merritt, continued the said business, until the same was dissolved, some time in the year 1884; that, during the course of dealings in the names of Gilmer & Clanton and Gilmer & Merritt, Morris extended credits to said firms, and made loans of money to them, from time to time, upon the faith and credit of the stock belonging to Gilmer, which had been pledged as aforesaid, but neither of said firms owed Morris any balance on the said account at the time they closed their said business; that in the early part of 1872, and up to the month of June, 1884, said Morris did not, directly or indirectly, notify Gilmer of the amount of the balances due him in said account, or require him to pay such balances; that he did not give notice to Gilmer that the stock must be redeemed, or that he had or would sell it, or was holding it otherwise than as a pledge; that said Morris continuously, from the month of March, 1875, to the month of June, 1884, held and acknowledged that he held the stock as such pledge, and that in June, 1884, complainant, Gilmer, for the first time learned that the stock had commenced paying dividends, and when he called upon Morris to inquire about it was then for the first time informed that Morris denied holding the stock as a pledge at all, and was further informed that it had been sold by Morris in the year 1881; but the bill avers that the alleged sale never was in fact made, and that defendant Morris has continued to hold the said stock. The bill prays for the recovery of the stock, and an accounting of the dividends thereof from the time of the alleged pledge. The defendants demur to the bill for want of equity, and as a stale demand; and that the complainant's suit is barred by the statue of limitation in the state of Alabama, which statute, it is alleged, applies to suits in equity as well as suits at law.

The bill makes a case of pledge for future advances, which were continuously made, extending over a term of years from 1875 to 1884, at which time, as alleged, a balance was due to defendant Morris, which was secured by the said pledge. The defendant Morris for the first time

alleged the sale of the pledged property, repudiated the pledge, and denied his liability in June, 1884. Where a pledge is made to secure future and continuing advances, which advances are made, the pledgeor's right of action to recover the pledged property accrues when all the advances secured by the pledge are paid, or when the pledgee, by positive act, repudiates the pledge, or improperly disposes of the pledged property. Under the facts stated in the bill, the complainant's right of action, therefore, accrued in June, 1884. It seems unnecessary, therefore, to consider in this case the statute of limitation of six years under the laws of Alabama, or to determine whether such statute has any application in a suit of equity in the courts of the United States.

Staleness of demand, by reason of laches, however, is a more serious objection, and as to time rests upon a different footing. "The growing importance of trade and commerce, with the increase of the means of rapid transit and speedy communication, have tended in modern times to shorten the period allowed by courts of equity beyond which a demand is considered stale on the ground of laches. * * * What lapse of time shall be regarded as rendering a pledgeor's right of redemption stale cannot, of course, be formulated into any fixed rule applicable to all cases. Each case must necessarily depend upon its own circumstances, having regard, not alone to the mere question of time, but also to the circumstances and relative situation of the parties, the nature of the property pledged, whether stationary or fluctuating in value, and other facts affecting the justness or equity of the right asserted. 'It is therefore,' as said by Mr. Schouler, 'largely a matter of judicial discretion.' Schouler, Bailm. 225, note 2. * * * It is well settled that a much shorter time will be allowed the pledgeor within which to exercise the right of redemption, where he seeks to make a profit out of the unexpected rise in the value of pledged stocks, than where he seeks merely to compel the pledgee to account for a surplus received by him from the sale of the stocks in ordinary cases. Schouler, Bailm. 225; *Oil Co.* v. *Marbury*, 91 U. S. 587." *Gilmer* v. *Morris*, 80 Ala. 78. "The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can, by due diligence, be ascertained. As the courts have never prescribed any specific period as applicable to every case, like the statute of limitation, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question. * * * These are generally the presence or absence of the parties at the place of the transaction; their knowledge or ignorance of the sale, and of the facts which render it voidable; the permanent or fluctuating character of the subject-matter of the transaction as affecting its value; and the actual rise or fall of the property in value during the period within which this option might have been exercised." *Oil Co.* v. *Marbury*, 91 U. S. 587. "Courts of equity often treat a lapse of time less than that prescribed by the statute of limitation as a presumptive bar, on the ground 'of discouraging stale claims or gross laches or unexplained acquiescence in the assertion of an adverse right.' 2

Story, Eq. Jur. § 1520. In *Smith* v. *Clay*, Amb. 645, Lord CAMDEN said: 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing, and laches and neglect are always discountenanced.' These doctrines have received the approval of this court in numerous cases. *Oil Co.* v. *Marbury*, 91 U. S. 587; *Badger* v. *Badger*, 2 Wall. 87; *Marsh* v. *Whitmore*, 21 Wall. 178; *Harwood* v. *Railroad Co.*, 17 Wall. 79." *Hayward* v. *Bank*, 96 U. S. 611. To the same effect, see *Indianapolis Rolling-Mill Co.* v. *St. Louis, etc., R. Co.*, 120 U. S. 256, 7 Sup. Ct. Rep. 542.

By the bill it appears that five years and seven months elapsed after the defendant Morris alleged a sale of the pledged property, and repudiated all liability on account of the pledge before suit was brought to recover the pledged property. The bill alleges, and the demurrer admits, that, in fact, Morris made no sale of the stock, but still holds and possesses it, drawing large dividends thereon. The bill further shows that the stock which is the subject of the suit for a long time was below par, but since about the time of the alleged sale has risen rapidly in value, and paid large dividends, so that the claim, which in 1884 would have been for about the par value of the stock, is now alleged to amount to over $150,000. In the bill there is no explanation for the delay in bringing suit, but, as a matter of fact, it is to my personal knowledge, and has been brought to my attention in argument in this case by both sides in citing the cases of *Gilmer* v. *Morris*, 80 Ala. 78, and *Morris* v. *Gilmer*, 129 U. S. 315, 9 Sup. Ct. Rep. 289, that the complainant did institute a suit in one of the chancery courts in the state of Alabama against these same parties defendant for the recovery of this same stock; that on an adverse decision in the said chancery court, afterwards affirmed by the supreme court of the state, on the 27th of January, 1886, a suit was brought in this court on September 20, 1886, for the same stock, which suit was pending and undisposed of until the 28th day of January, 1889, when the supreme court of the United States rendered a decision adverse to the complainant, this time, however, conceded not to be upon the merits of the case. How far these conceded facts outside of the bill should be considered in ruling on the demurrer is not clear, but I think they should have some weight. Taking them in connection with the fact that the alleged sale of the stock sued for is a pretense, and that, in fact, during the delay in bringing suit no change injurious to parties has occurred, and the further fact that complainant's bill, confessed by the demurrer, shows a breach of trust, I am of the opinion, giving full force to the authorities above quoted, that the charge of staleness of demand should not be sustained. If a sale of the pledged property was actually made, so that complainant had an option to affirm or disaffirm, or if defendants have been injured or prejudiced by any laches of complainant, such state of the case can be shown in the answer and evidence.

FITZHUGH *v.* McKINNEY.

(Circuit Court, N. D. Texas. May 26, 1890.)

1. EQUITY—JURISDICTION—REMEDY AT LAW—SET-OFF.
Rev. St. Tex. art. 649, provides that if the plaintiff's cause of action be a claim for unliquidated damages founded on tort, the defendant shall not be permitted to set off any debt due him by plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated damages founded on tort. Article 650 provides that defendant may set off any counter-claim arising out of, or incident to, plaintiff's cause of action. *Held*, that these provisions do not require the pleading of a set-off, so as to defeat a suit in equity to enforce it, on the ground that the party pleading it has an adequate remedy at law.

2. ATTORNEYS—LIEN ON JUDGMENT.
Attorneys, under the laws of Texas, have no such lien on judgments recovered by them as that an assignment to plaintiff's attorney of a part of a judgment as compensation will defeat a suit in equity by defendant to enforce a set-off against such judgment.

In Equity. Bill for injunction.

M. L. Crawford, for complainant.

J. M. McCoy and *John R. Hayter*, for respondent.

McCORMICK, J. On the 14th day of June, 1889, the respondent, Charles W. McKinney, recovered a judgment at law in this court against the complainant, for the sum of $4,050, besides costs, in an action originally instituted on the 4th day of November, 1887. It does not so appear in the bill and answer, but it was admitted on the hearing that this recovery was for damages for wrongfully suing out and executing certain writs of sequestration in a litigation between the same parties in the state courts for Lamar county, which litigation in Lamar county resulted in the two judgments in favor of complainant set out in the bill in this suit. On the 15th day of June, 1889, the complainant presented his bill herein to this court, showing the recovery of said judgment against him for $4,050, besides costs, and showing that he had recovered a judgment against respondent on the 14th day of October, 1886, for $620, besides costs, and on the 15th day of May, 1888, had recovered a judgment against respondent for $2,343.69, the first judgment drawing interest at the rate of 8 per cent. per annum, and the other at the rate of 12 per cent. per annum, both in full force; and that these, with the interest thereon, aggregated the amount of $3,400.61, no part of which had been paid, or in any manner discharged; that said Charles W. McKinney is notoriously insolvent; that complainant had paid to the clerk of this court all the costs adjudged against him in the suit of respondent against him, and had tendered to the respondent a full acquittance and discharge of both of said judgments against respondent, and the sum of $649.40, the difference between respondent's judgment against complainant and the two judgments of complainant against respondent, which respondent had refused to accept, and complainant had paid said sum of money, to-wit, $649.40, into the registry of this court for the respondent, and attached to his bill the instruments in writing, discharging complainant's judgments against respondent, and

prays that his said set-off and payment may be allowed, and the judgment against him forever enjoined. The answer substantially admits the material allegations of the bill, but presents—*First.* By way of plea and demurrer to the bill, the defense that the complainant could have pleaded his said judgments in set-off, in the action at law against defendant, and that, having failed to avail himself of this adequate remedy which he had at law, he cannot maintain this suit in equity. *Second.* Respondent says that on the day his said judgment was recovered against complainant, to-wit, on the 14th day of June, 1889, and before complainant's bill was presented to this court, the respondent, in consideration and fulfillment of a contract he had with his attorneys, to compensate them for their services as such attorneys in said action at law, had transferred to them a one-half interest in said judgment, and that on the same day, to-wit, the 14th day of June, 1889, he transferred the other half of said judgment to one Luther Rees, in part payment of his homestead in Dallas, Tex., on which that amount remained unpaid. The provisions of the Texas statutes bearing on the first ground of defense urged by the respondent is in these words:

"Art. 649. If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff. Art. 650. Noth ng in the preceding article shall be so construed as to prohibit the defendant from pleading in set-off any counter-claim founded on a cause of action arising out of, or incident to, or connected with, the plaintiff's cause of action." Rev. St. Tex. (Ed. 1879,) tit. 21.

It may be that under these provisions the complainant in this case was not prohibited from pleading his judgments in set-off to respondent's action for damages, but a careful consideration of the Texas cases satisfies me that he was not required to do so, and that his failure to do so would not preclude him from the relief he seeks in this suit. Under the Texas decisions, the most that can be claimed on account of said failure is the charging of complainant with the costs of this suit. *Walcott* v. *Hendrick*, 6 Tex. 415; *Hanchett* v. *Gray*, 7 Tex. 549; *Wright* v. *Treadwell*, 14 Tex. 256; *Simpson* v. *Huston*, Id. 476; *Duncan* v. *Magette*, 25 Tex. 245. It can make no difference that complainant's judgments were rendered by the state courts, and the judgment against him was rendered by this court, and therefore application has to be made to this court for relief by bill in equity. If all three of the judgments had been in the state courts, where no distinction between law and equity affects cases, and the complainant would there be entitled to the relief he seeks here, he cannot lose his rights because he was sued in the circuit court. This court has the right and power to grant him as full relief as he could get in the state courts. If the complainant had the right to have his judgments set off against the respondent's judgment, the right existed at the very instant respondent's judgment was rendered, and could not be affected by the alleged assignments of the judgment to respondent's attor-

neys or to Rees. *Merrill* v. *Souther*, 6 Dana, 305. That attorneys have no such lien on judgments recovered by them in this state as is claimed in respondent's answer is I think well settled. *Wright* v. *Treadwell*, *supra*. A decree will be entered granting the complainant the relief prayed for in his bill, except as to costs, which will be adjudged against complainant.

SLEDGE *v.* GAYOSO HOTEL CO.

(Circuit Court, W. D. Tennessee. August 26, 1890.)

DEMURRER—PLEADING—NEGLIGENCE.

The court should not assume, upon the bare and necessarily brief statements of a pleading, to decide the fact of original or contributory negligence. If the pleading be technically sufficient in its averments, and it be not clear upon those technical averments that there was not negligence, the question should be reserved for the trial, and a demurrer seeking prematurely the judgment of the court will be, of course, overruled.

At Law. On demurrer to the declaration.

Gantt & Patterson, for plaintiff.

Turley & Wright, for defendant.

HAMMOND, J. This is a suit for an injury to the plaintiff's foot, sustained by the working of the hotel elevator, which injury, the declaration alleges, was caused by the negligence of the defendant, and without fault on the part of the plaintiff. The declaration undertakes to set out briefly the facts relied on to constitute negligence, in a narrative mode, and, among other things, states that the plaintiff entered the open door of the elevator, whereupon the conveyance began to ascend of its own accord, there being no conductor in charge, and the plaintiff, attempting to get out, was injured. The demurrer insists that the declaration, on its face, shows contributory negligence—*First*, by entering the elevator while the conductor was absent; and, *secondly*, by attempting to leave it when the ascent commenced. But the second ground of demurrer seems to be abandoned, since only the first is submitted by the brief of defendant's counsel.

The declaration goes farther, perhaps, than it need to have gone under our system of pleading, in stating the facts so specifically; but, waiving that altogether, and under any system, it is always injudicious for a court to undertake, as a matter of mere pleading, to determine a question of negligence, either original or contributory, in any case where the declaration or plea contains a substantial cause of action or defense. Negligence is a mixed question of law and fact, sometimes largely depending upon inferences to be drawn wholly by the jury, and for the court to assume to decide them upon the necessarily brief statements of the conclusions of fact found in a pleading would be to usurp the function of the jury, or at least to trench upon it with insufficient knowledge of the

facts. It depends more upon the evidence than upon the conclusions from it found in the pleadings on either side. It has been our uniform practice, therefore, to decline to decide the question of negligence in cases like this, upon demurrer, if the declaration or plea be technically sufficient, taken as a whole, and only as a pleading, and not as a deposition or evidential statement of facts, which neither, certainly, is intended to be. Just as in this case, it is quite a bare assumption to say that it is, in all cases and under all circumstances, contributory negligence to enter an open elevator at an hotel when the conductor is away; and that is necessarily the ground of this demurrer, because the declaration, in its statement of facts, discloses no other circumstances whatever relating to that act of the plaintiff. Under some circumstances it might be the grossest negligence to enter an elevator while the conductor was away, even through an open door, and under others it might not be, possibly; and this is a question for the jury on the evidence in each particular case, or possibly for the court when all the evidence is in; but certainly it is not a question of law upon the pleadings, if the pleading be otherwise sufficient, as it is here, where it charges generally that the injury was done by the negligence of the defendant, and without the fault of the plaintiff. We all know that hotel elevators are provided with seats to be occupied by the guests; and suppose one should remain seated while the conductor, from some emergency, should leave his post, would that be negligence? Possibly not, and yet, under some circumstances, it might be negligence not to leave the seat and the elevator. So, as to entering it, one might do so without negligence, under some circumstances, and we cannot say, in the face of the declaration here, what the particular circumstances were. That this is the proper practice seems reasonable upon the authorities. 2 Thomp. Neg. p. 1235 *et seq.*, §§ 10–13; Id. §§ 23, 26; Id. §§ 36, 37. In *Railroad Co.* v. *Crist*, 116 Ind. 446, 19 N. E. Rep. 310, the court says:

"We do not decide, of course, that the negligent breach of a * * * duty not constituting a willful tort would make the defendant liable, if the plaintiff's negligence contributed to the injury, * * * but what we do decide is that the character of the duty, and the nature of the place where the injury was received, are important factors in the solution of the problem."

And it was there held that knowledge of a danger or an unsafety does not always, and under all circumstances, preclude a recovery as a matter of law arising in the pleadings. This case cites many recent and leading authorities on this subject of the knowledge of a danger being contributory negligence, from which it appears that it is not an absolute rule, as this demurrer assumes, that it is contributory negligence always to take the risk of a known danger. At all events, we cannot decide it on a demurrer to a declaration in a case like this, but reserve it for the trial.

Demurrer overruled.

STEPHENS v. OVERSTOLZ.

(Circuit Court, E. D. Missouri, E. D. September 26, 1890.)

1. SURVIVAL OF ACTIONS—REMEDIAL STATUTE.
An act of congress imposing a legal liability on the directors of a national bank for certain things which they may do, which shall result in an injury to the bank, its stockholders, or creditors, and making them liable for the amount of the damage, is a remedial and not a penal statute, and therefore an action under it survives against the estate of a director.
2. SAME.
Where a bank director makes a wrongful loan of money from which loss occurs, it is no defense to an action by the receiver of the bank against the director's estate that the insolvency of the person to whom the loan was made was not discovered until after the death of the director and the appointment of the receiver.
3. PLEADING—DEMURRER.
A general demurrer to a petition as a whole cannot be sustained if there is one good cause of action stated in it.

At Law. On demurrer to petition.

Action by Lon V. Stephens, receiver of the Fifth National Bank of St. Louis, against Phillipine Overstolz, executrix of Henry Overstolz, deceased.

Geo. D. Reynolds, U. S. Atty., and *Lubke & Muench*, for plaintiff.

Chester H. Krum, for defendant.

MILLER, Justice, *(orally.)* The main question in this case, which it would seem to be necessary to determine at this time, is the question whether the right of action stated in the petition in favor of the receiver is one that has abated by the death of the director who committed the wrongful acts charged, or is a right of action that survives against the executrix of the deceased. The argument is that the statute under which the suit is brought is a penal statute, and imposes a punishment; that the demand sued for is a penalty; and that it is of that character that the right to recover it ceased with the death of the wrong-doer. We cannot, as important as the case is, when on the circuit, where so much is to be done in a short time, give as full investigation to the authorities on the subject as we would like to do, but we have given it such consideration as we are able to, and all three of us are of the opinion that the act of congress on this subject treats the directors of a national bank as persons charged with a duty and a trust for the benefit of other parties; that, when they violate such trust, the statute in effect declares that they shall compensate the parties who have been injured for that violation of the trust. In effect that was a principle which existed before the statute was enacted. The statute declares the mode of proceeding, the liability of the wrong-doer, and the limit of his responsibility. It is not so essentially a penal statute intended to punish a wrong-doer for a wrongful act as to bring it within that class of penalties, the liability for which expires with the death of the party. The statute imposes a legal liability upon the officers of the bank for certain things which they may do which shall result in an injury to the bank, its stockholders or cred-

itors. The statute says, in effect, that they shall be liable for whatever damages result to any one from their violation of duty. Penal statutes, strictly speaking, are generally those which impose a punishment measured only by the offense or guilt of the party. They generally say that, for every such offense, the party shall be fined in a given sum, or imprisoned for a limited time. Generally they say exactly what the punishment shall be; that a party who does thus and so shall be liable to a fine of $500 or some other sum, or shall be liable to imprisonment for so long a time. Penalties of that nature are of a criminal character, but in this case, and in some others that might be cited, the object of the statute does not seem to be to punish the wrong-doer for the wrongful act, but rather to render him liable to all parties to the extent of the injury they have sustained; and the right to sue is given to the bank or its receiver, and even to the stockholders, and perhaps to the creditors of the bank who have been damaged by the wrongful act in question. Whoever is injured may sue, and the extent of the recovery depends upon the damage which the party suing has sustained. It does not fix any definite sum to be paid by the party for his wrong-doing. It simply says he must make good the damage he has inflicted upon others. We think, therefore, that it is a remedial statute. The officers of a bank are forbidden to do a certain thing, because it may tend to the ruin of the bank. The statute says you shall not do that, and if you do it you shall be liable to all persons injured by your wrongful act. You shall be liable to the bank, you shall be liable to the stockholders, and you may be liable to the general creditors of the bank, or the depositors of the bank. The extent of that liability is not affected by the circumstances which mislead you, or by your criminal intention, but depends on the fact that the act was done knowingly, and was in violation of the law. The extent of the liability incurred is the amount of damage you have inflicted upon others. We are of the opinion that the right of action in this case is not terminated by the death of the wrong-doer, but that the damage for which he is liable is a claim that survives against his estate as any other claim.

Some point was made that the receiver has no right to sue, because the damage had not been sustained at the time of the director's death, or at the time of the appointment of a receiver of the bank. I confess I have had some difficulty in apprehending the force of that argument. All that I can make of the contention is that although the wrong had been done, and the money had been loaned, yet, because it was not found out until after the receiver was appointed that the wrong had occasioned a loss to somebody, that, therefore, there was no right of action. We cannot assent to that view. The injury was done by the director in his life-time by the wrongful loan of the money in question, and the loss had really occurred before the receiver's appointment, although it was not known prior to that time, yet the men to whom the money was loaned were insolvent.

There is one objection to what is termed the "first clause" of the petition or declaration that we think is a good one. That count recites

certain proceedings had in court by which the bank itself suffered a forfeiture of its charter by reason of the wrongful acts of its directors. The count, as we understand it, merely recites that the court before whom that proceeding was pending found that the wrongful acts in question were done knowingly by the directors, but does not contain any direct averment otherwise than by recital that the acts were done knowingly. The averment of course that the court found that the deceased director did certain acts knowingly is not tantamount to an averment by the pleader that the deceased director did the acts knowingly. If this part of the petition had been demurred to specially we should have sustained it, because the knowledge of the director is not directly averred. But the demurrer is a general demurrer to the petition as a whole, and if there is one good cause of action stated in it the demurrer must of course be overruled. We do not know whether the plaintiff relies on the first count, but, as the matter stands, the other counts charge that the deceased did the acts and things complained of knowingly, and the demurrer must accordingly be overruled.

BERRIAN *v.* ROGERS *et al.*

SAME *v.* COOK *et al.*, (three cases.)

(Circuit Court, D. Colorado. **June 20, 1890.)**

1. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—PUBLICATION OF NOTICE.
The regularity of the publication of notice to a non-resident heir, in proceedings in the probate court by an administrator to sell real estate to pay debts, cannot be questioned in ejectment against the purchaser at the sale.
2. FEDERAL COURTS—STATE STATUTE.
The decision of the supreme court of a state, construing a state statute, is binding on the federal courts.

At Law.

Wells, McNeal & Taylor, for plaintiff.

L. C. Rockwell and *E. P. Hannon*, for defendants.

CALDWELL, J. This is an action of ejectment brought by Berrian against Cook and others. The case is this: An administrator was appointed for an estate, and he went before the probate court of the proper county, and filed a petition as required by the laws of this state, asking to be authorized to sell the real estate of his intestate to pay debts. That petition is very full and complete. No questions are raised about that, and such action was had on that petition as that it was granted, and a very full and elaborate order made by the court, authorizing and directing a sale of the real estate, and it was sold by the administrator. The sale was reported to the court and confirmed, and a deed made to the

purchasers at the sale. The plaintiff, deraigning title through one of the heirs of the estate to a parcel of that property, now brings ejectment on the assumption that that sale was void for non-compliance with the requirements of the statute of this state, in reference to the sale of the real property of the decedent by the administrator.

There is no occasion for me to go extensively into the questions raised by the case. The learned counsel for the plaintiffs concedes that all the questions raised in the case have been definitely and precisely decided by the supreme court of this state, and that, too, in a case involving the regularity of this very sale. Some of the heirs of the intestate or decedent appealed from that order of sale to the supreme court, and that court, sitting as a court of error, held that the proceedings were all regular; that the order of sale was proper, and that the title of the intestate to the property sold passed by that sale. In that suit every question now made in this was brought to the attention of the court, and was definitely passed on by the supreme court. The case has once been tried in this court before Judge HALLETT, whose judgment was the same as that of the supreme court. The statutes of this state give the beaten party in ejectment a second trial as of course, and so the case is before me for trial a second time. Independently of the decision of the supreme court, whose decision in the construction of the statutes of this state is binding upon this court, I should hold that this was a valid sale, on the authority of a long line of decisions of the supreme court of the United States. Undoubtedly the probate court had jurisdiction to do what was done in this case, and the only point raised is the question of the regularity of publication of the notice to one or more of the non-resident heirs. Now the supreme court of the United States has said a half-dozen times that you cannot raise that question collaterally in this proceeding. The rule seems not to be in accordance with the general doctrine on the subject of jurisdiction, but in this class of cases they maintained that doctrine. An interesting case on this subject is *Mohr* v. *Manierre*, 101 U. S. 417. The guardian of an insane man applied to the probate court for authority to sell his real estate to pay his debts and to support him. The usual proceedings were had; the order of sale made; the property sold; deed made; presently the man was restored to his senses, and when restored to his senses brought ejectment to recover the property back, on the ground that the proceedings for the sale were void for want of the required notice of the petition to sell. Now it happened at that sale there were two purchasers of different parcels,—one man purchased one parcel of that property, and another man purchased another parcel. When the man who had been restored to his senses brought his actions, it happened that one of the purchasers was a citizen of another state than Wisconsin, and when he was sued he removed his cause into the circuit court of the United States, so that one case was progressing in the circuit court of the United States and another in the state court. The case in the state court went to the supreme court of the state of Wisconsin, and they decided the deed was void, because the notice required by statute to those interested of the petition to sell had not been given as

required by the statute. The other case progressed, and finally went on certificate of division of opinion between the circuit judges to the supreme court of the United States, and, notwithstanding the decision of the supreme court of Wisconsin, the supreme court of the United States held that the purchaser got a good title. Mr. Justice FIELD, delivering the opinion of the court, says:

"We shall assume, however, that the notice was not published for the full period described, and the question for consideration [that is the very question in this case] is whether such omission, all other requisites of the statute having been complied with, rendered the order of the court invalid as against the plaintiff Mohr."

That question Justice FIELD answers in the negative, and quoting from the case of *Grignon's Lessee* v. *Astor*, 2 How. 319, says that it is the settled doctrine of the supreme court of the United States, and declines to be bound by the judgment of the supreme court of Wisconsin in this case. But in the case at bar the publication of notice seems to have been made in exact conformity to the requirements of the statute. The supreme court of the state so decided, and an independent investigation of the question leads me to the same conclusion. Let judgment be entered for the defendant.

McCORMICK *v.* ELIOT.

(Circuit Court, D. Massachusetts. October 10, 1890.)

1. LIMITATION OF ACTIONS—FAILURE OF ACTION BROUGHT IN TIME.
   Pub. St. Mass. c. 197, § 13, provides: "If in an action duly commenced within the time limited * * * the writ fails of a sufficient service of return by an unavoidable accident, or by a default or neglect of the officer to whom it is committed, * * * or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment." Plaintiff duly commenced an action against defendant by suing out a writ and putting it in the hands of an officer for service. The officer attached the goods of defendant, who was a non-resident, and a notice was given defendant by publication on order of the court. Judgment for plaintiff was reversed on writ of error, and the action ordered dismissed for want of jurisdiction. *Held*, that plaintiff could commence a new action on the same cause within a year thereafter.
2. SAME—RETROSPECTIVE STATUTE.
   Pub. St. Mass. c. 197, § 11, providing that "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country while he resided therein," containing no words manifesting such intent, is not retrospective.
3. PAYMENT—PRESUMPTION FROM LAPSE OF TIME.
   The lapse of 20 years raises no presumption of payment where the only evidence on the question is the testimony of plaintiff's clerk that the claim was never paid, and it appears that an action was pending during that period to enforce the claim.
4. PRINCIPAL AND AGENT—ACCOUNTING—INTEREST.
   Plaintiff intrusted goods to defendant to sell on commission, rendering accounts monthly. An account was stated by them in settlement. *Held*, that it being a claim by a principal against his agent for money, which the latter was bound to account for and pay over, it bore interest from the time the cause of action accrued.

At Law.

This was an action of contract, brought May 16, 1887, by McCormick, a citizen of Illinois, against Eliot, a citizen of Massachusetts, to recover

the balance of an account stated August 8, 1863, by Eliot and one Fiske with McCormick, amounting to the sum of $2,058.16, and interest. The defendant pleaded (1) a general denial; (2) accord and satisfaction; (3) that the cause of action did not accrue within six years; (4) that, by the statute of limitations of Illinois, the plaintiff's cause of action was barred by the defendant's continuous residence in Illinois for more than 10 years after it accrued, to wit, from April, 1867, to August, 1877. Rev. St. Ill. c. 83, § 15. The plaintiff filed a replication, alleging that within six years after his cause of action accrued, to wit, on October 21, 1863, he duly commenced an action against the defendant for the same cause in the superior court of Massachusetts for the county of Suffolk, and recovered a judgment therein on June 24, 1880, which was afterwards, within one year before bringing this action, to wit, on May 6, 1887, reversed by the supreme judicial court of Massachusetts on a writ of error sued out by the defendant; and, except as aforesaid, denying all the allegations of the answer. At the trial by jury in this court before the district judge, it appeared that the account stated was the result of a settlement by Eliot and Fiske with McCormick for goods intrusted by him to them to sell on commission, rendering accounts monthly; and a person who was in the plaintiff's employment from 1863 to the present time testified that the balance of account sued for had never been paid. The plaintiff, against the defendant's objection, was permitted to put in evidence duly exemplified copies of the judgments of the superior court and of the supreme judicial court of Massachusetts, mentioned in the replication. By the record of the superior court, it appeared that the action in that court was commenced by McCormick against Fiske and Eliot, October 21, 1863, by writ of summons and attachment; that on the same day an officer, as appeared by his return, duly attached all the defendant's real estate in the county, and that the defendants not being inhabitants of this state, nor having any residence therein, and neither they nor any agent, tenant, or attorney of theirs, known to the officer as such, being found in his precinct, he could make no further service of the writ; that the action was continued until April term, 1864, when the court ordered notice to the defendants by publication in a newspaper, and the action was continued to July term, 1864, when it was proved by affidavit that the order of notice had been complied with, and at the end of 10 days thereafter, no appearance having been entered for the defendants, a default was entered against them, and the action was continued for judgment from term to term until April term, 1880, when, on June 24th, the plaintiff discontinued against Fiske, and took judgment against Eliot; that on April 30, 1887, a rescript was sent down by the supreme judicial court on writ of error reversing that judgment. It also appeared that at the time of the attachment Eliot had real estate within the county; and that no execution was taken out on the judgment of the superior court; but that the plaintiff, on November 2, 1881, brought an action in that court on the judgment, which the supreme judicial court held to be maintainable in 138 Mass. 379. By the record of the supreme judicial court, it appeared that the judgment of the superior court was reversed, and the action ordered to be dismissed for want of juris-

diction, for the reasons stated in the opinion reported in 144 Mass. 10, 10 N. E. Rep. 705. It also appeared that the defendant was born in Boston in 1828, and lived there in his father's house, which was his usual place of abode, until 1856, when he went to Iowa, and there lived until April, 1867, when he removed to Chicago, and afterwards constantly resided there until August, 1877, when he moved back to Massachusetts, and lived there ever since; and that the plaintiff lived in Chicago ever since 1852. The defendant, without offering any evidence, thereupon requested the court to rule and instruct the jury as follows:

"(1) If the jury find that Eliot had lived in Massachusetts six years before suit was brought, and after date of settlement, the statute of limitations is a bar to recovery by plaintiff. (2) If the jury find that Eliot lived in Illinois, the state where plaintiff lived, for ten years at any time after settlement made and before this action was brought, then this action was barred by the statute of limitations of Illinois, and is likewise barred by the statute of limitations of Massachusetts. (3) The suit brought in Massachusetts against Eliot in 1863 was not 'duly commenced,' because it does not appear that he had no last and usual place of abode here, known to the officer, and because no service was made upon him personally, and therefore the reversal upon error of the judgment recovered in that suit did not open the bar of the statute of limitations. The Massachusetts court had no jurisdiction of the action brought against Eliot by McCormick, in 1863, and the proceedings in that action were null and void. No valid judgment could have been entered therein. The pretended judgment entered therein was a nullity, and could have been avoided by plea without reversal. Its reversal on error was such only if form. In fact, it was merely a declaration of its nullity, and did not stop the running of the statute of limitations, nor reopen it after it had run. * * * (5) The statute of limitations of Illinois was not interrupted by the pendency of the proceedings in Massachusetts, nor could an action have been maintained in Illinois at any time after the statutory period had run, whether before or after the Massachusetts judgment was declared void. (6) The statute of limitations of Illinois, the plaintiff's domicile, having barred his claim, it is lost altogether, and cannot be sued in the courts of the United States, even in a circuit where the local law refuses to recognize the bar of the statute of another state. (7) The thirteenth section of the Massachusetts statute has no application to cases where the bar of the statute of the plaintiff's domicile has fallen pending proceedings here, which could only have effect as proceedings *in rem*. Such cases are brought within the bar of the Massachusetts statute by the act of 1880, incorporated in the eleventh section, and are not withdrawn from it by the thirteenth section. (8) The expiration of more than twenty years since the cause of action accrued creates a legal presumption of payment, which can only be rebutted by very conclusive evidence, and no evidence capable of rebutting this presumption has been offered in this case. (9) The plaintiff is entitled to interest only from the date of the writ, no demand having been shown. (10) The plaintiff has been guilty of such laches in the prosecution of his claim that he is not entitled to interest, at least during the period from 1863 to 1880, when his suit was pending, without action, in the courts of Massachusetts."

The judge refused so to instruct the jury, but ruled that upon the foregoing evidence the provisions of the statute of limitations could not be set up as a defense to this action; that the burden of proof to show payment rested on the defendant, and that the evidence was not sufficient to sustain this defense; and that the plaintiff, if entitled to recover at all, should recover interest from August 8, 1863, when the account

was stated between the parties. Upon the announcement of these rulings, the defendant did not desire to go to the jury, but submitted to a verdict for the plaintiff for the sum of $5,150.10, and alleged exceptions, which were allowed by the court, as well to these rulings as to the refusal to instruct as requested. The defendant moved for a new trial for misdirection in matter of law, and upon this motion the parties, by stipulation in writing, submitted the questions of law arising upon the bill of exceptions to this court for final decision, and waived the right to sue out a writ of error.

Melville M. Weston and *Henry W. Chaplin*, for plaintiff.

George Putnam and *Conrad Reno*, for defendant.

Before GRAY, Justice, and NELSON, J.

GRAY, Justice, (*after stating the facts as above.*) Actions in the courts of the United States are doubtless governed by the statute of limitations of the state in which the court is held, as construed by the highest court of the state. *Bank* v. *Eldred*, 130 U. S. 693, 9 Sup. Ct. Rep. 690; *Moores* v. *Bank*, 104 U. S. 625. By section 1 of the Massachusetts statute of limitations of personal actions, (Pub. St. c. 197,) actions of contract founded upon contracts or liabilities not under seal, express or implied, except actions upon judgments of courts of record, must be commenced within six years next after the cause of action accrues. By section 13 of the same statute—

"If, in an action duly commenced within the time limited and allowed in this or the preceding chapter, the writ fails of a sufficient service or return by an unavoidable accident, or by a default or neglect of the officer to whom it is committed, or if the writ is abated or the action otherwise avoided or defeated by the death of a party thereto, or for any matter of form, or if after a verdict for the plaintiff the judgment is arrested, or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment; and if the cause of action by law survives, the executor or administrator of the plaintiff may commence such new action within said year."

By the law of Massachusetts, as declared by the supreme judicial court, service on the defendant is not necessary to the commencement of an action, but an action is duly commenced by suing out a writ and putting it in the hands of an officer, with intent that it shall be forthwith served; and, according to the settled construction of the saving clause in the statute of limitations, above quoted, if an action, duly commenced within the period of limitation, afterwards fails for want of due service by reason of a mistake as to the residence of the defendant, (*Bullock* v. *Dean*, 12 Metc., Mass., 15;) or by non-entry of the writ by a mistake of the clerk, (*Allen* v. *Sawtelle*, 7 Gray, 165;) or if a judgment recovered therein is judicially declared erroneous, and as such void and held for naught, whether by a technical reversal or otherwise,—the plaintiff may bring a new action within one year after the failure of the action or the setting aside of the judgment, (*Coffin* v. *Cottle*, 16 Pick. 383,) even if the first action was dismissed for want of jurisdiction of the court in which it was brought, (*Woods* v. *Houghton*, 1 Gray, 580.) And it has been so held

by our predecessors, Mr. Justice CLIFFORD and Judge LOWELL, in this court. *Caldwell* v. *Harding*, 1 Low. 326. In the case at bar, the first action was "duly commenced" by suing out the writ, and putting it into the hands of an officer for service. The service was sufficient to make the judgment, until and unless reversed by writ of error, conclusive against the defendant, according to a uniform series of decisions of the highest court of the state, the last of which was rendered in 1885, in an action between these parties on this very judgment. *McCormick* v. *Fiske*, 138 Mass. 379. And this judgment was reversed by that court on writ of error in *Eliot* v. *McCormick*, 144 Mass. 10, 10 N. E. Rep. 705, in which it was for the first time intimated (what has been since adjudged in *Needham* v. *Thayer*, 147 Mass. 536, 18 N. E. Rep. 429) that, under the fourteenth amendment of the constitution of the United States, and the decisions of the supreme court in *Pennoyer* v. *Neff*, 95 U. S. 714, and *Freeman* v. *Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165, a judgment rendered against an absent defendant on such a service was wholly void, except as to the property attached. This case is therefore within both the letter and spirit of section 13, c. 197, Pub. St. Mass.

It is equally clear that no presumption of payment from the lapse of 20 years can arise in this case, in which the only evidence bearing upon this question is the testimony of the plaintiff's clerk that the claim was never paid, and the records showing uninterrupted attempts by the plaintiff to enforce it by judicial process. The case falls within the opinion of the court in *Allen* v. *Sawtelle*, above cited:

"It is certain that the plaintiff did not mean to permit his debt to remain for such length of time as would bar him from its recovery without an attempt to enforce it. He used the diligence required by the law when he instituted his first suit against the defendant. That was defeated through no negligence or inattention of his own, and therefore there was no forbearance or delay from which a presumption could arise that the debt had already been in some way paid or discharged. Having been defeated in his first suit by a matter not affecting the merits of his claim, he has a right, since he seasonably proceeded with the second, to prosecute it to a regular conclusion." 7 Gray, 166.

The defendant further relies on the provision of the statute of Massachusetts of 1880, c. 98, re-enacted in Pub. St. c. 197, § 11, that "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country while he resided therein." But this statute, containing no words manifesting an intent of the legislature to give it a retrospective operation, must, like other statutes of limitation, be construed as prospective only, and therefore inapplicable to this case, in which the only residence of the defendant in Illinois was before its passage. *Murray* v. *Gibson*, 15 How. 421; *Sohn* v. *Waterson*, 17 Wall. 596; *King* v. *Tirrell*, 2 Gray, 331; *Dickson* v. *Railroad Co.*, 77 Ill. 331.

This being a claim by a principal against his agent, for money which the latter was bound to account for and pay over, clearly bears interest from the time that the cause of action accrued. *Dodge* v. *Perkins*, 9 Pick. 368; *Foote* v. *Blanchard*, 6 Allen, 221. Judgment on the verdict.

WHITE *et al.* *v.* BARNEY, Collector.

(*Circuit Court, S. D. New York.* May 16, 1890.)

1. CUSTOMS DUTIES—GOODS OF SIMILAR DESCRIPTION—DETERMINATION.
In determining whether goods are goods of similar description to delaines, cashmere delaines, muslin delaines, or barege delaines, under the provision for "all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description," contained in section 9 of the tariff act of July 14, 1862, (12 U. S. St. 543,) three matters are to be considered: (*a*) The rule which is to be used in determining whether the former goods are similar or dissimilar to the latter; (*b*) the standard of comparison, or, in other words, what are the different varieties of the latter goods with which the former are to be compared and found similar or dissimilar? and (*c*) what are the former goods which are to be compared with that standard?

2. SAME—RULE TO BE APPLIED.
The words, "of similar description," of this phrase, "goods of similar description," if a commercial phrase, with a particular and specific trade meaning other and different from its meaning in ordinary speech and conversation, should, in its interpretation, receive that particular and specific trade meaning; but, if not such commercial phrase, should receive its meaning in ordinary speech and conversation.

3. SAME—MEANINGS IF NOT A COMMERCIAL PHRASE.
While these words, "of similar description," have been held by the supreme court in *Greenleaf* v. *Goodrich*, 101 U. S. 278, to mean "similarity in product, in uses, in adaptation to uses, and not in appearance or in process of manufacture," the word "product," however, imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses; and in judging as to similarity of product the material of which a product is made, and its appearance when made, may be taken into consideration. By this phrase, "goods of similar description," is meant completed fabrics, composed wholly or in part of worsted, wool, mohair, or goat's hair, and used for dress goods, which also, as completed fabrics, possess qualities of general appearance, character, and texture like unto, or nearly corresponding to, or generally resembling, the qualities which distinguish delaines, or cashmere delaines, or barege delaines, or muslin delaines.

At Law. Action to recover back duties.

The plaintiff, between January 1, and June 23, 1864, imported from England into the port of New York certain dry goods which were classified for duty as similar to delaines, and not exceeding in value 40 cents per square yard, under the provision for "all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and all goods of similar description not exceeding in value 40 cents per square yard," contained in section 9 of the tariff act of July 14, 1862, (12 U. S. St. 543,) and upon which, pursuant to that provision, a duty of 2 cents per square yard was exacted of the plaintiffs by the defendant, as collector of customs at that port. Against this classification and exaction the plaintiffs protested, claiming that these goods were dutiable at 5 per cent. *ad valorem*, instead of 2 cents per square yard, under the provision for "manufactures not otherwise provided for, composed of mixed materials in part of cotton, silk, wool, or worsted, hemp, jute, or flax," contained in section 13 of the aforesaid tariff act. This action was brought to recover the excessive duties claimed to have been exacted.

Joseph M. Deuel, *Almon W. Griswold*, and *W. Wickham Smith*, for plaintiffs.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*charging jury.*) The particular provision of statute with which we are concerned here, is found in the ninth section of the act of July 14, 1862, which provides for an additional duty of 2 cents per square yard "on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description not exceeding in value 40 cents per square yard." The plaintiffs' goods coming into this port in regular course of business, the collector, through his appraising officers and examiners, looked at them, and decided, not that they were delaines of any of these named varieties, but that they were goods of a similar description to one or the other of the kinds of delaines which are enumerated in this section, and laid duty upon them accordingly. Of course the presumption with which we begin this case is that the collector's action, or the collector's determination, was correct; that, as a public officer, who examined the goods through his subordinates, he reached a correct conclusion; and it is to overthrow that conclusion that the plaintiffs come into court,—into the tribunal which the law allows them to seek,—in order to correct what they claim to be a mistake of the collector. The burden of proof, then, is upon the plaintiffs in this case to convince you, by a fair preponderance of proof, that their contention is a sound one, and that the collector erred when he found that plaintiffs' goods were in fact similar to these delaines which are enumerated in the statute. Now, in order to put the case to you in the way in which you can best handle it, it has been determined that a single question be put to you separately as to each kind of goods. Therefore, what will be given to you to take into the jury-room is this paper, with a question written on it, and that question you will answer in writing, and sign your names to the answers. This is the question which you will take with you:

"As to each variety of goods enumerated in the first column, answer 'Yes' or 'No' to this question: Were such goods of similar description to delaines, or to cashmere delaines, or to muslin delaines, or to barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, as such varieties of delaines were known in the trade and commerce of this country in 1862 and prior thereto?"

Then follows an enumeration of names, such as "Alexandra Cloth," "Alpacas," "Tartan Check," "Fancy End," etc. As to each one separately you are to answer "Yes" or "No" to that question. The question which you are to answer as to these goods is whether they were of similar description to the varieties of delaines which I have named. That, you will see, implies three matters for your consideration: (1) The rule which you are to use in determining whether the one variety of goods is similar to the other variety; (2) the determination of the standard of comparison,—that is, what are these different varieties of delaines with which the goods imported here were to be compared and found to be similar or dissimilar? and (3) what are the articles themselves which are to be compared with this standard?

First, as to the rule to be applied. The phraseology is "goods of similar description to delaines, or to cashmere delaines," etc., enumerat-

ing the several varieties. Now, the words "of similar description" constitute a common and familiar phrase in the ordinary use of English words. Sometimes, however, the usage of trade gives to words of ordinary every-day speech particular and technical trade meanings; and therefore, although in a former case (*Greenleaf* v. *Goodrich*, 101 U. S. 278) it has been held by the supreme court that the phrase "of similar description" is not a commercial phrase, yet that court has held in the case of *Schmieder* v. *Barney*, 113 U. S. 646, 5 Sup. Ct. Rep. 624, that the plaintiff might introduce, if he could find it, testimony to show that that phrase has acquired a particular and specific trade meaning other and different from its meaning in ordinary speech and conversation. And to that end plaintiffs have introduced here the testimony of a single witness, (Mr. Cummings,) who says that that phrase did have a particular trade meaning, and he undertook to state what it was. The other witnesses for the plaintiffs, although some of them were business men, and at that time engaged in the dry-goods business, did not testify to the point. I think that all of the defendant's trade witnesses testified that there was no such particular, special, and peculiar trade meaning of the words "of similar description." You are to weigh the testimony on both sides of that assertion, and if you come to the conclusion that the phrase "of similar description" had a peculiar, well-known, and wide-spread trade meaning, other and different from its meaning in ordinary speech, and that it covered a particular kind of goods other than the goods in suit, then you have a short cut out of the difficulties of this case, because, these tariff acts being passed to regulate the trade and commerce of the country, it is to be supposed that words are used therein in their commercial meaning, if they have one. If, however, you are not satisfied upon all the testimony that the plaintiffs have shown by a fair preponderance of proof that there was such peculiar, particular, and specific trade meaning attached to that phrase, "of similar description," you then come back to the proposition with which we started, viz., what rule are you to apply for determining whether goods are similar or not? What is it that makes dry goods "of similar description" to other dry goods? Is there any one thing that is controlling of the answer to that question? Several suggestions have been made here. It was suggested (and I think, if I remember the treasury circular accurately, that was originally the idea of the secretary of the treasury) that if goods were intended for women's and children's dresses, or if they were "dress goods," so called, that circumstance was sufficient to establish a similarity. I charge you, however, that the single fact that they are used for the same purpose as delaines is not sufficient to control your answer to the question. You must go further than that.

Again, it was suggested that the process of manufacture would enable you to determine the question: that delaines, as it appears, were woven in the gray, and that it would be enough for you to find that these goods were dissimilar to delaines, if you found as matter of fact that they were not woven in the gray. Upon this point we gain considerable light from the statutes. In 1861 (only a few months before the passage of this act

with which we are concerned) congress had passed an act using this phraseology:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of wool, gray and uncolored, and on all other gray or uncolored goods of similar description."

Those terms, "gray and uncolored," you will remember, do not appear in the later statute with which we are concerned. The section before you in this case, therefore, is more comprehensive than the earlier section; and, in view of that change of phraseology, I must charge you that it is not sufficient to show dissimilarity, to find a difference in the process of manufacture.

Again, it has been suggested that you are to look only to the materials. The evidence here shows that delaines were made of soft wool, with a short staple, such as the "Australian," or "Botany," so called, which presented generally a dead appearance; that many if not all of plaintiffs' goods contained longer, more wiry, more elastic, or brighter wool; and in some cases pure mohair wool, which came from Turkey, or again alpaca and kindred wools, from South America, and in other cases an English wool, which imitates the mohair or alpaca, thus making a more lustrous fabric. As to this suggestion the statute may again be referred to. It includes (by reference) goods composed wholly or in part of worsted, of wool, of mohair, or of goat's hair. It reads:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description."

The particular kind of wool used is therefore not the sole controlling characteristic. How, then, are you to determine similarity? While each of these characteristics to which I have called your attention as having been suggested in the course of this trial is not by itself controlling, yet each may be considered by you in reaching your conclusion,—a conclusion which must be based on a comparison of the fabrics or products themselves. The supreme court, in a similar case, (*Greenleaf* v. *Goodrich*, *supra*,) has laid down the rule that the phrase "of similar description" in this act means a similarity in product, in uses, and in adaptation to uses, and not in appearance or in process of manufacture. The word "product," however, imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses. In judging, therefore, as to similarity of product, you may take into consideration the material of which a product is made and its appearance when made.

Finally, by "goods of similar description" in this act was meant completed fabrics, composed wholly or in part of worsted, wool, mohair, or goat's hair, and used for dress goods, which also, as completed fabrics, possess qualities of general appearance, character, and texture like unto, or nearly corresponding to, or generally resembling, the qualities which distinguish delaines, or cashmere delaines, or barege delaines, or muslin delaines. The material of which the goods are composed, the method of their manufacture, so far as you are advised of it, their weave, their

weight, their texture, their surface or finish, their appearance, their feel, their color, their uses, their adaptation to uses,—all of these are elements properly to be considered by you in reaching your conclusion as to whether these goods imported are similar to the standards. But of course each of these elements is not to have equal weight. Some may be very important, some wholly unimportant. It will be for you to judge as to the relative importance of the several elements which I have suggested to you, and, giving to each its proper value, to then determine, by a consideration of all of them, whether the goods are or are not, in the ordinary use of the English language, "of similar description" to the standard. So much as to the rule. [The court next instructed the jury as to the various samples introduced in proof.]

The jury found a verdict for the plaintiffs.

KEYES *et al.* v. PUEBLO SMELTING & REFINING CO.

(*Circuit Court, D. Colorado.* July 2, 1890.)

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—MEASURE OF DAMAGES.

A sum paid in settlement of a claim for infringement of a patent cannot be taken as a standard to measure the value of the patented article, in determining the damages caused by another case of infringement. Following *Rude* v. *Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463.

In Equity.

G. G. Symes and *R. E. Foot*, for complainants.

C. E. Gast and *Thomas Macon*, for defendant.

CALDWELL, J. The case of *Winfield Scott Keyes and others* v. *The Pueblo Smelting & Refining Company*, No. 2,097, has been submitted on exceptions to the master's report. The court does not propose to do more this morning than simply state its conclusions.

The plaintiffs established their right to a patent for an improved method of smelting ores by a decree of this court rendered by Mr. Justice MILLER. Thereupon it was referred to a master to take and state an account of the gains and profits that had resulted to the defendants, and the damages that had resulted to the plaintiffs by reason of the use of this patented process by the defendant. The master has made his report, to which both parties have filed exceptions. The master reports that the gain or profit by the defendant by the use of the plaintiffs' patented process was $10,887.54. The defendant excepted to that finding. The proof supports the finding of the master, and the exception is overruled, and the master's report and findings as to the gains and profits, namely, $10,887.54, is confirmed.

The master proceeded to make an inquiry as to the damages that the plaintiffs had sustained by reason of the use of this patented process by the defendant, and he reports that the damages sustained, on the basis that he takes for ascertaining them, are $28,450.60. The defendant has excepted to that finding of the master, and this exception is sustained on the authority of the supreme court of the United States. I am unable to distinguish this case from two recent cases (*infra*) decided by that court, in which they lay down the rule that the payment of a sum in settlement of a claim for an alleged infringement of a patent cannot be taken as a standard to measure the value of improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement.

Now, the master reports that—

"The complainants have not shown by the receipt of license fees, which they claim to have established, a satisfactory measure of damages; but since 1882 it appears that in a majority of instances there has been paid to them by persons using their improvement the sum of $1,115.38 by way of compromise per furnace; and it appears that in the instances in which they were paid a less sum during that time other considerations than the payment of the money operated to reduce the price. * * * I find that the sum of $1,115.38, payable at the completion of a furnace for that furnace, with interest from the time of completion, furnishes a fair value for the computation of complainant's damages in the premises."

It will be seen that the basis of the master's finding is the sum paid by other infringers by way of compromise. The supreme court of the United States have decided, in two well-considered cases, that this is not a proper standard by which to measure the damages in such cases. The first case is that of *Rude* v. *Westcott*, 130 U. S. 152, 164, 165, 9 Sup. Ct. Rep. 463, in which the court, speaking by Mr. Justice FIELD, says:

"It is clear that a payment of any sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements patented in determining the damages sustained by the owners of the patent in other cases of infringement. Many considerations other than the value of the improvements patented may induce the payment in such cases. The avoidance of the risk and expense of litigation will always be a potential motive for a settlement. * * * Sales of licenses made at periods years apart will not establish any rule on the subject, and determine the value of the patent. Like sales of ordinary goods, they must be common,—that is, of frequent occurrence,—to establish such a market price for the article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated. In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of. [None of these parties paid anything here until after the infringement of the patent.] It must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness, by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued. Tested by these conditions, the sums paid in the instances mentioned, upon which the master relied, cannot be regarded as evidence of the value to the defendants of the invention patented."

In a still later case this doctrine is affirmed, in an opinion delivered by Mr. Justice BLATCHFORD, in this language, (*Cornely* v. *Marckwald*, 131 U. S. 159, 9 Sup. Ct. Rep. 744:)

"As to the question of an established license fee, the case is governed by the recent decision of this court in *Rude* v. *Westcott*, 130 U. S. 152, [9 Sup. Ct. Rep. 463,] where it was held that the payment of a sum in settlement of a claim for an alleged infringement of a patent 'cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement.'"

It will be observed by reference to the master's report that the standard adopted by him in this case, to measure the value of the improvements patented in determining the plaintiff's damages, is precisely the one the supreme court says cannot be taken, and furnishes no basis for a decree for damages. The exception to that part of the report awarding damages is sustained. All other exceptions to the report, both by plaintiffs and defendant, are overruled. The decree will be entered in accordance with the rulings of the court, and a prayer for appeal by both parties will be entered and allowed.

EGAN *v.* A CARGO OF SPRUCE LATH.

(*Circuit Court, S. D. New York.* September 30, 1890.)

MARITIME LIENS—FREIGHT AND DEMURRAGE—HOW LOST.

A cargo of lath, sold by the consignee to the claimant before arrival, was discharged without notice to claimant of any lien or claim for freight and demurrage, it being customary in the port of New York to discharge cargoes from canal-boats before demanding freight and demurrage, and the laths, as fast as they were discharged, were received by the claimant, and transported from the wharf to his lumber-yard, a half mile distant. Libelant's claim for freight and demurrage against the consignee and shipper being afterwards disputed as to amount, this libel was filed five days after the discharge was completed to establish a lien. *Held* that, as the delivery was unconditional, the lien had been lost. Affirming 41 Fed. Rep. 830.

In Admiralty. Appeal from district court.

Libel by Frank Egan against a cargo of spruce lath for freight and demurrage. The libel was dismissed, and libelant appeals.

Hyland & Zabriskie, for libelant.

Benj. Barker, Jr., for claimant.

LACOMBE, J. Decree of district court affirmed, with costs.

WILSON v. KNOX COUNTY.

(*Circuit Court, N. D. Missouri, E. D.* September 25, 1890.)

FEDERAL COURTS—JURISDICTION—ASSIGNMENT OF CHOSE IN ACTION.

By Act Cong. March 3, 1887, providing that no circuit or district court of the United States shall have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made, it was intended to prohibit suits in the federal court by assignees of choses in actions, unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer, and executed by a corporation.

At Law. Action on promissory notes.

This was a suit against Knox county, Mo., on certain county warrants aggregating $7,000, which were of the following form, omitting the dates, names of payees, amounts, etc.

"STATE OF MISSOURI.

"$———. EDINA, ———, 188–.

"*Treasurer of Knox County:* Pay to ——— ——— dollars out of any money in the treasury appropriated for ——— fund. Given at the courthouse the date above written, by order of the county court.

"Attest: ———, Clerk. ———, Presiding Judge."

The warrants were originally issued to a citizen of the state of Missouri, who assigned them to the plaintiff, a citizen of Illinois. The assignments are as follows:

"For value received, ——— assign the within warrant to ———, this ——— day of ———, 18—."

Both the warrants and the assignments thereon are in the form prescribed by the laws of the state of Missouri for drawing and assigning such instruments.

W. C. Hallister and *F. H. McCullough*, for plaintiff.

James Carr, for defendant.

Before MILLER, Justice, and CALDWELL, J.

MILLER, Justice. This case is pending in the northern division of this district, but by stipulation of counsel has been argued before us in the eastern division of the district.

The question that arises on the demurrer to the plea of the jurisdiction is whether the assignee of the warrants can maintain a suit thereon in this court, under the judiciary act of March 3, 1887, although the original holder was incapacitated from maintaining such a suit. The clause of the act under which the question arises is as follows:

"Nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The contention for the plaintiff is that the court has jurisdiction of the suit at bar, because the instruments sued upon are not "payable to bearer," and are "made by a corporation." This we think is an erroneous view of the law. Congress did not intend to give the federal courts jurisdiction of all suits by assignees of promissory notes and other choses in action, if the assigned choses were made by a corporation and were not payable to bearer. That construction would extend the jurisdiction of the federal courts, without any apparent reason, over a class of suits by assignees of choses in action, never before within their jurisdiction, whereas the main purpose of the act of 1887 seems to have been to curtail their jurisdiction. The general rule enunciated by the statute is that the federal courts shall not have jurisdiction of a suit by an assignee "of a promissory note or other chose in action," when the assignor could not maintain such a suit. The clause, "if such instrument be payable to bearer and be not made by any corporation," operates as an exception to the general rule, and gives the federal courts jurisdiction of those suits by assignees, where the action is founded on an obligation, made by a corporation, that is payable to bearer, and is negotiable by mere delivery. In the light of previous legislation on the subject, our view is that congress intended by the act of March 3, 1887, to prohibit suits in the federal court by assignees of choses in action, unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer and executed by a corporation. Construed in this way, the act of 1887 operates to restrict to some extent the jurisdiction exercised under the act of March 3, 1875, which was probably the intention of the law-maker. The instruments sued upon in this instance, though executed by a *quasi* corporation, are not payable to bearer, and are not even negotiable instruments under the law merchant. It follows, therefore, that an assignee of the warrants in question has no greater right to sue in this court than the original payee, and the demurrer to the plea will be overruled.

The views we have expressed are also entertained in other circuits and districts. *Vide Newgass* v. *New Orleans*, 33 Fed. Rep. 196; *Rollins* v. *Chaffee Co.*, 34 Fed. Rep. 91.

JESUP v. ILLINOIS CENT. R. CO. et al.

DUBUQUE & S. C. R. CO. v. JESUP et al.

(*Circuit Court, N. D. Illinois.* October 6, 1890.)

1. EQUITY—JURISDICTION—RAILROAD LEASE—ENFORCEMENT.
In September, 1866, the Cedar Falls Railroad Company leased its road to the Dubuque Company for the term of 40 years. A year later the Dubuque Company leased its own road to the Illinois Central Railroad Company for 20 years, with the option to retain it in perpetuity, and the latter company agreed to assume the lease theretofore entered into between the Dubuque and the Cedar Falls Railroads. *Held*, that the assumption of this lease by the Illinois Central created no direct obligation on its part to the Cedar Falls Company which it or its mortgagees could enforce by an action at law, but such obligation could be enforced only by a suit in equity.

2. RAILROAD COMPANIES—ASSUMPTION OF LEASE—CONSTRUCTION.
As the Illinois Central elected to surrender both the Dubuque and Cedar Falls roads to the Dubuque Company, after the expiration of 20 years, the assumption of the lease of the Cedar Falls road by the Illinois Central does not bind it for the rent of the Cedar Falls road after the expiration of the 20 years for which it had leased the Dubuque road, which forms the connecting link between the Illinois Central and the Cedar Falls Railroads.

3. SAME—ESTOPPEL.
An indorsement on the bonds of the Cedar Falls Company, made by its president, to the effect that the Illinois Central had assumed the lease, and that the minimum rent which that company had thereby obligated itself to pay is more than sufficient to meet the entire amount of interest on the bonds, does not estop the Illinois Central from denying its liability on the lease after the expiration of the 20 years, where such indorsement was not made at its instance or by its direction.

4. EQUITY—JURISDICTION—CROSS-BILL—DISMISSAL OF ORIGINAL BILL.
The trustee in a mortgage executed by the Cedar Falls Company to secure the proper application of the rents of its road filed his bill against the Illinois Central, the Dubuque, and the Cedar Falls Companies, alleging the insolvency of the latter company and its refusal to collect the rents. The prayer of the bill was that the trustee be henceforth empowered to collect such rents, and that the lease be declared binding on the Illinois Central for the entire term of 40 years. *Held* that, after a dismissal of the bill as to the Illinois Central, the court still had jurisdiction of a cross-bill filed by the Dubuque Company against the Cedar Falls Company and the trustee asking for a cancellation of the lease of the Cedar Falls road, as the relief sought by the cross-bill is directly connected with the subject-matter of the original bill, and is of an affirmative character.

5. SAME—RESIDENCE.
The fact that the Dubuque Company and the Cedar Falls Company are both Iowa corporations will not defeat the jurisdiction of this court over the cross-bill; both of these corporations being properly before the court as parties to the original bill.

6. RAILROAD COMPANIES—LEASE—FRAUD OF DIRECTORS.
The fact that the directors of the Dubuque Company failed to make the continuance of the lease of the Cedar Falls road dependent on construction of roads in Minnesota that would connect that road with St. Paul or Minneapolis, which was the expectation when the lease was executed, but which expectation was never realized, will not warrant the presumption that the directors of the Dubuque Company were guilty of actual fraud towards that company in executing the lease.

7. SAME—EXCESSIVE RENT.
Neither will the court indulge the presumption of fraud against the directors of the Dubuque Company because the rent stipulated for in the lease turned out to be larger than the business over the Cedar Falls road really justified, where such rent was fixed in accordance with the report of competent and disinterested experts, to whom that question had been referred.

8. SAME—EVIDENCE OF FRAUD.
The fact that the bonds and stocks allowed by the Cedar Falls Company to those constructing its road, some of whom were also directors of the Dubuque Company, were in excess of the actual cost of construction, is a matter entirely between the Cedar Falls Company and those who received such bonds, and in no wise affects the Dubuque Company or the validity of its lease of the Cedar Falls road.

9. CORPORATIONS—CONTRACTS—DIRECTORS.
A contract, in the name of a corporation, by its board of directors, is not void, if otherwise unassailable, simply because some of the directors, constituting a minority, used their position with the effect, or even for the purpose, of advancing their personal interest to the injury of the company they assumed to represent, although the fact that such directors, constituting but a minority, participated in the making of the contract, would cause the transaction to be closely scrutinized, to the end that the rights of complaining stockholders, however small in number, might not be sacrificed by those who were bound to protect their interests.

10. SAME—VOIDABLE CONTRACT.
The contract by which the Dubuque Company leased the Cedar Falls road would not have been void even if the majority of the directors of that company had been personally interested in the Cedar Falls Company. It would have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders, and that election must have been exercised, or the suit brought, within such time as was reasonable, taking into consideration all the facts and circumstances of the case, including the nature of the property that was the subject of the lease.

11. SAME—ACTION TO SET ASIDE—TIME TO SUE.
The rule is a wholesome one that requires the court, in cases of merely voidable contracts, to withhold relief from those who, with knowledge of the facts, or with full opportunity to ascertain them, unreasonably postpone application for relief.

12. SAME—RATIFICATION BY ACQUIESCENCE.
A contract not wholly invalid when executed, nor prohibited by law as relating to some illegal transaction, and which is therefore voidable only, may become, by the acts of the parties or by long acquiescence, binding upon them, especially where the nature of the property, which is the subject of the contract, is such that its value may be affected by its relations to other property of like kind or by the changing business of the country.

13. SAME—DELAY IN SUING.
While the law will always condemn the transactions of a party in his own behalf, when in respect to the matter concerned he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted, resistance of that character cannot be predicated of a case of a merely voidable contract, where the party complaining has not simply been silent for 20 years, but with knowledge of the facts, or with full opportunity to ascertain them, has enjoyed the fruits of the contract, and treated it as valid.

14. SAME—KNOWLEDGE OF STOCKHOLDERS.
The stockholders of the Dubuque Company, who would have ascertained the facts relating to the lease by the exercise of the slightest diligence at any time during the 20 years, are chargeable with knowledge of the fact of the lease, as well as of its terms, and cannot question its validity after it has been acted on during all that time by the Cedar Falls Company and its creditors.

In Equity.

Morris K. Jesup, plaintiff in the original suit, and a citizen of New York, is the surviving trustee in a mortgage made September 22, 1866, by the Cedar Falls & Minnesota Railroad Company, covering its road and the net earnings thereof, its franchises, privileges, right of way, depot grounds, and all material designed to be used in construction; also "the rents and moneys payable by any person or company" to that corporation "for the use of said road and appurtenances."

The main question in the original suit is whether the Illinois Central Railroad Company is liable to account to said trustee for certain rents reserved to the Cedar Falls & Minnesota Railroad Company in a lease by the latter company of its road, franchises, privileges, etc., to the Dubuque & Sioux City Railroad Company, a corporation of Iowa, which lease was assumed by the Illinois Central Railroad Company in a written contract, whereby the Dubuque & Sioux City Railroad Company, to be hereafter called the "Dubuque Company," leased its own road to the Illinois Central Railroad Company, for a specified term, with an option to retain it in perpetuity.

The question in the cross-suit is whether the Dubuque Company is entitled to a decree for the surrender and cancellation of the lease to it of the Cedar Falls & Minnesota Railroad.

The original and cross suits, as to some matters, are so closely connected that it will be proper to state the principal facts in chronological order, without stopping to distinguish those specially applicable to the original suit from those that are material in the cross-suit.

The case made by the pleadings, exhibits, and proofs is, in substance, as follows:

The Cedar Falls & Minnesota Railroad Company, to be hereafter called the "Cedar Falls Company," was incorporated in the year 1858, under the laws of Iowa, for the purpose of constructing a railway from a point in that state on the Dubuque & Sioux City Railroad to the Minnesota state line. Its proposed route was through Waverly and Charles City to Mona, on the line between Iowa and Minnesota.

The completion of the road to Mona became an object of great interest to the Dubuque Company. As early as December 29, 1860, the board of directors of that company, obviously for the purpose of assisting the Cedar Falls Company, passed a resolution reciting that it was "important to the interests of the Dubuque and Sioux City Railroad that the construction of the Cedar Falls and Minnesota Railroad, lying between the Dubuque and Sioux City Railroad and the state line of Minnesota, should be prosecuted with all possible dispatch," and directing "that for the term of five years from the 1st of January, 1862, there shall be paid by the Dubuque and Sioux City Railroad Company, in monthly payments, to the order of the trustees of the first mortgage bonds of the Cedar Falls and Minneapolis Railroad Company, fifteen per cent. of the gross earnings from all business passing to and from all points upon the Cedar Falls and Minnesota Railroad, provided the same is upon the through tickets or bills of lading, and upon condition that such fifteen per cent. so paid shall be applied to the purchase and cancellation of the bonds issued by said company." In 1863 it made, with the Cedar Falls Company, what is called a "drawback contract," to continue in force for 10 years from March 15, 1863, whereby, "for the purpose of inducing the investment of capital in the construction of the Cedar Falls and Minnesota Railroad," it agreed with "John Jackson, M. K. Jesup, and James Huff, trustees of said Cedar Falls and Minnesota Railroad," to pay over to them "fifteen per cent. of the gross earnings earned upon their road, or [upon] any part thereof, in the transportation of passengers or freight coming from or going to any place or station on said Cedar Falls and Minnesota road." That contract provided that this 15 per cent. should be applied to the payment of interest on any construction bonds issued for the purpose of constructing or equipping the Cedar Falls road.

In the annual report of the president of the Dubuque Company, January 1, 1864, it was said that "when another division shall be completed, and the road built from Cedar Falls to the Minnesota state line, a portion of which is now under contract, there would seem to be no reason why

the common stock even should not become valuable." In the report of the operations of the Dubuque Company for the five months ending March 16, 1864, it was said:

"The Cedar Falls and Minnesota Railroad is under contract from Cedar Falls to Waverly, a distance of 14 miles. It is expected that it will be completed and in operation early next fall. On the 9th of March, 1863, the Dubuque and Sioux City Railroad Company entered into a contract allowing a drawback to that road of 15 per cent. of all business coming from or going to that road. The Galena and Chicago Union and Illinois Central Companies will both enter into like contracts. This road when completed to the state line will, in connection with the Minnesota Central Railroad, form a continuous line to Minneapolis and St. Paul. The Minnesota Central Railroad Company expect to build their road to within thirty miles of the state line this year. These two roads when completed will form a very important railroad connection, and a valuable contributor to the Dubuque and Sioux City. The country on the line is tolerably well settled now, and is one of the finest wheat-growing regions west of the Mississippi. The Cedar valley for beauty, fertility of soil, and water-power cannot be surpassed by any other valley in the north-west."

These views were shared by many, if not by all, who were largely interested in the prosperity of the Dubuque Company. The result was that in October, 1864, the directors of that company passed a resolution authorizing its president to lease the Cedar Falls Railroad from station to station, as the track was completed and in running order, and Allan Campbell, one of the board, was appointed to examine the road, and report upon the amount of rent to be paid. In his report he stated that, while he thought well "of the business of this northern line," it was impossible, upon a cursory examination, and before the road was completed, to establish a rent that would be fair and equitable between the parties. He added:

"From my own observation, and from information derived from various sources, I feel a strong assurance that this northern road, when completed to the Minnesota state line, a distance of ——— miles, will tend materially to increase the receipts of the Dubuque and Sioux City road. The route passes through a rich grain country, and along water-courses which furnish a cheap and never-failing power for manufacturing purposes."

The terms of the proposed lease were for some time the subject of considerable discussion, particularly as to the amount of rent to be paid to the Cedar Falls Company. The matter was referred by that company to Col. R. B. Mason, a stockholder and former director of the Dubuque Company, and T. B. Blackstone, president of the Chicago & Alton Railroad Company, both gentlemen of high standing and of large experience in railroad matters. Neither of them had the slightest interest in the Cedar Falls Company. To them was submitted the form of a lease prepared by the vice-president of the Cedar Falls Company. They reported:

"The Dubuque and Sioux City Railroad Company under such a lease would receive, when the earnings amounted to $3,500 per mile, about 54 per cent., and, when the earnings amounted to $10,000 per mile, about 58 per cent., of the gross earnings. We do not think this would leave a very large margin for the Dubuque and Sioux City Railroad Company. But if a good road is constructed, complete in all respects, we believe, from the best information we have, that if $1,500 per mile and forty per cent. of the excess over $3,500

per mile was paid to the Cedar Falls and Minnesota Railroad, it would be a fair and equitable arrangement between the parties."

The letter or report having been submitted to the directors of the Dubuque Company, the latter authorized a lease upon the terms suggested by Mason and Blackstone, "except that the division of earnings after $3,500 per mile shall be seventy per cent. for the Dubuque and Sioux City Railroad Company and thirty per cent. for the Cedar Falls and Minnesota Railroad Company, and that said lease commence January 1, 1866;" further, that the lease should be in lieu of the drawback contract then existing between the companies.

By this lease, which was dated September 27, 1866, the Dubuque Company agreed to pay to the Cedar Falls Company, during the term of 40 years from January 1, 1867, a fixed rental of $1,500 per mile per annum, in equal monthly installments, and a further rent, every six months, of 35 per cent. of the gross earnings of the leased property when they exceeded $3,500 per mile per annum, and did not exceed $7,000 per mile per annum, and 30 per cent. of the gross earnings when they exceeded the latter sum per mile per annum. The lessee company covenanted to take possession of the road as it was opened from station to station, and to fully and efficiently equip, operate, and maintain it, assuming all liabilities and paying all expenses incident thereto, and giving to the leased property the same care and attention bestowed upon its own road.

This lease, by its terms, superseded the then existing drawback contract between the parties.

The mortgage in question, although antedating this lease, must have been executed subsequently, for it recites that the Cedar Falls Company "have leased their road, constructed and to be constructed, to the Dubuque and Sioux City Railroad Company," and states the terms of the lease as they appear in the instrument of September 27, 1866; or it may have been executed on the day it bears date, in anticipation of a lease then agreed to be made. It was given to secure the proper application of the rents and profits of the Cedar Falls road, constructed and to be constructed, and the punctual payment of the principal and interest of construction bonds proposed to be issued, and which were issued, for $1,407,000, maturing January 1, 1907, and bearing interest at the rate of 7 per cent. per annum, payable semi-annually. It constitutes a second lien on the part of the road then constructed from the junction with the Dubuque road, near Cedar Falls, to Waverly, a distance of about 14 miles, and a first lien upon the road to be constructed from Waverly to the Minnesota state line. The first lien on the 14 miles of road then constructed was created by a recorded deed of trust to Jesup and Richmond, dated April 25, 1864, to secure certain bonds issued by the Cedar Falls Company, of which $210,000 were outstanding when the mortgage for $1,407,000 was made. The mortgage of September 22, 1866, recites the purpose of the Cedar Falls Company to issue certificates of stock on its railroad, constructed and to be constructed, at the rate of $21,000 per mile, including the stock already issued. It also provides, among

other things, that the Cedar Falls Company should remain in possession of its road, or in receipt of the rents and profits, so long as it was not in default as to any of the bonds mentioned, or in applying the income, rents, and profits, as indicated in the mortgage; but that "in case of default of payment of either of said bonds or of the interest coupons, or of failure to apply the income, rents, and profits as above provided, it shall be the duty of said trustees to proceed to enforce payment by foreclosure, or to collect and disburse the income, rents, and profits in the manner above provided, as to them shall seem best for the interest of all parties concerned."

The Dubuque Company took possession of the Cedar Falls road under the above lease. But on the 13th day of September, 1867, it leased its own road and appurtenances to the Illinois Central Railroad Company for the term of 20 years from October 1, 1867, at an annual rental of 35 per cent. of its gross earnings during the first 10 years of the lease, and 36 per cent. during the last 10 years, with the option, "during said term of twenty years, to take the Dubuque and Sioux City Railroad and before-mentioned property in perpetuity, paying 36 per cent. of the gross earnings thereof, and in that case no charge for improvements of any kind is to be made." It was also provided that, if the Illinois Central Railroad Company failed to give notice of its election to surrender the property at the end of 20 years, it would be deemed to have exercised the option to keep it in perpetuity at an annual rental of 36 per cent. of its gross earnings.

This lease, to which was appended a copy of the Cedar Falls lease, contained a clause upon which Jesup, the trustee, bases, in part, his claim against the Illinois Central Railroad Company. That clause is in these words:

> "It is further agreed that the party of the second part [the Illinois Central Railroad Company] shall assume the lease made by the party of the first part [the Dubuque Company] with the Cedar Falls and Minnesota Railroad Company."

The Illinois Central Railroad Company took possession of the Dubuque and Cedar Falls roads under the lease of September 13, 1867, and operated both roads, paying to the Dubuque Company, for a time, the rental stipulated in the lease of September 27, 1866, but subsequently making payment directly to the Cedar Falls Company. It elected, upon due notice, to surrender the Dubuque road after the expiration of 20 years from October 1, 1867, and on the 1st of October, 1887, it did surrender to the Dubuque Company the possession of both the Dubuque and Cedar Falls roads. The Dubuque Company and the Illinois Central Railroad Company had a settlement, in which the former admitted its indebtedness to the latter in the sum of $529,634, which was paid by a note maturing October 1, 1888. The parties agreed, in that settlement, that neither had any claim or demand against the other growing out of the lease of September 13, 1867.

It is admitted that the rental accruing to the Cedar Falls Company during the 20 years its road was held by the Illinois Central Railroad

Company, that is, up to October 1, 1887, was fully paid by the latter company before this litigation was commenced.

The original suit was instituted by Jesup and Forrest, trustees, on the 1st day of March, 1888, against the three railroad companies named in the caption. The bill, after setting out the terms of the mortgage of September 22, 1866, and the lease of September 27, 1866, alleged that the latter was the result of nogotiations between the defendant railway companies, having in view the extension of the Cedar Falls road to the Minnesota line, so as to open that state to the Illinois Central Railroad and its connections; that said bonds, aggregating $1,407,000, and the mortgage to secure the same, were made in order that the lease of the Cedar Falls road might be executed according to the understanding resulting from the alleged negotiations; that the Illinois Central Railroad Company entered into possession of that part of the Cedar Falls road then constructed, and was accepted as lessee in fact in place of the Dubuque Company; that thereupon, and not before, the construction bonds were placed upon the market and negotiated upon the faith of both leases, having on them, pursuant to an agreement with the Illinois Central Railroad Company, an indorsement dated New York, October 1, 1867, and signed by John S. Kennedy, as president of the Cedar Falls Company, in these words:

"The lease of the Cedar Falls and Minnesota Railroad to the Dubuque and Sioux City Railroad Company, referred to in the within bond, has this day been assumed by the Illinois Central Railroad Company, and the minimun rent which that company has thereby obligated to pay in monthly installments is more than sufficient to meet the entire amount of interest on this issue of bonds;"

—that the work of constructing the remaining portion of the Cedar Falls road was carried on with the money derived from the sale of such bonds, and was accepted by the Illinois Central Railroad Company, which continued to operate the road, receiving the rents and income therefrom, and paying the fixed rental thereof to the Cedar Falls Company; and that about or during the year 1866 the Illinois Central Railroad Company purchased and acquired control of the stock, and thereby of the management, of the Dubuque Company, for the purpose, among other things, of wrecking and destroying the Cedar Falls Company, and thereupon subverted the Dubuque road to its own use and purposes, causing the Dubuque Company to take steps looking to a surrender by it of the lease of the Cedar Falls road.

The bill further alleged that the Illinois Central Railroad Company has neglected to perform the covenants in the lease of 1867, and to account for the earnings and income of the Cedar Falls road, in consequence of which the Cedar Falls Company has made default in the payment of the bonds and coupons mentioned in said deed of trust, to-wit, the semi-annual coupons due January 1, 1888; that the latter company was insolvent, and without resources, other than said leased property; that it had not only failed to collect and properly apply the income, rents, and profits of the mortgaged property, but had misapplied some portions of

them; and that a foreclosure and sale of the mortgaged property, before the obligation of the Illinois Central Railroad Company to assume the lease of September 27, 1866, shall have been enforced, would be injurious to the Cedar Falls Company and its stockholders, as well as to the holders of the bonds secured by the mortgage.

The trustees pray that it may be adjudged and decreed:

That they alone are henceforth entitled to receive and collect the rents, income, and profits arising from the mortgaged premises; that they be subrogated to the rights and interests of the Cedar Falls Company under the lease to the Dubuque Company for and during the remainder of the term of 40 years, with all the rights of the lessor against the other defendants for an accounting of past transactions under the lease; that the lease of September 27, 1866, is a lawful, valid, and subsisting instrument, assumed by and binding upon the Illinois Central Railroad Company, according to the terms and tenor thereof, throughout the entire term of 40 years originally demised; that the latter company account for the rents reserved under the lease; that the plaintiffs have judgment against it for all rents, income, and profits now due and owing to the Cedar Falls Company under and by virtue of such lease; that the Illinois Central Railroad Company is estopped from alleging or giving out that the indorsement on said bonds was not their act and deed, and is bound to continue to occupy the premises demised by the Cedar Falls Company, operating, repairing, and maintaining the same, as provided for in the lease; that the defendants be restrained from entering into any arrangement, or from agreeing, that said lease is void or voidable, or from paying rents to any other persons than the plaintiff; that they severally account to the plaintiff for all sums of money received by them, or either of them, for the demised premises; that the Illinois Central Railroad Company, under the direction of the court, put the demised premises in good condition and repair, as required by the lease, and that an accounting be had to ascertain the amount necessary for that purpose; that, upon its refusal and neglect to pay such amount, judgment be entered therefor in favor of the plaintiff; and that the plaintiff have complete, full, and adequate relief as may seem meet.

The Cedar Falls Company entered its appearance, but has never filed an answer to the original bill.

The Illinois Central Railroad Company answered, denying that it was directly or indirectly concerned in the negotiations resulting in the lease of the Cedar Falls road to the Dubuque Company, or that it ever assumed any obligations in respect to that road, except those contained in its lease of the Dubuque road, and that it had fully met and performed all of those obligations. It denied that it assumed the lease of the Cedar Falls road for the full term of 40 years, and insisted that it only agreed to carry out the provisions thereof during the term for which it leased, and should retain, the Dubuque road and appurtenances. It denies that it is indebted to plaintiff or to the Cedar Falls Company in any sum whatever, because it had, prior to the institution of this action, paid over to the Cedar Falls Company the entire rent reserved by the lease of

September 27, 1866, for the full term during which it held its road, and, on the 1st day of October, 1887, surrendered to the Dubuque Company both the Dubuque and Cedar Falls roads. The answer of this company is quite lengthy, but the above is a sufficient statement of the grounds upon which it resists any decree against itself.

It will be remembered that some time after its answer was filed the Illinois Central Company moved that the suit be dismissed upon the ground that the Dubuque Company was an indispensable party to the relief sought in the original suit, and, not having voluntarily appeared herein, and being an Iowa corporation, it could not be brought before the court by service of process, so as to be bound by any decree that might be rendered. Upon the hearing of this motion it was ordered, December 4, 1888, that the bill and all proceedings under it stand dismissed, unless the Dubuque Company, on or before the first Monday in February, 1889, by voluntary appearance herein or otherwise, became subject to the authority of the court in this case.

The Dubuque Company subsequently entered its appearance and filed an answer. It also, by leave of the court, filed a cross-bill against the trustees in the mortgage of 1867 and against the Cedar Falls Company, which states with much detail the facts and circumstances upon which rests its claim to have the lease of September 27, 1866, set aside and canceled. The cross-bill proceeds, mainly, on these grounds: That Morris K. Jesup, Platt Smith, Charles L. Frost, D. Willis James, and Isaac H. Knox, continuously, and others from time to time, were directors, officers, and agents of the Dubuque Company; that they and their associates constituted a syndicate organized for the purpose of constructing the Cedar Falls road, not for the purpose of operating it themselves, but as a piece of marketable property; that they did this under the corporate name of the Cedar Falls Company, which, as an organization, they owned and controlled; that in negotiating and making the lease of the Cedar Falls road, which lease was and is burdensome and injurious to the Dubuque Company, the managing officers and directors of the latter company were, as such directors and officers, dealing with themselves, in reference to matters in which they were privately and personally interested; that such dealings between parties thus situated were prohibited by law and by public policy; that in said transactions, Jesup and his "associates," holding fiduciary relations with the Dubuque Company, knowingly and fraudulently disregarded and sacrificed its interests for the purposes of profit and advantage to themselves individually as stockholders and bondholders of the Cedar Falls Company; and, consequently, that the Dubuque Company is entitled to a decree canceling the lease in question.

It is also alleged in the cross-bill that during the term of 20 years, while the Cedar Falls road was controlled by the Illinois Central Railroad Company, it was a matter of no moment to the stockholders of the Dubuque Company what was the amount of rent reserved to the Cedar Falls Company by the lease of September 27, 1866, because the Illinois Central Railroad Company, in its contract with the Dubuque Company,

had assumed such lease; that Jesup remained in the position of president and director of the Dubuque Company from the date of the execution of the lease of 1866 until September, 1887, during which time he assumed and exercised, and was accorded by the other acting directors, the absolute and exclusive control of that company; that he dictated its policy and management, and concealed from it all knowledge of the facts; that on the day last named he and the other directors of the Dubuque Company resigned, whereby its stockholders, through a new board of directors, became at the end of 20 years for the first time possessed of the ability to ascertain the true position of that company, and to manage its affairs for its best welfare; that, until the present time, it has not had the power to institute in its own name any action for the purpose of submitting the question of the validity of said lease to judicial decision; and that, while such lease is in existence under the hands of its officers and its corporate seal, it affords a continuous right of action at law to the Cedar Falls Company and the trustees in its mortgage for the recovery, monthly, of the stipulated rental.

Other grounds set out in the cross-bill for the cancellation of the lease are that there was no authority under the laws of Iowa for the execution either of the lease or of the mortgage; that the lease of the Cedar Falls road was never lawfully authorized and adopted by the then directors of the Dubuque Company, three-fourths in value of the preferred stockholders not having given their written consent to it, or to the indebtedness created thereby; and that it was never lawfully or intelligently ratified or confirmed by the stockholders of that company.

Jesup, trustee, (his co-trustee, Forrest, also a citizen of New York, having died after this litigation commenced,) and the Cedar Falls Company filed separate answers to the cross-bill, each denying all the allegations therein contained that impeached the integrity or fairness of the mortgage of September 22, 1866, or the lease of September 27, 1866, and contesting the right of the Dubuque Company to have the lease set aside and canceled.

After the issues upon the cross-bill were made up, this cause was before the court upon various motions, among others, a motion of the Dubuque Company for an injunction restraining the surviving trustee, Jesup, and the Cedar Falls Company from commencing or prosecuting any separate action against it for the recovery of rents accruing under the lease of September 27, 1866. By an order entered May 13, 1889, this motion was granted, upon condition that the Dubuque Company deposited in the registry of this court, subject to its final order, the full amount of fixed rentals accruing under said lease and unpaid, namely, those accruing since October 1, 1887, at the rate of $1,500 per mile per annum, and that it deposit further fixed rentals, as they became due and payable; such deposits, however, being without prejudice to the rights of the parties, or either of them, in respect to the ultimate disposition of the sums so paid into court. This order was complied with by a deposit in the registry of the court of the sum of $187,553.28, the amount of said fixed rentals, at the above rate, from October 1, 1887, to May 1, 1889.

The injunction asked for was accordingly granted. The fixed rentals accruing since the last date have been regularly paid into court.

Thomas De Witt Cuyler, *Francis B. Daniels*, and *John E. Parsons*, for Morris K. Jesup, trustee.

Stephen H. Olin and *Lyman & Jackson*, for Cedar Falls & Minnesota R. Co.

Benjamin F. Ayer, for Illinois Central R. Co.

John N. Jewell, for Dubuque & Sioux City R. Co.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

With this general outline of the case, as disclosed by a very voluminous record, the court will proceed to consider the issues arising in the original suit.

We have seen that by the contract of September 13, 1867, between the Dubuque Company and the Illinois Central Railroad Company, the latter agreed to assume the lease made by the Cedar Falls & Minnesota Railroad Company to the Dubuque Company. If this assumption made the Illinois Central Railroad Company liable, as between it and the Dubuque Company, for the stipulated rental of the Cedar Falls road, during the whole period of 40 years for which it was leased to the Dubuque Company, and if the latter company, after, or when, taking back that road into its own possession, could not, to the prejudice of the Cedar Falls Company or its mortgage bondholders, discharge the Illinois Central Railroad Company from such liability, then the right of the trustee in the mortgage of September 22, 1866, to invoke the jurisdiction of a court of equity, in respect to any amount due from the Illinois Central Railroad Company, cannot well be doubted. That mortgage refers to the lease by the Dubuque Company, and covers not only the net earnings of the Cedar Falls road, constructed and to be constructed, but the rents and moneys payable by any person or company to the Cedar Falls Company for the use of said road and appurtenances. The agreement of the Illinois Central Railroad Company to assume the lease of the Cedar Falls road created no direct obligation on its part to the Cedar Falls Company, or to the trustee in the mortgage of September 22, 1866, that could be enforced by an action at law. Only by a suit in equity, to which the Cedar Falls Company in some form was a party, could the trustee obtain the benefit of the assumption by the Illinois Central Railroad Company of the lease of the Cedar Falls road to the Dubuque Company. *National Bank* v. *Grand Lodge*, 98 U. S. 123; *Keller* v. *Ashford*, 133 U. S. 610, 620, 622, 10 Sup. Ct. Rep. 494. This point is referred to and determined, because the objection to the original suit as not being one of equitable cognizance, if sound, would be sufficient to dispose of the case as to the Illinois Central Railroad Company without reference to any other question.

It therefore becomes necessary to inquire as to the scope and effect of the agreement of the Illinois Central Railroad Company to assume the lease of the Cedar Falls road. As neither the Cedar Falls Company nor

the trustees in the mortgage were parties to that agreement their understanding of its provisions, after or when its contents became known to them, cannot be of consequence. The inquiry must be restricted to the intention of the two corporations that executed it. Now, when the Illinois Central Railroad Company agreed to assume the lease of the Cedar Falls road, was it intended that it should become bound for the rent of the Cedar Falls road, after it had surrendered the possession of the Dubuque road, which constituted the link between the Illinois Central railroad and the Cedar Falls road? Of what use would the Cedar Falls road have been to the Illinois Central Railroad Company, after the surrender of the Dubuque road? It is so clear from the whole structure of the lease of September 13, 1867, that no such intention existed upon the part either of the Illinois Central Railroad Company or of the Dubuque Company that an analysis of its several provisions is unnecessary. Nor is there any ground to believe that the Cedar Falls Company or the trustees in its mortgage supposed that they could look to the Illinois Central Railroad Company for rents accruing subsequently to the surrender (whenever that might occur) of the Cedar Falls road to the Dubuque Company. If the Illinois Central Railroad Company had exercised its option to take the Dubuque road in perpetuity, the Cedar Falls Company and the trustees in its mortgage might, perhaps, have held the former liable for the rents of the Cedar Falls road during the whole term of 40 years for which it was leased to the Dubuque Company. But that option was not exercised. The reasonable interpretation of the instrument of September 13, 1867, taking into view its words and the circumstances attending its execution, is that the Illinois Central Railroad Company, so long and only so long, as it retained the Dubuque road as lessee, would meet the obligations imposed upon the Dubuque Company in respect to the lease of the Cedar Falls road. And this construction is in no wise affected by the indorsement over the signature of the president of the Cedar Falls Company on the bonds secured by the mortgage of 1866. In respect to that indorsement, it may be said that it does not impose any obligation upon the Illinois Central Railroad Company, even by way of estoppel. There was no act upon the part of that company, in respect to the bonds or that indorsement, from which an estoppel could arise. The indorsement was not made at the instance or by the direction of the Illinois Central Railroad Company. So far as the record shows, it was entirely the work of those interested in the negotiation of the bonds secured by the mortgage of September 22, 1866. The facts set out in the indorsement are true. But if the parties making it, or causing it to be made, omitted to state the additional fact that the very instrument containing the assumption of the lease of the Cedar Falls road expressly provided for the termination of the lease of the Dubuque road at the end of 20 years, at the pleasure of the Illinois Central Railroad Company, the responsibility for such omission is upon them, and not upon the latter company.

The result is that, as the rentals due the Cedar Falls Company up to October 1, 1887, on which day its road was surrendered to the Dubuque

Company, were fully paid by the Illinois Central Railroad Company before the commencement of this suit, there is no ground whatever for a decree against that corporation. As to it, the original suit must be dismissed, with costs against the plaintiff.

In respect to the jurisdiction of the court to proceed in the cross-suit after the dismissal of the original suit as to the Illinois Central Railroad Company, we are of opinion that a final decree may be passed determining the validity of the lease of 1866 as between the Dubuque and Cedar Falls Companies, and the right of the trustee in the mortgage of 1866 to the funds in court. The original suit is based upon that lease as a valid instrument for all the purposes embraced by it, and a part of the relief sought is a decree establishing the validity of the lease, and subrogating the trustee to all the rights of the Cedar Falls Company under it, with sole authority, in view as well of the default of that company and its embarrassed financial condition, as of its alleged failure to collect and properly apply the rents and profits accruing from the mortgaged property, to receive, sue for, and have possession of such rents and profits for the purposes expressed in the mortgage. Now the relief sought by the cross-bill is directly connected with the subject-matter of the original suit, and is of an affirmative character. The cross-suit strikes at the foundation of the trustee's claim to the funds in court, namely, the lease of 1866, and asks a decree to protect the Dubuque Company from any suit upon it, either by the trustee or by the Cedar Falls Company. We perceive no difficulty arising out of the established rules of equity in the way of a comprehensive decree in the cross-suit that will determine finally, as between the Dubuque Company and the Cedar Falls Company, the efficacy of the lease of 1866, and therefore the right of the trustee, Jesup, to have and collect the rents arising from that instrument. *Kingsbury* v. *Buckner*, 134 U. S. 650, 676, 677, 10 Sup. Ct. Rep. 638; *Hurd* v. *Case*, 32 Ill. 45, 49; *Jones* v. *Smith*, 14 Ill. 229–232; *Lloyd* v. *Kirkwood*, 112 Ill. 329, 336. In Story's Eq. Pl. § 399, note, it is said:

"A distinction should be drawn between a cross-bill which seeks affirmative relief as to other matters than those brought in suit by the bill, yet properly connected therewith, and a cross-bill which is filed simply as a means of defense, since there are rules applicable to one class which do not apply to the other. Thus a dismissal of the original bill carries the cross-bill with it, when the latter seeks relief by way of defense; but it is otherwise, and relief may still be given upon the cross-bill, where affirmative relief is sought thereby as to collateral matters properly presented in connection with the matters adjudged in the bill."

So, in *Chamley* v. *Dunsany*, 2 Schoales & L. 718, Lord ELDON said:

"The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may then be decided between him and his co-defendant, and the co-defendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjudged between the defendants; and, if a court of equity refused so to decree, it would be a good cause of appeal by either defendant."

See, also, *Ladner* v. *Ogden*, 31 Miss. 344; *Worrell* v. *Wade*, 17 Iowa, 96; *Ragland* v. *Broadnax*, 29 Grat. 401.

Nor is the right to make a final decree in the cross-suit affected by the circumstance that the Dubuque Company and the Cedar Falls Company are both Iowa corporations. As said in *Schenck* v. *Peay*, 1 Woolw. 175:

"A cross-bill will be sustained in a federal court, where a defendant is compelled to avail himself of that mode of defense in order to protect himself from an injustice resulting to him from the position in which the cause stands, although the parties, plaintiff and defendant, or some of them, are citizens of the same state, provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction."

Jones v. *Andrews*, 10 Wall. 333; *Krippendorf* v. *Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; *Covell* v. *Heyman*, 111 U. S. 176, 179, 4 Sup. Ct. Rep. 355; *Pacific Railroad Co.* v. *Missouri Pac. R. Co.*, 111 U. S. 505, 522, 4 Sup. Ct. Rep. 583; *Gumbel* v. *Pitkin*, 124 U. S. 131, 144, 8 Sup. Ct. Rep. 379; *Johnson* v. *Christian*, 125 U. S. 642, 646, 8 Sup. Ct. Rep. 989, 1135.

Is, then, the Dubuque Company entitled to a decree requiring the surrender and cancellation of the lease of 1866? To what extent the Cedar Falls road, when completed, would bring business to the Dubuque road, and what was the probability of the construction of roads in Minnesota that would connect that road over the Cedar Falls road with the cities of St. Paul and Minneapolis, were matters in respect to which all parties connected with the lease of 1866 had equal opportunity for information. Indeed, they were matters about which neither party could well mislead the other. Standing in the light of the actual results of the lease, as now depicted, it is easy to see that those representing the Dubuque Company in making that lease would have done well, if, out of abundant caution, they had made its continuance dependent upon the construction, within a reasonable or fixed time, of a road or roads directly connecting Mona with St. Paul or Minneapolis. But such error of judgment, if it can be so called, upon the part of the directors of the Dubuque Company, does not justify the cancellation of the lease. The evidence of their failure in that particular mode to guard its interests, if at all pertinent to the present inquiry, can only be so in its remote bearing upon other propositions embodying the principal grounds upon which the cancellation of the lease is sought. Those propositions are that the individuals chiefly instrumental in fastening the lease of 1866 upon the Dubuque Company for the term of 40 years were prevented from exercising a sound or impartial judgment in its behalf, by reason of their personal interest in, and their relations with, the Cedar Falls Company; that they occupied at the time such relations of trust to the Dubuque Company as forbade them from representing it in a matter in which their private interests would be promoted in proportion as the terms imposed were hard on that corporation and beneficial to the Cedar Falls Company; that the contract in question, nominally one of lease, was yet one that cannot properly be enforced at law or in equity, being in its inception fraudulent and against public policy, and therefore one against which the affirmative relief asked should be given, all parties in interest being before the court.

This proposition, so far as it imputes actual fraud in the matter of the lease, is not sustained by the record. We are of opinion, upon a careful review of all the evidence, that those who participated in the making of the lease, whether on the one side or the other, believed in good faith that the completion of the Cedar Falls road to the Minnesota state line, and the leasing of it by the Dubuque Company for a term of years, at a reasonable rental, was important to, if not imperatively required by, the interests of both companies, each of which was at that time in such financial condition as to excite uneasiness in the minds of parties interested in their prosperity. We cannot perceive that there was any purpose upon the part of those to whom fraud is now imputed either to wreck the Dubuque Company, or to impose unnecessary burdens upon it for the purpose of giving increased value to the bonds and stock of the Cedar Falls Company. No one at that time doubted that the Cedar Falls road, if completed, would be a valuable feeder of the Dubuque road. And there was a hope, which unfortunately for all concerned was not realized, that the Cedar Falls road would shortly or ultimately form a link in a continuous line of road or roads connecting the Dubuque road directly with the cities of St. Paul and Minneapolis. The only matter that was the subject of serious discussion was as to the amount of rent to be exacted from the Dubuque Company for the use of the Cedar Falls road. And that question was not determined in a corner, or without full opportunity to consider it. In the face of the report made by Mason and Blackstone, disinterested and competent experts, as to what would be a reasonable rental to be paid by the Dubuque Company, upon the basis of a completed road in good condition, the presumption of fraud should not be indulged, simply because it may now appear, as the result of circumstances not foreseen, or not deemed at the time of sufficient importance to be guarded against, that the rent stipulated in the lease is larger than the business over the Cedar Falls road really justified.

Much stress, in this connection, is laid upon the evidence tending to prove that the amount of bonds and stocks allowed by the Cedar Falls Company to those constructing its road was largely in excess of the actual cost of construction. Whether such be the fact or not, we need not stop to inquire. That is a matter between the Cedar Falls Company and those receiving its bonds and stock in payment for construction. It does not, in any wise, concern the Dubuque Company, nor elucidate the real issues in the present case. If it were true that, under all the circumstances as they existed in 1866, including the depreciated value of the bonds and stocks of the Cedar Falls Company, the amount allowed by it for construction was too large, that fact would not show that the Dubuque Company is entitled to a decree canceling the lease which it made of the Cedar Falls road. The question before the Dubuque Company in 1866 was whether, in justice to its stockholders, it could afford to pay the proposed rent for the use of the Cedar Falls road. The decision of that question did not depend upon the amount the Cedar Falls Company might pay, in stocks and bonds, for the construction of its road, but it did depend upon the amount of business that would probably be done

on the Cedar Falls road after it passed, under the lease, to the control of the Dubuque Company, and after its completion to Mona. There was no concealment or misrepresentation as to the business done over the 14 miles of road constructed before the lease was made. And as to the business that would be done on the entire line when completed to Mona, and as to the probability of ultimate connection over other roads with St. Paul or Minneapolis, these were matters about which differences of opinion would exist, and were to be determined in the light of what is called "railroad experience."

Looking at all the facts and circumstances, we are of opinion that the directors of the Dubuque Company, including those who, at the time, were holders of the bonds and stocks of the Cedar Falls Company, and expected to become interested in constructing the Cedar Falls road to Mona, were not guilty of actual fraud in leasing the Cedar Falls road upon the terms prescribed in the instrument of September 27, 1866. The lease seems to have been made in the exercise of an honest judgment upon their part as to what, under all the circumstances, the best interests of both companies absolutely demanded. The excess, if any, of the rents agreed to be paid by the Dubuque Company, over what the business of the Cedar Falls road justified, is not such as to raise a presumption of fraud upon the part of those causing the lease to be made. At most, it would only show error of judgment in respect to a matter of business.

Recurring to the main proposition advanced by the Dubuque Company, we next inquire whether the lease of 1866 should be adjudged void upon grounds of public policy arising out of the relations of trust which Jesup and others, at the time, held to that company. Without stating in detail the proceedings of the various meetings of the board of directors of the Dubuque Company at which the subject of the lease was mentioned or discussed, it is sufficient to say that the lease was approved by nine directors. Of that number, five, Morton, Knox, Stout, Schuchardt, and Robb, had no interest whatever in the Cedar Falls Company as stockholders, bondholders, or creditors, and all of that five, unless Robb was an exception, were large holders of the stock of the Dubuque Company. Of the remaining directors, Jesup, Frost, Smith, and James, were at the time holders of outstanding bonds and stock of the Cedar Falls Company, the value of which would be increased by the completion of the road. Indeed, it is a fair inference from the testimony that the directors of the Dubuque Company who were not interested in the Cedar Falls Company looked to Jesup, James, Frost, and Smith, or some of them, to provide the means for the completion of the Cedar Falls road to the state line. It is also true that the four directors last named expected to become holders of the bonds and stock issued on account of the additional road to be constructed from Waverly to Mona. While two of that number, Jesup and James, were large holders of the stock of the Dubuque Company, their interests in the Cedar Falls Company were greater than in the other company. It is not, therefore, to be questioned that, when the lease of 1866 was made, Jesup, Frost, Smith, and James

were in a position where their private interests in connection with the Cedar Falls Company might conflict with their duty as directors of the Dubuque Company. They were on both sides of the question as to the lease of the Cedar Falls road upon the terms stipulated. As stockholders and bondholders of the Cedar Falls Company, they were interested in binding the Dubuque Company to pay the highest possible rent. As directors of the Dubuque Company, their duty was to protect it against burdens that could not be prudently or safely assumed, and to advance its interests in every proper way.

These facts being admitted or proven, the inquiry yet remains, to what extent do they affect the validity and binding force of the lease or justify a decree of cancellation? The attention of the court has been called to *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658. That was a case of a contract authorized by railroad directors pursuant to a scheme by which they were to share with the other party large sums to be realized from the contract. The court said:

"It is among the rudiments of the law that the same person cannot act for himself, and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. * * * The law, therefore, will always condemn the transactions of a party on his own behalf, when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule. They are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of others for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the court for consideration."

The case from which the above extract is made, and others of like character, are cited as requiring a decree canceling the lease in question as void upon grounds of public policy.

We do not think that the cases referred to justify such a decree in this case. A contract, in the name of a corporation, by its board of directors, is not void, if otherwise unassailable, simply because some of the directors, constituting a minority, used their position with the effect, or even for the purpose, of advancing their personal interests to the injury of the company they assumed to represent. The lease here in question, as we have seen, was approved by the nine directors of the Dubuque Company, five of whom had no personal ends to subserve by imposing upon the company a lease that was unreasonable or harsh in its terms. On the contrary, as already stated, at least four of that five were holders of the stock of the Dubuque Company, and therefore interested to guard

it against unnecessary or improper burdens. We need not inquire as to the extent of their information touching the facts bearing upon the question of the proposed lease. It is sufficient to say that they approved it, and that their approval was not, so far as the record shows, obtained through misrepresentation or concealment by their co-directors, who, in view of their personal interest in the Cedar Falls Company, ought not to have participated in deciding the question of lease or in the making of the lease. An instructive case upon this point is *U. S. Rolling-Stock Co.* v. *Atlantic & G. W. R. Co.*, 34 Ohio, 450, 465. That was a suit upon a contract by a railroad company for rolling stock. The contract was approved by eight directors of the former company, (the whole number of directors being thirteen, but only eight acted,) two of the number acting being also directors of and interested in the rolling-stock company. The defense was that the rent was not fair, nor the contract binding, because of the interest which some of the directors had in the rolling-stock company. The court said:

"If it be granted that the confirmation of the contract by the defendant's board of directors, at the meeting of August 2, 1872, was voidable in equity at the election of the company, for want of the presence at that meeting of the board of a quorum of directors who were not directors of the plaintiff, it nevertheless appears that the board was composed of thirteen persons, a clear majority of whom were affected with no incapacity to act for the best interests of the company, and who sustained no fiduciary relation to the plaintiff whatever. This majority possessed ample power to restrain and control the action of the minority, and, if the contract was voidable at the option of the company, it had full power to express the company's election if it saw fit to avoid the contract. The fact that some of the persons composing this majority might vote with those who were members of both boards, and thereby create a majority in favor of the contract, would in no wise affect the validity of the transaction, nor relieve the board from the duty to move in the matter if they desired the company's escape from liability. We have not, upon the most diligent research, been able to find a case holding a contract made between two corporations by their respective boards of directors invalid, or voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board of directors are also directors of the other company. Nor do we think such a rule ought to be adopted. There is no just reason, where a quorum of directors sustaining no relation of trust or duty to the other corporation are present, participating in the action of the board, why such action should not be binding upon the company, in the absence of such fraud as would lead a court of equity to undo or set aside the transaction. If the mere fact that the minority of one board are members of the other gives the company an opportunity to avoid the contract without respect to its fairness, the same result would follow where such minority consisted of but one person, and notwithstanding the board might consist of twenty or more. In our judgment, where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness; and hence the fact that five [out of thirteen] of the defendant's board of directors were members of the plaintiff's board, whatever may have been its opinion of defendant's right to disaffirm or repudiate the contract, if exercised within a reasonable time, did not disable the defendant from subsequently affirming the contract, if satisfied with its terms, or rejecting it if not; nor did it relieve it from the duty to exercise its election to avoid or rescind within a reasonable time, if

not willing to abide by its terms. That it did not do this, nor take any steps towards its disaffirmance, but continued to act under it for nearly two years and a half, receiving the rolling stock, for the use of which it stipulated, and with which it operated the whole of its road for the whole of said period, making payment for such use in accordance with the rate fixed by the contractors, very clearly appears from the admitted facts. * * * Hence the conceded facts clearly establish a ratification of the contract, and prevent the the defense from denying its validity."

In determining the weight to be given to the considerations of public policy that have been pressed with so much force, the court cannot ignore the fact that more than 20 years elapsed after the lease in question was made before any action was taken by or in behalf of the Dubuque Company to have it canceled. During that long period no warning was given by it, or by its officers or stockholders, that any question could or ever would be made as to the integrity of the lease of 1866. On the contrary, at a meeting of its stockholders held March 15, 1869, a resolution approving and ratifying the lease of September 27, 1866, was confirmed by a unanimous vote of those present in person or by proxy, 27,394 shares being represented at the meeting. These proceedings were spread at large upon the records of the Dubuque Company. Now, it is said that during the whole period of 20 years while the Cedar Falls road was controlled by the Illinois Central Railroad Company, Jesup was either president or in control of the Dubuque Company, had possession of its records and papers, and dominated its proceedings, and that it was not until he and the directors whom he controlled resigned in 1887 that the Dubuque Company was in a position, or was able, to ascertain the facts, and take such steps as would right the wrong alleged to have been done to it in 1866. What facts? It is inconceivable that the fact of the lease of the Cedar Falls road to the Dubuque Company, as well as the terms of the lease, were not known, or could not easily have been known, to every director and stockholder in the Dubuque Company. If directors or stockholders of that company were ignorant for 20 years of the terms of the lease, it was because they were guilty of the grossest negligence in not making inquiry on the subject. So far from the directors or stockholders of the Dubuque Company being kept in ignorance of the lease or its terms, the company disclosed the exact situation in its annual report of January 1, 1867. In that report it was said:

"Since the last annual report, this company has leased the Cedar Falls and Minnesota Railroad, constructed a distance of fourteen miles from the junction to Waverly, and to be constructed sixty-two miles from Waverly to the state line, for forty years from the 1st of January, 1867, at a rent of $1,500 per mile, and the further sum of 35 per cent. of all gross earnings exceeding $3,500 and not exceeding $7,000 per mile per annum, and 30 per cent. of all gross earnings exceeding the sum of $7,000 per mile per annum. This road has already been a valuable contributor in bringing business upon your road. Waverly receives and forwards more freight than any station west of Dubuque."

The proof satisfactorily shows that this report went to the stockholders of the Dubuque Company. But if there was no proof on the subject,

it would be presumed at this late day that it was known to them, or that every stockholder could know, if he tried to know, all the facts. During all that time the Dubuque Company, its officers and stockholders, have remained silent, not only leaving the Illinois Central Railroad Company to treat the lease of September 27, 1866, as valid and binding upon the Dubuque Company, and therefore to be assumed by the former company during its possession of the Cedar Falls road, but inducing, as may be reasonably inferred, the holders of the stock and bonds of the Cedar Falls Company to believe that the rental agreed to be paid by the Dubuque Company could be looked to as a security for the full term of 40 years. This silence and delay upon the part of the Dubuque Company cannot be excused upon the ground suggested in its answer, namely, that so long as the Illinois Central Railroad Company agreed to pay, and paid, the rent of the Cedar Falls road, it was of "no moment" to the stockholders of the former company what was the amount of such rent. That suggestion assumes that the question of the continuance of the lease concerned only the Dubuque Company. But it was of moment to the Cedar Falls Company, its bondholders and creditors, to say nothing of its stockholders, to know whether that lease was to be carried out according to its terms, and whether the Dubuque Company intended to dispute its binding force. If, at the instance of the latter company, or of its stockholders, the lease had been abrogated shortly after it was executed, it may be that the Cedar Falls Company could have made with other railroad corporations arrangements quite as favorable as those set forth in that lease. The Dubuque Company had no right, therefore, to treat it as a valid lease, to be respected by the Cedar Falls Company and by the Illinois Central Railroad Company, so long as the latter retained possession of the Dubuque road, but to be repudiated as soon as the Illinois Central Railroad Company ceased to be under an obligation to assume it.

The suggestion that the facts entitling the Dubuque Company to a decree canceling the lease could not have been discovered by it until its own road was turned back to it by the Illinois Central Railroad Company, and until after the election of new directors in 1887, has no substantial ground upon which to rest. Here is a lease of a railroad, which was treated as valid, and acted upon by all the parties concerned for more than 20 years. At the expiration of that long period the lessee company asks a cancellation of the lease because of certain facts which it claims to have just found out, but which its stockholders and directors either knew or could easily have ascertained at any time within the past 20 years. It may be literally true, as alleged, that the particular individuals in control of the Dubuque Company, when the cross-suit was commenced, as well as those now holding the majority of its stock, did not acquire knowledge of all the facts connected with the making of the lease until shortly before the commencement of the present litigation. After the surrender of the Dubuque road by the Illinois Central Railroad Company, the latter company, with information as to every fact bearing upon the question of the reasonableness of the rental fixed in the lease

of 1866, purchased, in its own name, or in the name of others, a part of the stock of the former company, and a new board of directors was elected friendly to it or in its interest. And before the cross-bill was filed the Illinois Central Railroad Company had become the owner of nearly all the stock of the Dubuque Company, with full knowledge upon its part of every fact now relied upon for the cancellation of the lease of 1866. In short, that company, after running the Cedar Falls road for 20 years, and thereby ascertaining, to its own satisfaction, that the business on and over it did not justify the rental the Dubuque Company agreed to pay, acquired substantially the whole of the stock of that company, and is the beneficial party in interest seeking the cancellation of the lease. Of the right of the Illinois Central Company to purchase the stock of the Dubuque Company, no question is made. But when the latter company alleges its ignorance, until after the new board was elected in 1887, of the facts connected with the lease of 1866, it must be taken as referring to those now in control, and to those who are now its stockholders. Even if such ignorance existed upon the part of some of those who became stockholders of the Dubuque Company after that corporation resumed possession of its road, that circumstance cannot shut out of view the fact that those who were in any wise interested in the Dubuque road, either as directors or stockholders, when the lease of 1866 was made and for 20 years thereafter, knew, or could easily have ascertained, all the circumstances attending the execution of that instrument, as well as the nature of its terms and conditions.

Taking all the evidence together, the court must proceed upon the ground that means of knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge, and that the fact of the lease, as well as its terms, were fully known to each stockholder and to every officer of the Dubuque Company for 20 years and more prior to this litigation. *Wood* v. *Carpenter*, 101 U. S. 135, 143; *New Albany* v. *Burke*, 11 Wall. 96, 107.

The fundamental error in the argument for the Dubuque Company is in the assumption that the lease was absolutely void by reason of Jesup and other directors, who were interested in the Cedar Falls Company, having participated in the making of it. We have already indicated that, so far as the lease depended upon the action of the board of directors, its technical validity was placed beyond question by the approval of the majority of the directors, no one of whom then or ever had, so far as the record shows, any interest in the Cedar Falls Company. But to avoid misapprehension it is well to say that, in the judgment of the court, the lease would not have been void, even if a majority of the directors of the Dubuque Company occupied the same relations to the Cedar Falls Company that Jesup, James, Frost, and Smith did when the lease was made. It would, at most, have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders, and that election must have been exercised, or the suit brought, within such time as was reasonable, taking into consideration all the facts and circumstances of the case, including the nature of the property that was the subject of

the lease. This last principle is illustrated in *Oil Co.* v. *Marbury*, 91 U. S. 587; *Gas Co.* v. *Berry*, 113 U. S. 322[1]; and *Leavenworth Co.* v. *Railway Co.*, 134 U. S. 688, 704, 10 Sup. Ct. Rep. 708 *et seq.* If, as was expected, the completion of the Cedar Falls road had been followed by the construction of roads in Minnesota connecting Mona with the cities of St. Paul and Minneapolis, it may be that the lease of 1866 would have been very profitable to the Dubuque Company; in which event the courts would not have listened readily to an application by the Cedar Falls Company, after an unreasonable delay upon its part, to set aside the lease upon the ground that some of those representing it were at the time directors or stockholders of the Dubuque Company. So, if the lease had been in fact beneficial to the Dubuque Company, and if, for that reason, a majority of its directors and stockholders had desired to hold onto it, the court would not necessarily, at the instance of a minority of directors and a minority of stockholders, have set it aside simply because some of its directors were at the time personally interested in promoting the welfare of the Cedar Falls Company; though the fact that such directors, constituting a minority of those acting, participated in making the contract, would cause the whole transaction to be closely scrutinized to the end that the rights of complaining stockholders, however small in number, might not be sacrificed by those who were bound to protect their interests. This shows that the lease was not void because of the relations of some of the directors of the Dubuque Company to the Cedar Falls Company, and that it would not have been absolutely void if the majority of such directors approving the lease held such relations to the lessor company.

The rule is a wholesome one that requires the court, in cases of merely voidable contracts, to withhold relief from those who, with knowledge of the facts, or with full opportunity to ascertain the facts, unreasonably postpone application for relief. A contract not wholly invalid when executed, nor prohibited by law as relating to some illegal transaction, and which is therefore voidable only, may become, by the acts of the parties or by long acquiescence, binding upon them, especially where the nature of the property which is the subject of the contract is such that its value may be affected by its relations to other property of like kind, and by the changing business of the country. If, after the making of the lease of 1866, the directors and stockholders of the Dubuque Company had held a meeting, and, with knowledge of the facts, or with the means of ascertaining them, had declared, in words, that they would postpone application to have the lease set aside until they found out by operating the Cedar Falls road whether it was remunerative or not to them, or until the Illinois Central Railroad Company ceased to be under obligation to pay the stipulated rent, the case would not have been in point of law materially different from what it appears to be from the record before us. In so holding the court does not depart from the salutary principles announced in *Wardell* v. *Railroad Co.*, and approved in numerous cases.

[1] 5 Sup. Ct. Rep. 525.

On the contrary, while that case holds that the law will always condemn the transactions of a party in his own behalf when in respect to the matter concerned he is the agent of others, it also declares that the court will relieve against them "whenever their enforcement is seasonably resisted." Seasonable resistance cannot be predicated of a case of a merely voidable contract, where the party complaining has not simply been silent for 20 years, but with knowledge of the facts, or with full opportunity to ascertain them, has enjoyed the fruits of the contract, and treated it as valid.

The court is of opinion that, independently of any question as to the statute of limitations of Iowa, in which state the contract of lease was made, and was to be executed, the Dubuque Company is estopped to dispute the binding force of the lease of September 27, 1866, and, therefore, is not entitled to a decree of cancellation.

Other points than those above discussed are raised by the cross-bill, but they are not insisted upon in the printed arguments, and are not, in the judgment of the court, of sufficient importance to be noticed.

Let a decree be prepared and submitted to the court, recognizing the right of the plaintiff, Jesup, as surviving trustee in the mortgage of September 13, 1866, to receive the funds now in the registry of the court, and containing such other provisions as may be proper and not inconsistent with this opinion.

Judge BLODGETT, who participated in the hearing and decision of this case, concurs in the views expressed in this opinion.

POTTER *v.* TIBBETTS *et al.*

(*Circuit Court, D. Minnesota.* September 16, 1890.)

PRE-EMPTION CLAIMS—ENTRIES—LAND-OFFICE RULINGS.

The tenant of a pre-emptor cannot himself pre-empt the same land upon hearing that his landlord's entry has been canceled and vacated by the land-office, when it afterwards turns out that such cancellation was void, and was vacated by the commissioner of the general land-office.

John B. and *W. H. Sanborn*, for complainant.

W. P. Clough, *Geo. Gray*, *Bigelow*, *Flandrau & Squires*, *F. M. Dudley*, *Jas. McNaught*, and *Willis & Willard*, for defendants.

NELSON, J. A suit in equity is brought by the complainant, asserting title to the N. E. ¼ of the N. E. ¼ of section 26, township 47, range 27, located in this district. The legal title is in a corporation designated as the Lake Superior & Puget Sound Land Company, and it is charged that this company holds it in trust for complainant, and he prays for a decree ordering a conveyance of the same, and for other and further relief.

The following are the facts:

It is admitted that the land in controversy has, ever since the survey thereof, been located in the district of lands subject to sale at the United States land-office in St. Cloud, Minn. That said lands were surveyed, and the township plat thereof filed with the commissioner of the general land-office, and a copy filed with the register and receiver at St. Cloud, Minn., May 28, 1872. That the defendant Nathaniel Tibbetts filed his declaratory statement August 22, 1872, for the N. E. ¼ of the N. E. ¼ of section 26, the S. E. ¼ of the S. E. ¼ of section 23, the S. W. ¼ of the S. W. ¼ of section 24, and the N. W. ¼ of the N. W. ¼ of section 25, township 47 N., of range 27, alleging settlement September 13, 1870. That all the above-described lands were and are within the limits of the grant of lands to the Northern Pacific Railroad Company, by the act of congress approved July 2, 1864. That August 13, 1870, the Northern Pacific Railroad Company filed a plat of the general route of its line of railroad, extending opposite and past the land in controversy. That the land was within 20 miles of and on said line of general route. That September 15, 1870, the secretary of the interior ordered withdrawn from sale or location by homestead or pre-emption entry, all odd-numbered sections of said line of general route, and within 20 miles thereof. That said order of withdrawal was received at the local land-office at St. Cloud, Minn., September 24, 1870. That October 12, 1870, said railroad company filed an amended map of general route in the office of the commissioner of the general land-office. That said above-described lands are on said line of general route, as indicated by said amended map and general route, and within 20 miles thereof. That November 7, 1870, the secretary of the interior ordered the withdrawal from sale or location, homestead or pre-emption entry, all the odd-numbered sections on said amended line of general route, and within 20 miles thereof, and that said order of withdrawal was received at the local land-office at St. Cloud, Minn., November 17, 1870. That the Northern Pacific Railroad Company definitely located the line of its said railroad extending opposite to and past the said lands, and within 20 miles thereof, and on the 20th day of November, 1871, duly filed in the office of the commissioner of the general land-office a plat of that portion of said line so definitely located, extending opposite to and past said land hereinbefore described. That prior to January 6, 1873, the said Northern Pacific Railroad Company had located, constructed, and equipped its said railroad along the said line of definite location, through the township and range aforesaid, and fully completed and equipped its said line through said township and range, as provided by said act of congress; and on January 6, 1873, the same was duly accepted by the president of the United States. On the 3d day of September, 1872, the defendant Nathaniel Tibbetts was permitted to prove up his pre-emption settlement and occupation of said land, and that the records of the local land-office and of the general land-office show that the said tracts of land were entered and paid for by the defendant Nathaniel Tibbetts on that day. That on the 7th day of April, 1873, the entry of said tracts of land by Nathaniel Tibbetts, which was

made by Georgia Agricultural College scrip, number 10,054, was canceled and vacated, and that Exhibit C, attached to the answer herein, is a correct copy of the letter of the commissioner of the general land-office, canceling said entry; and that from the decision contained in said exhibit no appeal was taken by the defendant Tibbetts to the secretary of the interior. That the records of the general land-office and local land-office show that the complainant, Warren Potter, filed a declaratory statement, number 4,511, December 6, 1873, for the E. ½ of the N. E. ¼, and the N. ½ of the S. E. ¼ of section 26, township 47 N., of range 27 W., alleging settlement September 6, 1873. That on the 6th day of February, 1874, the commissioner of the general land-office changed the decision made by him in the letter of April 7, 1873, as appears in Exhibit D attached to the answer of the defendant corporations in this action, and permitted the defendant Nathaniel Tibbetts to enter the S. W. ¼ of the S. W. ¼ of section 24 at $2.50 per acre cash; and on the 9th day of April, 1874, the commissioner of the general land-office ordered the whole case of the defendant Nathaniel Tibbetts reopened in and by his letter, (Exhibit E,) attached to the answer of the defendant corporations. That on the 13th day of July, 1874, the complainant, Warren Potter, made an application to make proof of his pre-emption, settlement, and claim, and to enter and pay for the E. ½ of the N. E. ¼, and the N. ½ of the N. E. ¼ of section 26, township 47, range 27; and on the 19th day of December, 1874, the commissioner of the general land-office directed the local officers to order a hearing to determine the rights of the parties to the tract in controversy, namely, the N. E. ¼ of the N. E. ¼ of section 26, township 47, range 27. That on the 7th day of January, 1875, citations were issued by the register and receiver at the St. Cloud office, setting the 12th day of February following for a hearing, at which it appears by the records that both parties appeared, and that the complainant, Warren Potter, offered his proof of pre-emption, settlement, and occupation and improvements. That on the 15th day of June, 1874, the acting commissioner of the general land-office made the ruling and decision in the case which appears in Exhibit H, attached to the answer herein of the defendant corporations. That on December 19, 1874, the commissioner of the general land-office issued the letter of instructions to the register and receiver of the St. Cloud office, a copy of which is hereto attached and marked "Exhibit A." That upon this final hearing the register and receiver of the land-office simply took the testimony offered, and transmitted it to the general land-office, and on the 20th day of October, 1876, the commissioner of the general land-office made the decision, a copy of which is Exhibit I of the answer herein of the defendant corporations; and, upon an appeal to the secretary of the interior, an opinion was rendered, a copy of which is Exhibit K of the answer of the defendant corporations herein.

It is admitted that Exhibits A and B, attached to the defendant corporations' answer, are correct copies of the orders of withdrawal made September 15, 1870, and November 7, 1870, along the lines of general route of the Northern Pacific Railroad Company.

It is admitted by the parties that the cancellation of the entry of the land in controversy by Nathaniel Tibbetts, contained in Exhibit C, was made without any notice whatever to Nathaniel Tibbetts, or any other parties in interest, and that, upon receipt of said exhibit at the local land-office at St. Cloud, a written notice thereof was forthwith sent to Nathaniel Tibbetts by the land-officers at that point, and that the same was received by him.

It is admitted that the following was the rule of practice of the general land-office and the department of the interior in regard to appeals during all the time that proceedings were had in the general land-office and the department of the interior relating to the entry of the land in controversy, namely:

"(33) Any party aggrieved by the rejection of his claim has a right to appeal from the decision of the register and receiver to the commissioner of the general land-office. Such appeal, however, with the reasons therefor, must be filed with the land-officers within thirty days from the day of their decision, accompanied by the rejection papers, if any; also with any argument the party desires to file. These papers will then be forwarded by the district land-officers for review and decision. Their report should set forth the nature of the claim, whether homestead, pre-emption, timber culture, railroad, mineral, swamp, or other state selection, with the name of parties, description of land, number of filing, entry, list of description, and date of hearing. No appeal will be entertained unless sent up through the district land-office. The party may still further appeal from the decision of the commissioner of the general land-office to the secretary of the interior. This appeal must be taken within sixty days after service of notice upon the party. It may be filed with the district land-officers, and by them forwarded, or it may be filed with the commissioner, and must recite the points of exception. If not appealed, the decision is by law made final. (Section 2273 of the Revised Statutes.) After appeal thirty days are usually allowed for the filing of arguments, and the case is then sent to the secretary, whose decision is final and conclusive."

It is admitted, subject to the objection of the complainant, that it is immaterial that Exhibit D, attached to the defendant corporations' answer, is a true and correct copy of the commissioner's decision of February 6, 1874.

It is admitted that on the 13th of March, A. D. 1874, the said defendant Nathaniel Tibbetts, in accordance with said modified decision of the commissioner of the general land-office, entered said S. W. ¼ of the S. W. ¼ of section 24, township 47 N., of range 27 W., and paid for the same in cash.

It is admitted, subject to the objection on the part of complainant, that it is immaterial that Exhibit D is a correct copy of a portion of the records of the general land-office relating to the application of Nathaniel Tibbetts to be allowed to change the alleged date of his settlement in his declaratory statement to August 5, 1870, and to enter the lands described in his declaratory statement. And I find that Exhibit E, attached to the defendant corporations' answer, is a correct copy of the letter of the commissioner of the general land-office, dated April 9, 1874.

It is admitted, subject to the objection on the part of the complainant of immateriality, that Exhibit F, attached to the defendant corporations'

answer, is a correct copy of the letter on file in the general land-office dated May 15, 1874, written by the attorney of the defendant the Northern Pacific Railroad Company. And I find that Exhibit G, attached to the defendant corporations' answer, is a correct copy of the letter of the commissioner dated May 28, 1874.

It is admitted that Exhibit H, attached to the defendant corporations' answer, is a true and correct copy of the letter of the commissioner of the general land-office dated June 15, 1874.

It is admitted that on the 25th day of June, 1874, cash entry was made of all the said lands described in Tibbetts' original declaratory statement, in the name of said Tibbetts by the parties in interest, and that said lands passed to patent under said entry, and that the legal title to the same is now in the defendant the Lake Superior & Puget Sound Land Company.

It is admitted that the complainant is a qualified pre-emptor. And I find that Tibbetts having made an affidavit subsequent to the cancellation of his pre-emption entry by the land commissioner, that his settlement on the land in suit was as early as August 5, 1870, before the map of definite location of the Northern Pacific Railroad had been filed, and before withdrawal by the secretary of the interior of the odd sections had been ordered. I find that the railroad, by its counsel, addressed a communication to the commissioner of the general land-office *inter alia*, saying: "I am authorized to state that the company will interpose no objection to the rehearing of the case, [the Tibbetts claim,] and withdraws from any contest for said land." I also find that on September 4, 1872, when Tibbetts' application to prove up was pending, the company filed a written consent that he be allowed to enter the land without opposition from the company. I find that after the entry of land by Tibbetts on the 11th of September, 1872, he sold and conveyed, with covenants of warranty, for a valuable consideration, the land in controversy to Thomas H. Canfield, which deed was duly recorded, and on December 17, 1872, Canfield sold and conveyed the same land to the defendant the Lake Superior & Puget Sound Land Company. I find that Tibbetts had no talk with any person in relation to the purchase of the land until February, 1871, and this conversation was, in substance, that Canfield came to him and asked if he was the man that claimed this land, and said that if there was a station built on the place he wanted the first chance to buy, a privilege from me. I find that complainant first settled on the land upon which he filed his declaratory statement for pre-emption as a tenant of defendant Tibbetts, and occupied a house belonging to him; and that after the entry of Tibbetts had been canceled, as heretofore stated, he built one of his own, made some improvements, and filed his statement upon being informed that the land was public land, subject to entry by the local land-officers.

Conclusion. The cancellation of the Tibbetts' entry was without any authority of law, and his settlement and occupation of the land in controversy did not conflict with the railroad grant. The testimony did not show that Tibbetts had agreed to sell the land to Canfield or the

Lake Superior & Puget Sound Land Company, or did any act which would make his entry fraudulent, and authorize the land department by any proceedings to set aside his pre-emption; nor can the court say that he committed a fraud on the pre-emption law. Canfield or his grantee had no notice of the cancellation, and no opportunity to contest the right of the commissioner of the land-office to do so; and, if the power could have been legally exercised, it is null and void as to them. The complainant could not change his right as lessee to that of pre-emptor, under the circumstances. He was not the first settler on the land, under the pre-emption laws of the United States. Neither Canfield nor the Lake Superior & Puget Sound Land Company are prejudiced by the return of the land scrip to Tibbetts, or any other action of the land department, subsequent to the rights acquired under the deed from Tibbetts and wife to Canfield.

Decree will be entered dismissing the bill.

In re MASON.

(*District Court, D. Minnesota.* September 8, 1890.

1. UNITED STATES COMMISSIONER—DISOBEDIENCE OF SUBPŒNA—CONTEMPT.
A commissioner of the circuit court of the United States has no power in a criminal proceeding before him to arrest a witness who refuses to obey a subpœna, and compel him to answer then and there for a contempt.

2. SAME.
The power to punish for contempt is the highest exercise of judicial power, and is not an incident to the mere exercise of judicial functions; and such power cannot be upheld upon inferences and implications, but must be expressly conferred by law.

At Law. On petition for *habeas corpus*.

M. D. Munn and *D. W. Lawler*, for petitioner.

J. M. Shaw, for respondent.

NELSON, J. On August 28, 1890, a petition was presented to me signed by John H. Mason for a writ of *habeas corpus*. The petition is sworn to, and states in substance that said Mason was imprisoned and restrained of his liberty by J. C. Donahower, who is the United States marshal of the district of Minnesota; and that the cause of such confinement or restraint is a certain pretended warrant or order, issued by R. R. Odell, as United States circuit court commissioner, within and for the district of Minnesota, directing the said Donahower, as marshal, to arrest the petitioner for contempt in not obeying an alleged summons of said commissioner, which pretended warrant, as the petitioner is advised, issued without authority of law. A writ of *habeas corpus* was ordered and issued, and the marshal made the following return:

"*United States of America, District of Minnesota—ss.*:

"I hereby certify and return that in obedience to the annexed writ I herewith produce the therein named John H. Mason, and have him now before

the court as commanded in the said writ; and I further certify and return that the said John H. Mason is now in my custody, under and by virtue of a certain writ, issued by one R. R. Odell, Esq., a commissioner of the circuit court of the United States, a true and correct copy of which said writ is hereto attached. J. C. DONAHOWER, U. S. Marshal."

A copy of the warrant attached to the return is as follows:

"U. S. OF AMERICA, DISTRICT OF MINNESOTA, CITY OF MINNEAPOLIS.
"*The President of the United States of America to the Marshal of the District of Minnesota, Greeting:*
"You are hereby commanded to arrest John H. Mason, and immediately have John H. Mason before R. R. Odell, commissioner of the circuit court of the United States, in and for said district, at his office, No. 1121 Northwestern Guaranty Loan Building, in the city of Minneapolis, state of Minnesota, then and there to answer for a contempt by him committed in not attending before R. R. Odell, the said commissioner, though legally summoned.
[L. S.] "Given under my hand and official seal this 27th day of Aug., 1890.
"R. R. ODELL,
"Commissioner of the Circuit Court of the United States for the District of Minnesota."

The petitioner in traverse of the return of the marshal denied that he has committed any contempt as recited, and denies that he was summoned to appear before the said commissioner; and also denies that the commissioner had any legal right or authority to issue the writ, and that his detention and imprisonment are unlawful, and that he is entitled to his discharge. The petition and return of the marshal, with the accompanying papers, not giving sufficient information of the proceedings before the commissioner upon which he acted in issuing his warrant, and causing the arrest of the petitioner to be brought before him, then and there to answer for a contempt by him committed in not attending before him, a writ of *certiorari* was issued for a complete transcript, which has been produced and filed. In the report of the commissioner, a copy of the summons or subpœna is attached, which it is alleged in the warrant the petitioner disobeyed. It is in the following words:

"UNITED STATES OF AMERICA, DISTRICT OF MINNESOTA—*ss.*
"*The President of the United States of America to the Marshal of the District of Minnesota, Greeting:*
"You are hereby commanded to summon John H. Mason, Andrew Dickey, and O. O. Randall, if they be found in your bailiwick, to be and appear before me, R. R. Odell, a commissioner of the circuit court of the United States for the district of Minnesota aforesaid, at my office, 913, etc., Guaranty Loan Building, city of Minneapolis, in said district, on the 26th of Aug., 1890, at 2 o'clock P. M., to give testimony and the truth to say in a cause pending before me wherein the United States is complainant and William Pulfords and others defendants.
"In behalf of complainant.
"Hereof fail not under penalty of law, and have you then and there this writ.
"Given under my hand this 22d day of Aug., 1890.
"R. R. ODELL,
"Commissioner of the Circuit Court of the United States for the District of Minnesota."

Indorsed:

"I received this writ * * * and served the same by copy as follows: Personally on J. H. Mason at 10 o'clock A. M., on the 26th day of August, 1890. J. C. DONAHOWER, U. S. Marshal.
"Per W. S. DAGGETT, Deputy-Marshal."

Upon this hearing of the *habeas corpus*, the petitioner was called to contradict the return of the officer of personal service. Without considering whether or not the evidence is sufficient to overcome the truth of the return, I will proceed to consider the principal question which has been urged. The substantial and controlling question presented for determination relates to the power of a commissioner of the circuit court of the United States in a criminal proceeding before him to arrest a citizen who refuses to obey a subpœna to appear as a witness and compel him to answer then and there for a contempt. Before coming to the consideration of this question, it is proper to say that the commissioner's report of the proceedings shows that on the 21st of August, 1890, a complaint, sworn to before another commissioner of the circuit court of the United States in this district, and upon which a warrant was issued for the arrest of certain alleged offenders against the laws of the United States, was presented to Commissioner Odell, and the persons who had been arrested appeared; and, according to the transcript of the proceedings of the commissioner, were arraigned, and gave separate recognizances for their appearance before him on August 22d, at 2 P. M. On that day, defendants with counsel appeared, and a special attorney of the government; and, by agreement and consent of defendants, an adjournment was had until 2 P. M., August 26, 1890. The transcript states that this adjournment was requested by defendants' counsel for the purpose of determining whether defendants wanted an examination, or waived it. On agreement of counsel, the commissioner ordered the defendants to report to him as early as 2 P. M., August 25, 1890, whether they wished examination or not, and the subpœna was issued to John H. Mason, returnable August 26, 1890, which previously appears *verbatim*. Permission was given to the United States attorney to fill other names in the subpœna. On August 25, 1890, counsel notified the commissioner that the defendants would not waive examination, and requested and demanded a hearing; whereupon the commissioner sent notice to the special attorney of the government that the defendants demanded examination. On the 26th of August, at 2 P. M., the accused persons, with their counsel, and the special attorney, Mr. Baxter, appeared, and moved that an adjournment be had until September 5th upon an affidavit which, among other things, stated that two persons, naming them, were material witnesses for the government in this proceeding, without whose testimony it cannot safely proceed to the hearing of this matter, and that he was informed by their employers that they were out of the state, and would not return before September 15, 1890. Other reasons are given in the affidavit for an adjournment, which it is not important to state. The commissioner declined to grant the request of the government for the adjournment, and called John H. Mason who had been subpœnaed

as a witness. The witness not appearing, the marshal was ordered to bring him into court on adjourned day thereof; and cause was adjourned, as stated, until August 27, 1890, at 2 P. M. On the latter day, Mason not appearing, an attachment was issued for his arrest, which is the warrant recited by the marshal in his return to the writ of *habeas corpus* as the authority for holding the petitioner. An adjournment was had until August 28th, at 10 A. M. On this adjourned day, at 2:30 P. M., the government, through the district attorney, moved for a continuance for 10 days, which the commissioner denied; and the district attorney then requested that he be allowed to withdraw the complaints, and that the prisoners be discharged. The commissioner informed the district attorney that this could not be done; whereupon he withdrew, and the commissioner adjourned until the 29th, and a new subpœna was issued for J. H. Mason. The service of this writ of *habeas corpus* was reported by the marshal at that day, through a deputy, to the commissioner. On the 29th, the second subpœna for Mason, issued August 28th, was returned, served, and the commissioner caused the marshal to call John H. Mason, who did not answer. Adjournments were had from day to day, for the reason that said witness was not present, up to the time of the service of the *certiorari*.

The method pursued by the commissioner is not the usual one of conducting criminal accusations. The United States district attorney, or an attorney appointed by the government for a special purpose, according to all authorities, is the official representative of the government in criminal prosecutions. I cite only one: *Confiscation Cases*, 7 Wall. 457. His requests within reasonable limits are entitled to consideration. A commissioner, as a committing magistrate, should never refuse a request by the government for a reasonable time to collect and procure proofs for the purpose of inquiring whether there is a probable cause of an offense against the laws, and particularly so when the proceeding under the state law for the arrest and commitment of offenders gives the state a right to an adjournment on proper showing. And it can seldom happen that a commissioner will feel bound to investigate the charges in case the district attorney declines to prosecute. Of course, when a criminal prosecution has been instituted before a commissioner, and the accused persons have been arrested, and the time fixed for the examination, the district attorney has no authority to dismiss the proceedings, and an unwillingness of the government representative to proceed will not preclude the commissioner from investigating charges brought before him properly authenticated; but it has been found by experience that it is more conducive to the orderly administration of justice, for the protection of the citizen, and the complete vindication of the laws in discovering and punishing offenders, to let the government representative, who is appointed for that purpose, and upon whom the duty is imposed of obtaining the proofs, inquire whether there is probable cause under the evidence collected of any offense against the laws, and conduct an examination, if necessary. The report of the commissioner shows that the government representative declined to act in the prosecution before the

commissioner in its present form; and it becomes a serious question whether the ends of justice demand an examination when the law officers of the government, under oath, declare that important testimony cannot be then obtained. What purpose would be subserved by such a course of proceeding? If the evidence on an examination is insufficient to hold the accused party, or no evidence is produced, he must be discharged; but such discharge is not a finality to investigation for the same offense, and it may well be doubted whether the watchful solicitude of the law over the personal liberty and security of the citizen necessarily imposes on the commissioner the duty of investigating alleged charges on evidence regarded by the government representative as insufficient. The government should be held to reasonable diligence in procuring and producing proofs, and if no proofs are presented the accused should be discharged; but it would seem most unusual, if not indiscreet, for a commissioner to refuse the government a reasonable opportunity to collect the testimony. In the case of *U. S.* v. *Worms*, 4 Blatchf. 332, the defendants, on a preliminary warrant for examination, were committed for an unlimited time. They were imprisoned some two months without any steps being taken for their examination. The court on an application for their discharge decided that the adjournment should be for a time certain, and that the commitment was erroneous, but that, where cause is shown on the part of the government for further delay to procure testimony, great diligence should be required in its procurement, and, in case of neglect, the commissioner should discharge the accused persons, and while the court considered the imprisonment exceptionable and irregular, it refrained even from discharging the parties on the government representative agreeing to a speedy hearing of the case. The commissioner, however, considering that his duty required the continuance of the examination, proceeded on his own motion to subpœna witnesses in behalf of the government, and to arrest for contempt a disobedience of his summons. I listened attentively to the very able and ingenious argument of Judge Shaw, in favor of sustaining the power of the commissioner to arrest and punish for contempt; and if he is correct in the construction of section 1014, Rev. St. U. S., that all the laws of the state of Minnesota which give justices of the peace special powers, among which is the power to punish witnesses for contempt in the examination of offenders, are conferred by implication upon commissioners by that section, then his position is impregnable. Certainly there is no express language giving that power. It is necessary then to look to this section and see if the broad construction contended for is correct. By that section, undoubtedly, congress intended to assimilate the proceedings for the arrest, imprisonment, and bail, as the case may be, to the mode of procedure prescribed by the laws of the several states, and as exercised by justices of the peace when acting as arresting, examining, and committing magistrates. It is then claimed by counsel that the power to examine gives the right to subpœna witnesses, and, as an incident to it, the power to enforce obedience to the subpœna by arrest and punishment for contempt.

To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record, or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases the mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inferences and implications, but must be expressly conferred by law. A very learned, elaborate, and well-considered discussion of this question is found in the case of *In re Kerrigan*, 33 N. J. Law, 344, which was approved in *Rhinehart* v. *Lance*, 43 N. J. Law, 311. In this case the recorder of the city of Hoboken, by law, possessed all powers conferred on justices of the peace in the several counties of the state. The justices of the peace had the power by law to arrest, examine, and commit offenders; and it was claimed that, this being a judicial function, the authority to punish for contempt was incident to its exercise. While admitting that some authoritative text-writers seem to have supposed this was the law, the learned court pointed out that this assumption was destitute of authority, and was explained by the indefinite use of the word "commit," (or "imprison," which is the language under section 1014,) and in not discriminating between its use in the sense of committing in default of bail to answer before a criminal court on indictment, and the power to commit by way of punishment. The learned judge, speaking for the court, shows that by the common law only courts of record could punish contempts, and that the powers of a justice of the peace at common law were originally ministerial entirely, consisting chiefly in preserving the peace, receiving complaints, issuing summons or warrant, taking the examination of witnesses, and of the informant, and bailing or committing the accused, but no English case is found directly asserting the power to punish for contempt. But there is authority of the courts of the United States directly upon this question. In *Re Perkins*, on *habeas corpus* before Circuit Court Judge GRESHAM, the particular question raised here was decided. Judge GRESHAM said:

"It is a stretch of language to say that the punishment of a witness for contempt, and by a commissioner, is a necessary part of the usual mode of process against offenders, or essential to the exercise of any power expressly conferred on him by the federal law."

So in *Ex Parte Doll*, before the late United States Judge CADWALADER, in 1869, (7 Phila. 595.) Doll had been arrested on complaint made by an officer of the internal revenue for failing to appear and testify in relation to his income. At the examination, before the commissioner, an order was made that "Doll produce his books before the commissioner, or be committed for contempt." On refusal to comply, he was committed. Upon the hearing, the power of the commissioner to arrest and punish for contempt was raised. The judge, in discharging the prisoner for the irregular proceeding of the commissioner, *inter alia*, said that—

"He very much doubted even the power of congress to invest a commissioner with the authority in a proceeding originally instituted before him to summarily commit a citizen for an alleged contempt. This was an exercise of the

judicial power of the United States, which, under the constitution, could not be intrusted to an officer appointed and holding his office in the manner in which these commissioners were appointed and held their offices."

In the celebrated case of *Kilbourn* v. *Thompson*, involving the question of the power of the congress to arrest and punish a witness for contempt (103 U. S. 182) in refusing to answer questions before a committee of the house, Justice MILLER, speaking for the court, among other things, said:

"The constitution declares that no person shall be deprived of his life, liberty, or property, without due process of law, and it has been repeatedly held by the United States supreme court that this means a trial in which the rights of the party shall be decided by a court of justice appointed by law and governed by the rules of law previously established."

I agree with Judge GRESHAM that—

"We only look to the state of Indiana [in this case Minnesota] to ascertain the mode in which powers expressly conferred on commissioners by the federal statute shall be exercised, * * * and it is not necessary to the due exercise of the power to arrest, examine, and bail that commissioners should have authority to punish for contempt."

It is stated that the commissioner had the authority to arrest the petitioner for the purpose of taking him before some court having authority to punish for contempt, and that he was about to do this. I can see no distinction between the power to decide that a contempt has been committed, and forthwith arrest the person, and the authority to punish. The arrest is for the purpose of punishment, and if the commissioner had no power to punish he could not deprive the petitioner of his liberty, however short the time might be.

I have given this case such examination and reflection as opportunity has afforded, and have reached the conclusion that the commissioner had no jurisdiction to issue a warrant for the arrest of the petitioner. If wrong, there is a higher tribunal which can correct the error. The petitioner is discharged.

In re ALIANO.

In re VARANA.

(Circuit Court, S. D. New York. September 8, 1890.)

IMMIGRATION—CONVICTS—WHO ARE.

An immigrant who has been convicted in the country from which he came of an assault with a deadly weapon, and has served the term of imprisonment imposed, is a convict, within the meaning of the act regulating immigration.

At Law.

A. C. Astarita, for relators.

Abram J. Rose, Asst. U. S. Dist. Atty.

LACOMBE, Circuit Judge. The relators, by their own admission, were found guilty in the country from which they came of an assault with a deadly weapon. They were sentenced to two and four months' imprisonment, respectively, and have served their terms. They are clearly convicts, within the meaning of the act regulating immigration.

In re CROSS *et al.*

(District Court, E. D. North Carolina. June 2, 1890.)

1. EXTRADITION—OBJECTION TO TRIAL—WHEN TO BE TAKEN.

Where an indicted person, who has escaped to Canada, and against whom an extradition warrant has been issued, returns to this country voluntarily, under an agreement that he shall only be tried for the offense for which he has been indicted, and he is thereupon tried and convicted, the objection that the crime for which he was tried was not an extraditable offense must be raised at the trial in order to be available.

2. SAME—HABEAS CORPUS—JURISDICTION OF FEDERAL COURT.

An application for the release of such person on *habeas corpus*, because not tried for an extraditable offense, does not raise any question under the constitution, treaties, or laws of the United States.

3. SAME—FORGERY.

The treaty of 1842, between the United States and Great Britain, which provided for the extradition of persons charged with forgery, allows the extradition from Canada of a fugitive who is charged with an act which was forgery by the laws of Great Britain in 1842.

At Law. Petition for *habeas corpus.*

W. B. Henry, for petitioners.

SEYMOUR, J. Charles E. Cross and Samuel C. White file their petition for a writ of *habeas corpus.* It thereby appears that they are confined in the county work-house of Wake county under a judgment pronounced by the superior court of that county upon an indictment charging them with forgery. From the original judgment in their case an appeal

was taken to the supreme court of North Carolina, where it was affirmed, (7 S. E. Rep. 715,) and thence the proceedings were carried by writ of error to the supreme court of the United States, upon the contention that the offense for which defendants were indicted was cognizable only in the federal courts. The supreme court having affirmed the judgment of the supreme court of North Carolina, (132 U. S. 131, 10 Sup. Ct. Rep. 47,) the sentence of the state court is now being carried out against the petitioners. They now allege that their imprisonment is illegal and void, as being in violation of the treaty of 1842 between the United States and Great Britain. The facts upon which it is contended that the treaty has been violated are as follows: In April, 1888, the prisoners, fearing arrest, as they state, "sought and obtained an asylum in the dominion of Canada," whither they were pursued by F. H. Busbee, Esq., the United States attorney for this district, acting in that capacity, and also as agent for the state of North Carolina, and one C. D. Heartt. These two gentlemen carried with them all necessary papers for the extradition of defendants, and caused them to be arrested in Canada. While under arrest defendants entered into an agreement to return to North Carolina, and thereupon the extradition proceedings were abandoned. The agreement is in these words:

"TORONTO, ONTARIO, April 3, 1888.

"*In the Matter of the Extradition of Chas. E. Cross and Sam C. White.* Representing the state of North Carolina in the matter of adjustment pending against Chas. E. Cross and Sam C. White in the superior court of the county of Wake, and as United States attorney for the eastern district of North Carolina, charged with the prosecution of all offenses against the United States in said district, I stipulate and covenant to and with said Cross and White that, if they shall surrender themselves to Charles D. Heartt, the person designated by the president of the United States to receive them under the extradition laws, without any proceeding under the extradition act, and shall, so far as they may be able, aid in the delivery to the special receiver of the State National Bank (F. H. Busbee) of the money brought by them to Canada, and shall return with said Heartt and *posse* to the state of North Carolina, there to be dealt with according to law, I will not institute, or permit to be instituted, in the courts of the United States, any indictment or prosecution for any offense under the national banking laws; and that in behalf of the state there shall be no prosecution instituted against them, or either of them, other than those for which extradition is or was about to be sought, to-wit: (1) An indictment for forging a promissory note for $6,250, (describing it;) (2) an indictment for forging a promissory note for $7,500, (describing it;) (3) an indictment for forging a promissory note for $5,800, (describing it.) That said Cross and White shall be received upon like conditions as if they had been extradited upon these prosecutions, and none other.

"C. E. CROSS.
"SAM C. WHITE.
"F. H. BUSBEE.

"In all capacities."

In pursuance of this agreement defendants returned to the United States, and were tried for forgery, and convicted. The indictment upon which they were tried is annexed to this petition. It was found, at March term, 1888, before extradition proceedings were begun, or the

agreement which was substituted for them was made, and charges the defendants with forging a promissory note for $6,250, purporting to be signed by D. H. Graves and W. H. Sanders, "with intent to defraud, contrary to the form of the statute," etc. Petitioners aver that, under the above-cited agreement, they were entitled to the same immunities that they would have been entitled to had they been regularly extradited, and that had they been regularly extradited they could only have been tried for common-law forgery and uttering; no other kind having been contemplated under the treaty of 1842. They say that they were in fact tried and convicted of a statutory forgery and uttering differing from common-law forgery in proof and degree of punishment, and that therefore they have been tried for a different offense from that for which they might have been extradited. I am of the opinion that it appears from the petition itself that the party is not entitled to the writ. If that be so, the court ought not to grant, as is asked, an order to show cause, but should refuse to make any order other than a denial of the writ. Rev. St. § 755. I do not mean to say that a writ or an order to show cause ought to be issued in no case where the court entertains an opinion adverse to the petitioner. The question may be one of sufficient novelty or importance to justify an argument or notice; but in the matter at bar there is nothing to justify further investigation. I will briefly assign several reasons, any one of which is fatal to the petitioners' right to the writ:

1. The matter is *res adjudicata*. If Cross and White were put upon trial in violation of an agreement between the state's agent and themselves, they should have taken the objection in the superior court of Wake in such a way as to have enabled them to take it to the supreme court, when the record was carried there by the writ of *certiorari*. They cannot be allowed to take their case to the court of last resort in this way.

2. Petitioners were tried in strict conformity to the agreement they produce, upon an indictment pending when the extradition papers were taken out, founded on one of the notes set out in their agreement with Mr. Busbee. If the indictment does not charge an extraditable offense, that objection was open to them in Canada. They consented to come to North Carolina to be tried on this very indictment.

3. The indictment sets forth facts which constitute forgery at common law; but it is not conceived that that is material. Since the recent case of *U. S.* v. *Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, it is settled that a defendant who has been extradited has a right to exemption from trial for any other offense than that for which he has been surrendered until he shall have had an opportunity to return to the country from which he had been taken. The treaty of 1842 provides for the delivery, mutually, to and by the respective governments of the United States and Great Britain of all persons charged with the crimes of murder, assault with intent to murder, piracy, arson, robbery, or forgery. Without doubt the treaty contemplated only such acts as were, in 1842, held in the two countries to constitute the offense specified. Forgery is not to be confined to forgery at common law, but includes all acts that were forgery

in England and the United States at the date of the treaty. If since that date any state should have passed a statute giving the name of forgery to some act not so called before,—as, for example, to oral false representations,—such false representations, although designated as forgery, would not constitute an extraditable offense under the treaty. But these defendants were tried for an offense known in 1842 as "forgery" in all English speaking countries. Forgery may be defined at common law to be the fraudulent making or altering of a writing, to the prejudice of another man's right." 4 Bl. Comm. 247. The punishment was fine and imprisonment; and forgery, at the time when the commentator wrote (1765) it, was by statute a capital felony. The statute in force in Great Britain in 1842 was the act of 11 Geo. IV., and 1 Wm. IV. c. 66. Under this statute the forgery of a promissory note, before a capital felony, was made a felony punishable by either transportation or penal imprisonment; so that neither is the mode of trial nor the punishment of the offense charged in the indictment in the case at bar different from what it was either in North Carolina or in England in 1842.

4. No question arises under the constitution, treaties, or laws of the United States, and therefore the federal courts have no jurisdiction. The defendants were not extradited, and therefore could not have been tried in violation of the treaty of 1842. The case of *Ker* v. *Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225, was a stronger one than this, for Ker, who had taken refuge in Peru, had, pending extradition proceedings, been kidnapped in that country, and carried to Illinois for trial. Nevertheless the supreme court held that no case arose under the treaties, laws, or constitution of the United States. Conceding, contrary to the fact, that the state authorities violated the contract between their agent and defendants, there would at most arise either a defense to be interposed by a plea of abatement to the prosecution in Wake county or an action for damages, neither of which matters are relevant to this proceeding.

The conclusion reached, then, is that the defendants have nothing whatever to complain of, since they have been tried in strict conformity to their own agreement; that, if they had ever any cause of objection to the trial in Wake, they lost it by failing to interpose in apt time a plea to the jurisdiction of the case; that no federal question exists, because the defendants were never extradited, but came to North Carolina voluntarily; and, finally, that had the prisoners been extradited, and had they in proper time interposed a plea in abatement on the grounds stated in their petition, the federal courts, although in such case they would have had jurisdiction of the question raised, would yet have been compelled to deny the writ of *habeas corpus*, because it would still have appeared in the petition and accompanying papers that defendants were tried for an offense coming within the terms of the treaty of 1842, and for the very offense set forth in the extradition papers. The motion for a writ of *habeas corpus*, and also the motion for an order to show cause, denied.

ROBBINS *et al. v.* AURORA WATCH CO.

(Circuit Court, N. D. Illinois. July 31, 1890.)

1. INFRINGEMENT OF PATENTS—EXTENT OF CLAIM.
The first, third, fourth, fifth, and sixth claims of reissued letters patent No. 10,631 for a "stem-winding watch," are for a device the distinctive characteristic of which is that the winding and hand-setting engagements are not effected by the direct force of the push and pull upon the stem-arbor, but are brought about by longitudinal movement of the stem-arbor, which brings into action certain light springs arranged to swing the yoke which carries the winding and setting train that has no positive connection with the stem-arbor. *Held*, that these claims were infringed by a device accomplishing the same result by means of an oscillating yoke carrying a winding and hands-setting train, adapted to be placed in winding and setting engagement by the endwise movement of the stem-arbor acting on springs in such a manner that the engagement is not forced by the direct push or pull upon the stem-arbor.

2. SAME—WHAT CONSTITUTES INFRINGEMENT.
Patent No. 287,001 for a "watch pendant" covers a device in the stem to lock the arbor in either the winding or setting position. *Held*, that the manufacturer of watch movements only did not infringe this patent, though his movements were adapted to be used in any case fitted with the device covered by the patent.

3. SAME—NOVELTY.
The claim in reissued letters patent No. 10,631 for a "stem-winding watch," for a device whereby the shifts from the winding and hands-setting engagements to each other are not effected by the direct force of the push and pull upon the stem-arbor, but are brought about by longitudinal movements of the stem-arbor, which bring into action light springs arranged to swing the yoke which carries the winding and setting trains, is novel, though there are several prior patents which effect these shifts by means of the direct force of the push and pull upon the stem-arbor.

4. SAME—CONSTRUCTION OF CLAIMS.
The claims of a patent must be so construed, if possible, as to uphold the patent, and though they may be broad enough to include results as well as devices, yet, where the specific devices are set out in the drawings and specifications, the claims should be construed as for the devices there shown.

In Equity.

Prindle & Russel and *L. Hill*, for complainants.

Bond, Adams & Jones, for defendant.

BLODGETT, J. The bill in this case charges the defendant with the infringement of reissued letters patent No. 10,631, granted to complainants, as assignees of Duane H. Church, on the 4th day of August, 1885, for a "stem-winding watch,"—the original patent having been granted to Church, assignor, to the American Watch Company, July 3, 1883, and patent No. 287,001, granted October 23, 1883, to Caleb K. Colby for a "watch pendant." The improvement covered by the Church patent is applicable to the class of watches where the watch is wound and the hands set by means of the stem, and consists of an oscillating yoke, carrying upon its under side, pivoted at or near its longitudinal center, a pinion, which is so set as to engage with smaller pinions carried at each end of the yoke. This central wheel, or pinion, having beveled cogs on the under side thereof, which engage with the beveled pinion, which is set in the line of the stem, and into which the inner end of the stem-arbor enters a short distance, by a square or octagonal opening, so that this beveled pinion can be rotated by the stem-arbor. By rotating the stem-arbor, motion is imparted to the central pinion of the yoke, whereby

such motion is communicated to the two pinions at the ends of the yoke. Passing through the small beveled pinion with which the stem-arbor engages is a loose sliding block or bar, which meets the inner end of the stem-arbor, for the purpose of a thrust or push motion of the stem-arbor, and acts as an extension or prolongation of the stem-arbor. By pressing the stem-arbor inward this sliding bar acts upon a spring, which throws the stem winding and setting train into engagement with the winding wheel, which is done by swinging the yoke so as to bring the pinion on one end of it into contact with the winding wheel, when, by rotating the stem-arbor, the watch can be wound up,—there being a latch in the sheath, or case, of the stem, which is arranged to hold the stem-arbor at the extreme of its inward movement, whereby the winding wheels are kept in winding engagement,—while, when it is desired to set the hands, the stem is drawn outwardly, which allows a spring arranged for that purpose to swing the yoke out of winding and into setting engagement. It will be seen that a latch or catch in the stem, which shall hold the stem-arbor safely at the points of its extreme inward and outward movement, is necessary to the working of this stem-winding and stem hands-setting device, and the patent shows a latch or retaining device in the stem to lock the arbor in either the winding or setting position, of which Church claimed to be the inventor, and for which claims were allowed him in his original patent; but, on the application for a reissue, an interference was declared between himself and Colby as to these claims, on the hearing of which Colby was decided to be the prior inventor of the locking device in the stem, and Church's claims for that part of his device were disallowed, and the patent for that feature awarded to Colby. The Church patent, therefore, while it contains a description of the latch or retaining device in the stem-sheath has no claims covering it, but the stem-winding and stem-setting devices of his patent are adapted to be used only with some device for locking the stem-arbor in its inward and outward positions, and, perhaps, this comment will hold true as to all practical stem-winding and stem-setting watches. Infringement is charged in this case of the first, third, fourth, fifth, and sixth claims of the reissued patent, which are:

"(1) As an improvement in stem winding and setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding wheel or the dial-wheels by the longitudinal movement of a stem-arbor that has no positive connection with said train, substantially as and for the purpose specified. * * * (3) As an improvement in stem winding and setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding wheel or the dial-wheels, by the longitudinal movement of a stem-arbor, and is normally in engagement with said dial-wheels, substantially as and for the purpose set forth. (4) As an improvement in stem winding and setting watches, a winding and hands-setting train which is normally in engagement with the dial-wheels, in combination with a rotatable stem-arbor that has no positive connection with said train, and is adapted to be moved longitudinally within the case stem to cause said winding and hands-setting train to engage with the winding wheel, and to be simultaneously disengaged from said dial-wheels, substantially as and for the purpose shown and described. (5) As an improvement in stem winding and

setting watches, a winding and hands-setting train which is normally in engagement with the dial-wheels, in combination with a rotatable longitudinally movable stem-arbor that has no positive connection with the watch movement, and when moved longitudinally to the inner limit of its motion will cause said winding and setting train to be disengaged from said dial-wheels, and engaged with the winding wheel, and when moved longitudinally to the outer limit of its motion will permit said train to de disengaged from said winding wheel, and engaged with said dial-wheels, substantially as and for the purpose specified. (6) As an improvement in stem winding and setting watches the combination of a winding and hands-setting train which is normally in engagement with the dial-wheels, a stem-arbor having no positive connection with said train, and an intermediate device which is adapted to communicate the longitudinal inward movement of said stem-arbor to said winding train, and cause the same to engage with the winding wheel, substantially as and for the purpose shown and described."

The defenses insisted upon are (1) that the patent is void for want of novelty; (2) that the claims sued upon are too general, and do not describe with sufficient certainty the device by which the results are effected; (3) that defendant does not infringe.

The distinctive characteristic of the Church device is that the winding and hands-setting engagements are not effected by the direct force of the push and pull upon the stem-arbor, which is objectionable, because the force of the hand of the operator directly applied is liable to injure the delicate cog-wheel mechanisms which are thus forced into contact with each other. These winding and hands-setting engagements are brought about by longitudinal movements of the stem-arbor, which bring into action certain light springs arranged to swing the yoke which carries the winding and setting trains. For instance, the watch, as ordinarily carried in the pocket, is always in the winding engagement, and this is effected by pushing the stem-arbor inwardly, to the limit of its movement in that direction, when it is caught and held by the latch in the sheath of the stem. This inward movement of the stem-arbor carries inward the loose sliding bar or block, N, as it is called in the specification, which by such inward movement comes in contact with and swings inwardly an arm, which by such inward movement causes a spring to bear upon the end of the yoke which carries the winding train, and thereby brings the winding pinion in contact with the winding wheel of the mainspring. This spring being light, if the cogs of these wheels meet end on, or do not mesh, they rest in contact until the winding pinion has revolved, when its cogs come at once into engagement with the cogs of the winding wheel, where they are kept in winding engagement so long as the stem-arbor is held at its inward limit. When the stem-arbor is released from its inward movements and drawn outwardly, it releases the arm upon which the bar, N, has been pressing, and another spring is brought into action, which swings the yoke out of the winding engagement, and brings the end carrying the hands-setting pinion into contact with the dial-wheels, and the cogs of the respective wheels mesh, if they happen to meet in the proper relations, and, if not, they are retained in contact until the rotation of the pinions brings the cogs into engagement.

It will be seen from this description, if I have made it clear, that the engagements of the pinions of this yoke with the winding and dial wheels are effected by the operation of springs, which are brought into operation by the inward and outward movements of the stem-arbor. It is because these springs are in their natural position, and not constrained when the parts are in the hands-setting engagements, that the inventor says "that the hands-setting engagement is the normal condition of the mechanism." It is not claimed that Church was the first to make a stem-winding and stem hands-setting device for a watch. The English patent shown in this case, granted in 1844 to Adolph Nicole, shows a device for winding a watch and setting its hands by the stem-arbor, the winding and hands-setting train consisting of a V-shaped metal plate, with a pinion pivoted near its center, having cogs, or teeth, on its outer periphery, and beveled cogs on the under side of its rim. The beveled cogs engage with the beveled pinion attached to the inner end of the stem-arbor, which has an endwise movement. This V-shaped metal plate carries upon its point a small pinion, which gears with the large central pinion, so that, by rotating the stem-arbor, motion is transmitted to this small pinion on the end of the plate. This V-shaped metal plate is pivoted to the rim which holds the movement at its right-hand corner in such a position that the small pinion on its point rests between the winding wheel and dial-wheels of the watch, and by pressing on the stem-arbor this small pinion is swung into contact with the winding wheel, while, when the stem-arbor is drawn outwardly, it brings the pinion into engagement with the dial-wheels. Here, then, is shown a device for winding and setting the hands of the watch by a longitudinal movement of the stem-arbor, and the V-shaped plate shown operates substantially in the same manner as the oscillating yoke in the Church patent. But the stem-arbor was positively connected with the winding and setting train, and these two engagements for winding and setting were brought about by the direct pull and push of the operator upon the stem-arbor, which was liable to injure the delicate structure of the small wheels, if they happened to come in contact in such a way as not to directly engage or mesh into each other. In the Lehman American patent of July, 1866, a stem-winding and stem hands-setting device is shown, in which a rotating and longitudinally moving stem-arbor is made to work the winding and hands-setting mechanism without the oscillating yoke or plate. The winding and hands-setting engagements being brought about by clutches arranged upon the stem-arbor within a movement, so that this stem-arbor has a positive connection with the movement or works of the watch, and with the hands-setting and winding train. The engagements of the winding and hands-setting train are also effected by the pull and push of the stem-arbor, which makes the mechanism liable to be injured in bringing about these engagements, as I have already described. These two patents seem to me to be fair representative types of the different classes of stem-setting and stem-winding watches, which are shown in the art, from the proofs in the case. The Carnahan patent of October, 1881, shows an oscillating yoke carrying the wheels at each end, which are

respectively brought into engagement with the winding and setting wheels by longitudinal movements of the stem-arbor. The patent granted to Charles V. Woerd, February 9, 1883, also shows an oscillating yoke carrying a winding-pinion at one end, and the hands-setting pinion at the other end, by means of which the winding and hands-setting engagements are obtained through the instrumentality of a longitudinally moving stem-arbor; but in both the latter devices, as in the Nicole patent, the force of the pull or push to effect these engagements is expended upon the wheels, and is therefore liable to injure the wheels in the manner which has been described. So that Church seems to have been the first in the art to obtain the winding and setting engagements by means of springs, which were brought into action by the inward and outward movements of the stem-arbor, thereby avoiding the liability to injure the wheels.

It is true there is but little difference, mechanically speaking, between the operation of the Carnahan and Woerd devices, and the device of Church. Both Carnahan and Woerd show the winding engagement as the normal condition of their watch, and the hands-setting engagement to be the exceptional or constrained condition. But, as I have already said, their mechanism and arrangement of operative parts is such that the pull and push upon the stem-arbor is transmitted directly to the wheels which are to be brought into engagement, and therein they differ from the Church device. The advantages claimed for the Church device are (1) that the movement can be removed from the case of the watch without taking the movement apart so as to remove the stem-arbor; (2) that there is no liability to injure the wheels in effecting either the setting or winding engagements.

As to the first advantage insisted upon, it appears clearly from the proof that Church was by no means the first to show a device whereby the movement could be taken from the watch without removing the stem-arbor, or disturbing the same. It is shown in the Brez patent of July, 1875, in the Fitch patent of April, 1879, in the Eisen patent of December, 1880, and in the Woerd patent, which I have already cited, besides in several other patents which appear in evidence in the case, and which it is unnecessary to refer to. But I find in none of the patents cited any mechanism which effects the winding and setting engagements by means of springs which are brought into action in such a manner as to relieve the wheels from the direct force of the pull and push upon the stem-arbor. As I have already said, Church did not invent the short stem-arbor which allowed of the removal of the movement from the case of the watch, nor did he invent the latch or lock, in the sheath of the stem-arbor, by means of which the stem-arbor is retained at the limit of its inward or outward movement, but he has adjusted and attached what he did invent to be used with such a stem-arbor, and I therefore think he has the right to claim that his winding and hands-setting train has no positive connection with the stem-arbor, as he has, by means of his sliding block, N, within the movement, secured all the results which would be accomplished by a longer stem-arbor. This slid-

ing block or bar, while it has no positive connection with the stem-arbor, being so arranged in connection with the stem-arbor that it is pushed inwardly by the inward movement of the stem, and follows the stem-arbor outwardly, when the stem is withdrawn to its inward limit, by reason of the action of the springs belonging to the winding and hands-setting trains.

As to the criticism that the claims of the complainants' patent are too broad, and include results rather than devices, I will merely say, it is one of the settled canons for the construction of the claims of a patent that they must be so construed, if possible, as to uphold the patent, and, in the light of this rule, when the first claim is, in terms, for a winding and hands-setting train that is adapted to be placed in engagement with the winding and dial wheels of the watch by a longitudinal movement of the stem-arbor that has no positive connection with the train, the claim cannot be held to mean any kind of a winding or hands-setting train, but such an one as is shown in the specifications and drawings of the patent. If the claim is held to mean any winding and setting train adapted to be put into winding and setting engagement by a longitudinal movement of the stem-arbor, which has no positive connection with the train, then, it would manifestly be anticipated by the Woerd and Carnahan patents, and perhaps other inventors who show winding and setting trains adapted to be placed in winding and setting engagements by endwise movements of stem-arbors that have no positive connection with such trains. And this explanation applies to all the claims; if they are to be read in the broadest sense of which their language is capable of being understood, then they are obnoxious to the criticism that they are claims for results and not for devices. But the words, "substantially as and for the purpose shown," take us back to the specifications and drawings, and bring the devices there shown into the claims, and I construe the claim as for the devices there shown. Therefore, while these claims are broad, I think they can be sustained as for the devices which are described. *Corn-Planter Patent*, 23 Wall. 218.

Upon the question of infringement, I think it only needs a comparison of the complainants' patent with the defendant's watch to see that there is no substantial difference between them. Defendant's watches, three of which are in evidence, show an oscillating yoke carrying a winding and hands-setting train adapted to be placed in winding and setting engagement by the endwise movement of the stem-arbor, by means of a loose sliding prolongation of the stem-arbor, like complainants' bar, or block, N, which, when the stem-arbor is pushed inward, brings into action a spring which throws the end of the yoke carrying the winding pinion into contact with the winding wheel, and which, when the pressure of the stem-arbor is withdrawn, throws the winding pinion out of engagement with the winding wheel, and the setting wheel into setting engagement with the dial-wheels, by the action of springs, and which secure the same result as the complainants' patent; that is, the engagement is not forced by the direct push or pull upon the stem-arbor, but by the more gentle action of the springs. Therefore, while there is some

slight change in the mechanism, it is practically the same as that of the complainants' patent. While defendant contends that the normal condition of its watch is that of the winding engagement, yet, the moment the pressure upon the stem-arbor is withdrawn, the action of the spring throws it into setting engagement the same as in the complainants' patent. In other words, as I understand the operation of defendant's watch, it is normal in the setting engagement the same as complainants'; it is only in winding engagement while constrained there by pressure from the stem-arbor pushed inward to its inner limit.

As I have already said, the Colby patent, upon which this suit is brought, refers only to the locking device in the stem-arbor, so far as this suit is concerned, which locking device is in the pendant sheath of the stem-arbor. The proof shows affirmatively that the defendant only manufactures the movements of watches; that it has never made any watch-cases, and has never made any stems or pendants with this locking device; and the complainants admit that the only ground for holding the defendant liable upon this Colby patent is that it is a contributory infringer, inasmuch as its movements are adapted to be used with the Colby pendant, or stem-locking device. I think it is an abundant answer to this claim that the defendant's movement is adapted to be used with any watch which has the stem-arbor not directly connected with the stem-winding and hands-setting trains. Several such stem-arbors are shown in the proofs. In the Himmer patent a device is shown for locking the stem-arbor in its various positions by means of a catch or latch, which could undoubtedly be applied to pendants, or to the complainants' watch, if they saw fit. I therefore find that there is no infringement of the Colby patent. A decree may therefore be prepared finding that the defendant infringes the first, third, fourth, fifth, and sixth claims of the Church patent, and that it does not infringe the Colby patent, and the bill is dismissed as to the Colby patent.

CONSOLIDATED ROLLER-MILL CO. *v.* BARNARD & LEAS MANUF'G CO.

(*Circuit Court, N. D. Illinois.* February 10, 1890.)

1. PATENTS FOR INVENTION—ANTICIPATION—MECHANICAL EQUIVALENTS.
Patent No. 222,895, granted December 23, 1879, to William D. Gray, for "an improvement in roller grinding-machines," and patent No. 238,677, granted March 8, 1881, to said Gray, for a "roller-mill for grinding grain," are anticipated by the Nemelka Austrian and French patents of 1875, and the Nemelka Lake English patent of 1877; the adjustments of the rolls provided for by by the Gray patents being accomplished by substantially the same instrumentality adopted by the Nemelka patents, though somewhat differently placed or modified.

2. SAME—PATENTABILITY—INVENTION.
Reissued patent No. 10,139, granted to W. H. Odell, for a "roller-mill," (original granted December 13, 1881,) is void for want of invention, the device being but the connection of the two shafts in a double roller mill, so as to obtain a simultaneous operation of the two.

8. SAME.

Patent No. 269,623, granted December 26, 1882, to Hans Birkholz, for a "roller grinding-mill," is but a modified form of the first Gray patent, there being no patentable difference in the devices.

In Equity.

Rodney Mason, for complainant.

Parkinson & Parkinson and *John W. Munday*, for defendant.

BLODGETT, J. The bill in this case, as amended, charges the infringement by defendant of patent No. 222,895, granted December 23, 1879, to William D. Gray, for "an improvement in roller grinding-mills." Patent No. 238,677, granted March 8, 1881, to the said Gray, for a "roller-mill for grinding grain." Reissued patent No. 10,139 granted June 20, 1882, to W. H. Odell, for a "roller-mill,"—the original of said last-named patent having been granted December 13, 1881,—and patent No. 269,623, granted December 26, 1882, to Hans Birkholz for a "roller grinding-mill."

While the bill charges infringement of each of these several patents in general terms, the complainant's proof limits the charge to the infringement of the fourth, fifth, and sixth claims of Gray's patent No. 222,895; second and third claims of Gray's patent No. 238,677; second claim of Odell's reissued patent No. 10,139; first claim of Birkholz's patent 269,623.

All these patents are intended to be applied to machinery for the purpose of grinding grain by means of rollers in place of millstones introduced into this country at a comparatively recent date.

It is conceded that the process of grinding grain by means of rollers as a substitute for the immemorial millstones originated in Europe, and that the devices therefor had been brought to an approximately successful operation long before they were adopted in the United States. Hence all the patents in question here are for what are claimed to be improvements on the roller-mills of Europe, as our manufacturers found them developed and in use there. The Gray patent No. 222,895, granted December, 1879, is said in the specifications to relate to roller grinding-mills, and to consist of a peculiar construction and arrangement of devices for adjusting the rolls vertically, as well as horizontally, whereby any unevenness in the wear of the rolls, or their journals or parts, may be compensated for, and the grinding or crushing surfaces kept exactly in line. The invention also consists in the device for separating the rolls when not in action, without disturbing their parallelism. Only those portions of the devices covered by this patent, which provide for the lateral adjustment of the surfaces of the rolls, so as to secure the parallelism of their surfaces, and which provide for the separating of the rolls from their working position without disturbing their parallelism, and the feature which regulates the working pressure of the rolls, are in question here.

The proof shows that it was common in the European roller-mills, before Gray's device was produced, to secure this element of adjusta-

bility by setting one of the rollers in fixed journals, while the other roller was set in a movable, sliding, or swinging frame, so as to be capable of such vertical and horizontal movement as to allow the requisite vertical and horizontal adjustments. Finding the mechanism in this stage of development,—that is, with one movable roller,—and without considering for the present any of the devices older than Gray's for securing the desired parallelism of the surface of the roller, Gray, by this patent, secured this adjustment of parallelism of surface by means of two rods, G, extending horizontally from the ends of the fixed roller frame to the swinging frame, which holds the movable roller; and these rods, being screw threaded at some distance on each end, allowed the desired adjustment for parallelism to be made by manipulating nuts upon these ends so as to draw and hold the movable rolls into the right relation to the surface of the fixed roller. And, in order to allow the movable roll to yield or give way in case a hard substance, like a wire, nail, or gravel-stone should get between the grinding surfaces, spiral springs are interposed between the bearings of this roll upon these adjusting rods and the point where they are attached to the swinging frame. It had also been found in practical use before Gray entered the field that, when the mill was stopped with some grain yet in the hopper, the grain would fall into the space between the rolls, where it would rest, and act as a wedge or brake to greatly retard, if not prevent, the starting of the mill again; and provision is therefore made for separating the rolls, without disturbing their grinding adjustment for parallelism, by means of nuts upon the threaded ends of the rods, G, where they are attached to the frame which holds the stationary roller, or by cams or eccentrics working upon the ends of these adjusting rods. These features of the patent are covered by the fourth, fifth, and sixth claims, which are:

"(4) In combination with the movable roller bearing, the rod, G, adjustable stop devices to limit the inward movement of the bearing, an outside spring urging the bearing inward, and adjusting devices, substantially such as shown, to regulate the tension of the spring. (5) In combination with the roller bearing, the adjusting rod provided, at one end with a stop to limit the inward movement, a spring, and means for adjusting the latter, and provided at the other end with a stop and holding devices, substantially as shown and described. (6) The combination of the bearing, D, rod, G, nut, I, spring, H, nut, *j*, stop, *n*, and nut, *o*."

The feature of the Gray patent No. 238,677, which is in controversy here, is the provision for working the eccentrics to which the ends of the rods, G, of the first-mentioned patent are attached, where those rods are fastened to the frame, which holds the stationary roll, by means of the rod or shaft which connects the two eccentrics, and enables the operator to work these two eccentrics by one movement of this connecting rod, so that both the rods, G, are equally extended or shortened by the motion of this rod, thereby throwing the rolls apart, so that the grain may drop through between them without wedging the rolls when the mill stops, and drawing them together again in their grinding position when the mill is put in motion, instead of requiring the operator to manipulate separately the nut or cam on the end of each rod, G, for such

purpose. These characteristics of this patent are covered by the second and third claims, which are:

"(2) In combination with the swinging roll supports, E, and the rods, G, connected thereto, the eccentrics, H, shafts, I, and rod, K. (3) In combination with the movable roll supports, E, and the rods, G, adjustably connected thereto, a transverse shaft, I, provided with two eccentrics connected to the rods, G, at opposite ends of one roll, whereby the roll may be thrown into and out of action instantly without changing the adjusting devices."

The feature of the reissued Odell patent No. 10,139, in controversy here, is a device for throwing the two sets of rolls in a double roller-mill apart from their grinding position, and bringing them together again by the movement of a single lever or bar. This lever being so arranged as to work simultaneously with the rod or cams of the rods, G, or their equivalents in the first Gray patent, and this feature of the patent is covered by the second claim, which is:

"(2) In a roller-mill, the combination with the adjustable rolls and journals, of transverse shafts, *h*, a through shaft, J, link mechanism connecting the said shafts, and a single hand lever, K, connected with the through shaft, for simultaneously adjusting both sets of rolls by a single lever movement, substantially as described."

The Birkholz patent No. 269,623, so far as in question here, shows a frame having a fixed or stationary roller, with a swinging frame or casing pivoted to the fixed frame carrying the other roller, and a transverse rod like Gray's rod, G, whereby the distance of the roller and swinging frame, or movable roller, from the fixed roller, can be adjusted by means of nuts working on this rod, and a spring at one end of the rod to relieve the rolls in case any unusually hard substance comes between them. This feature is covered by the first claim of the patent, which is:

"(1) The combination, substantially as before set forth, of the fixed roller supporting standard, the movable roller carrying casing pivoted thereto, the adjustable gauge rod, the nut thereof, held by the standard, and the spring connected with said rod, and adjustable in tension independently thereof."

The defenses insisted upon are: (1) Want of patentable novelty in the claims of which infringement is charged. (2) That the defendant does not infringe.

I have already said that when Gray entered the art he found already there methods of adjusting the rolls so as to bring their axes into the same horizontal plane and methods of adjusting the parallelism of the surface of the rolls. I may add he found also methods of separating the rolls so that they would not bind or be wedged by the grain dropping between them when the rollers were at rest, which separation did not disturb their parallelism, and the material questions are whether Gray's mode of securing these several adjustments are new in the art, and if they are found so, then whether the defendant has copied Gray or the older machines. I do not deem it necessary to analyze all the prior devices put in evidence by the defendant, and which it is claimed show the same adjustments accomplished prior to Gray's invention by other inventors, it being, as I think, sufficient to consider the Nemelka Austrian

patent, and the Nemelka French patent of 1875, and the Nemelka Lake English patent of 1877, together with some casual reference to the other patents and descriptions found in the record. Gray, in his first patent, provided for four adjustments, or what may be called adjustments:

"(1) The vertical adjustment, which was intended to bring the axis of the rolls into the same horizontal plane, which is not in question here. (2) The adjustment of the surface of rolls to parallelism, that is, bringing their grinding surfaces parallel to each other, so that they would grind uniformly their entire length. (This is called 'tramming' in the proofs, the word being imported into this art of milling from the older art of grinding with millstones, where it was necessary to bring the grinding surfaces of the stones into perfect parallelism with each other, in order that they might grind uniformly all the grain that passed between them.) (3) The device for spreading the rolls apart, or throwing them out of working position, to prevent their becoming wedged or bound by the grain dropping between them without disturbing their adjustment for parallelism or their vertical adjustment. (4) And adjusting the pressure of the spring so as to hold the rollers with sufficient rigidity together for the purpose of grinding, and at the same time allowing them to yield when any unusually or unexpectedly hard substance should come between them."

And the devices of his patent which are here brought in question all have reference to these adjustments. An examination of the Nemelka devices as exhibited in his Austrian and French patents and in the English patent to Lake, and in the model of the French Nemelka patent, which is before the court, and was used upon the hearing, shows that each of these adjustments is provided for in those patents, and by substantially the same instrumentality which were adopted by Gray, although somewhat differently placed or modified. For illustration, Gray provided for the vertical adjustment by a cam or eccentric, working upon the pivot by which the swinging arm carrying the movable roller was attached to the frame, while Nemelka accomplished his vertical adjustment by a screw worked by a worm, which, for the purposes of the question here, must, I think, be considered the equivalent of Gray's cam or eccentric. Nemelka also showed a swinging frame carrying a movable roller, with a cam working upon the pivot by which the swinging frame was fastened to the fixed frame, by means of which the rolls could be separated without disturbing their parallelism, and a provision for adjusting the rollers to parallelism by sliding the pivoted attachment upon the fixed frame. He also shows a spring to hold the movable roll to its grinding position and pressure, with means for regulating the pressure of the spring and the grinding distance by means of cams, screws, and nuts, and I cannot resist the conclusion that all which Gray did by his first patent, under consideration, was to secure the same adjustments which are shown in these prior machines by, in many respects, the same instrumentality, but differently located, or well-known equivalents of such instrumentalities.

The especial feature of Gray's second patent, by which his two rods, G, are moved inwardly and outwardly by the operation of the cam, to which they are connected at their inner ends, whereby the rolls are thrown apart without disturbing their grinding adjustment, is also shown

in the Nemelka French patent, and it is there accomplished by the use of cams, not working upon the ends of transverse rods like Gray's rods, G, but working upon the pivots by which the swinging frame is pivoted to the fixed frame; these cams being connected so that they were operated simultaneously by a movement of this shaft. So that I find in these older devices all that is covered by the two patents to Gray.

The Odell patent shows only a device for separating the two sets of rolls of the double roller-mill by one movement, and I am compelled to say that I cannot conceive that it required invention to connect the shaft by which the cams in one movable roll were operated simultaneously with the cams of the other movable roll in a double mill. The ordinary and well-known device by which all the bolts in an iron safe door are shot by the movement of a single lever seems to me to fully anticipate whatever there is in the second claim of this Odell patent, all which is fully explained by the testimony of defendant's expert witness.

The Birkholz patent seems to me to be only another form of Gray's first patent. I see nothing in his connecting his swinging frame by his rod, F, to essentially differentiate that device from the device shown in the first and second patents of Gray, except that he shows only one rod, and locates that below the rolls instead of above, which it does not seem to me is a patentable difference. But if there were room for doubt in the question, whether there is any patentable difference in the device of Gray and of Birkholz, I shall be constrained to find from the proof that the defendant does not infringe this patent, as I can find nothing in the defendant's structure which corresponds to the rod, F, either in function or location.

I will say further that, if I deemed it necessary to enter upon that field of the case, I think it is fully demonstrated from the defendant's proof that the defendant's devices for securing the adjustments in their mill, substantially the same as are secured by Gray, so far differ from Gray's as that no infringement can be charged against the defendant. The defendant's mill No. 2 contains a swinging frame carrying the movable rolls, but does not contain the rod, G, of the Gray patent with the cam operating upon the end of it, and does not secure the spring pressure to hold the roll in working position by a spring located upon such rod. The defendant secures the movement of separating its rolls, without disturbing their parallel or vertical adjustment, by a cam located in the pivot by which the swinging arm is attached to the frame, while Gray gets his movement by what is practically the elongation of his rods, G, by means of the cams at their ends.

I have been very much embarrassed in the examination of this case by the opinion of the learned judge of the eastern district of Michigan, in the case of *This Complainant* v. *Coombs*, reported in 39 Fed. Rep. 25. I have carefully examined that opinion, and the proofs which were submitted to the court in the case, sincerely hoping that I might be enabled to arrive at the same conclusion with the learned judge who tried that case, as I think no one is more anxious than myself to preserve and act upon the rule of comity, which it seems to me

should prevail between the federal courts in cases involving the same patents; but after mature and careful consideration I feel constrained to say that my reading of the prior art satisfies me that Mr. Gray in effect invented nothing. He merely adopted well-known equivalents for the mechanism known and shown in the prior art for producing the same adjustments which are secured by his machine, and operating in substantially the same way. And I do not see that Gray, from the proof before me, has any right to be claimed as an original inventor, and entitled to invoke the doctrine of equivalents in regard to his mechanism in any respect. He came into the art at so late a date, and when others had covered the same ground which he attempted to cover, that, if his patents are to be sustained at all, they are to be sustained only for the special devices which he shows, and which I am clear the defendant in this case does not infringe. I may further say upon this point that the rule of comity perhaps ought not to be invoked by the complainant here to the same extent as in most cases where it has been applied, for the reason that in the case of *This Complainant* v. *Freeman*,[1] heard before the learned district judge of the western district of Wisconsin several years since, that court, upon the testimony which is now before this court, in these French and English patents, held that Gray's patent was invalid for want of novelty, and dismissed that case; so that we have here a decision in this circuit against the complainant pressing with equal binding force upon us as does the decision relied upon by the complainant from the eastern district of Michigan. The bill is dismissed for want of equity.

ON REHEARING.

(July 14, 1890.)

BLODGETT, J. Now comes the defendant by its solicitor, and the court, having considered the complainant's motion for a rehearing herein, overrules the same.

BRUSH ELECTRIC CO. *v.* WESTERN ELECTRIC LIGHT & POWER CO.

(*Circuit Court, N. D. Ohio.* August 15, 1890.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Letters patent No. 219,208, to Charles F. Brush for an electric lamp, are valid, and cover all forms of mechanism constructed to separate two or more pairs or sets of carbons dissimultaneously or successively, so that the light is established between the members of but one pair or set at a time, while the members of the remaining pair are kept separate. The word "dissimultaneous," used in his claims, refers to that separation which results in the production of a single arc. This patent is infringed by patent No. 418,758 to Charles E. Scribner for an electric arc-lamp, notwithstanding that the primary or initial separation of the two pairs of carbons in the Scribner lamp is simultaneous.

(*Syllabus by the Court.*)

[1] No opinion was filed.

In Equity.

This was a bill in equity to recover damages for the infringement of letters patent No. 219,208, issued September 2, 1879, to Charles F. Brush for an electric lamp. In the introduction to his specifications, he states that his invention "relates to electric lamps or light regulators, and it consists:

"(1) In a lamp having two or more sets of carbons adapted by any suitable means to burn successively; that is, one set after another.

"(2) In a lamp having two or more sets of carbons, each set adapted to move independently in burning and feeding.

"(3) In a lamp having two or more sets of carbons, adapted each to have independent movements, and each operated and influenced by the same electric current.

"(4) In a lamp having two or more sets of carbons, said carbons, by any suitable means, being adapted to be separated dissimultaneously, whereby the voltaic arc between, but in a single set of carbons, is produced."

To effect this result, he employs and shows a system of mechanism of which a lifter, D, is a prominent feature. This lifter has a movement imparted to it by magnetic attraction due to the current operating the lamp, and in being raised lifts the upper or positive carbon of each set, not simultaneously, but one after the other, in such manner that the arc is formed between carbons last separated, which burn until they are consumed, when the carbon first raised is automatically lowered, and the arc formed between the carbons first separated, which also burns until these are consumed. By multiplying the sets of carbons this process may be continued until the last ones are consumed and the light thus indefinitely prolonged. While this mechanism is elaborately explained and described, the patentee is careful not to limit himself to that or any other, and in his specifications says expressly:

"I do not in any degree limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished."

The claims alleged to be infringed were the first six, which are as follows:

"(1) In an electric lamp, two or more pairs or sets of carbons, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, substantially as described and for the purpose specified.

"(2) In an electric lamp, two or more pairs or sets of carbons, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, and establish the electric light between the members of but one pair, to-wit, the pair last separated, while the members of the remaining pair or pairs are maintained in a separate relation, substantially as shown.

"(3) In an electric lamp having more than one pair or sets of carbons, the combination with said carbon sets or pairs of mechanism constructed to impart to them independent and dissimultaneous separating and feeding movements, whereby the electric light will be established between the members of but one of said pairs or sets at a time, while the members of the remaining pair or pairs are maintained in a separated relation, substantially as shown.

"(4) In a single electric lamp, two or more pairs or sets of carbons all placed in circuit, so that when their members are in contact the current may

pass freely through all said pairs alike, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, substantially as and for the purpose shown.

"(5) In an electric lamp wherein more than one set or pair of carbons are employed, the lifter, D, or its equivalent, moved by any suitable means, and constructed to act upon said carbons or carbon-holders dissimultaneously or successively, substantially as and for the purpose shown.

"(6) In an electric lamp whereby more than one pair or set of carbons are employed, a clamp, C, or its equivalent, for each pair or set, said clamp, C, adapted to grasp and move said carbons or carbon-holders dissimultaneously or successively, substantially as and for the purpose shown."

Complainant was the assignee of this patent from Brush. The answer set up several patents, which were claimed to be anticipations, and denied infringement in general terms. The case was argued before Judge RICKS of the northern district of Ohio and Judge BROWN of the eastern district of Michigan.

L. L. Leggett and *H. A. Seymour*, for complainant.

John W. Munday, *Ephraim Banning*, and *George P. Barton*, for defendants.

BROWN, J. The progress of the art of electrical illumination has been marked by successive and well-defined steps from the early experiments of Sir Humphrey Davy, in 1810, to its present perfected condition. Sir Humphrey seems to have succeeded, with the aid of a galvanic battery of 2,000 cells, in producing an arc-shaped light between two pencils of charcoal; but, owing to the rapid combustion of his charcoal points, to the want of proper mechanism for adjusting his electrodes to compensate for wear, and to the great cost of his battery, his experiments were of no practical or commercial value. The first of these obstacles was removed in 1844 by Foucault, who substituted for the soft charcoal points of Davy the hard gas carbon electrodes now in use; the second, in 1848, by Archereau, who devised an imperfect and clumsy regulating device, by which two vertical carbon electrodes were maintained in the same relative position, notwithstanding their combustion; and the last in 1870 by the invention of the dynamo-electric machine of Gramme, wherein a current of sufficient strength to render electric lighting commercially practicable is generated at a comparatively small expense. These discoveries, and in particular the dynamo of Gramme, opened up to electrical experimentalists new and unsuspected possibilities of usefulness, and henceforward inventions multiplied with great rapidity. Most of them, however, were directed to improvements in the material of which the carbons were made, in the brilliancy and steadiness of the light itself, to improvements upon the dynamos, and in the mechanism by which the carbons were held in the same relative position during the process of combustion. One difficulty, however, remained to be overcome. The electrical resistance of the carbons was such as to preclude the employment of very long rods, and their consumption by burning away was hastened by their adjacent ends becoming highly heated to a considerable distance from the arc. This difficulty was partially reme-

died by covering the carbon pencils with a thin film of copper, electrically deposited thereon, by which the electrical resistance of the carbons was materially decreased, much longer rods were possible, and the light maintained continuously for from 6 to 10 hours. This was insufficient, however, for all-night lighting, and necessitated the extinguishment of the lamp and a renewal of the carbons at some time during the night, in order to keep up a continuous light.

To obviate this inconvenience, Mr. Brush invented the device embodied in the patent in suit, the most prominent feature of which is the use of double sets of carbons in such manner that when the first pair is consumed the arc is automatically established between the second pair, and is continued until they are consumed. This is accomplished by the use of certain helices, E, which, when the current is turned on, are energized and operated to raise a lifter, D. This lifter, acting upon two ring clamps, CC, surrounding the carbon-holders, tilts them, and causes them to clamp and lift the two carbon-holders, DD, not at exactly the same instant, but in a quick but perceptible succession, whereby the arc is established between the pair last separated, and held there until they are consumed, (the first pair being meanwhile retained in their position,) when the first pair automatically descend and take their place. By this means a steady light can be kept up, without any manual interference whatever, for a period of from 14 to 20 hours. This was certainly an important discovery, and even if his patent be not "pioneer" in the strict sense of the term, it is such a decided step in advance of anything which preceded it that defendants' experts, Warner and Kellogg, are constrained to admit, not only that Brush was the first to invent the principle of substitution in his double carbon lamp, but that the Western Electric Company could not successfully compete with the companies using his patent in furnishing all-night electric lighting plants unless it could provide double carbon lamps to its customers. Such being the undisputed facts, we think that complainant is entitled to the favorable consideration of the court, and his patent to a liberal construction,—a construction which, so far as consonant with the language the patentee has himself chosen, will protect him in what he has actually invented. None of the devices set up in the answer contain the principle of the Brush patent; none of them are even worthy of being considered as anticipations, except the American patents to Day of 1874, Nos. 147,827 and 156,015, and the French patent to Denayrouse of 1877, No. 3,170. The Day patents, upon which defendants chiefly rely as an anticipation of the Brush patent, as construed by the complainant, exhibit a single carbon lamp, having two carbons instead of one attached to each carbon-holder, so that in the operation of the lamp both branches of the carbon-holder are raised and lowered *simultaneously*. While the upper and lower carbons are in contact, the current is divided between them, but, when separated to form the arc, though the separation of both sets occurs at the same instant, owing to the difference in resistance of the carbons only a single arc is formed. When this arc has burned for a few minutes, the arc will shift to the other pair of carbons, remaining until they are so far con-

sumed as to require additional feeding, when the arc is shifted back to the first pair, and they are thus caused to burn alternately, instead of successively, as in the Brush patent. This alternation is of course owing to the fact that both sets of carbons are separated *simultaneously*, and not in succession, as in the Brush patent, in which one is held in reserve until the first pair is wholly consumed. The Day lamp, however, not only lacks the non-coincidence in the separation of the carbons, which is the prominent feature of the Brush patent, but in practice it never seems to have been a success. The shifting of the light from one pair of carbons to the other took place every few minutes, and was attended each time by a momentary extinguishment of the light, which occurred so frequently that it was not considered of any commercial value; and during the 16 years it has been in existence but two lamps seem ever to have been constructed in accordance with the patent, one of which was tested in 1879 and proved a failure, and the other of which was made in 1887 for the purpose of being used as an exhibit in this case. Not only was the light fluctuating and unsteady, but the idle pair of carbons so near the pair in operation threw a broad shadow back of them, which was transferred from one side of the lamp to the other as the arc shifted, and seriously impaired the commercial value of the lamp.

The French patent of Denayrouse, it is true, contained the principal feature of the Brush patent in the successive combustion of two pairs of carbons, but by means so different that they can by no stretch of construction be regarded as mechanical equivalents. The invention has no application to carbons placed end to end, as in the American patents, but to those lying side by side, as in the patent of Jablochkoff, who appears to have originated this arrangement. It is in fact a duplication of the Jablochkoff candle, with the addition of—

"An electric key for making and breaking contact with the electric current for each such candle. This key is worked by one arm of a lever, the other arm of which has a stud pressed by a spring against the candle, which is burning, near its lower end. When this candle is burned nearly down, so that the stud of the lever is no longer supported by the solid matter of the candle or carbon, the lever and key are moved by the spring, and contact is thus broken with the circuit for the nearly consumed candle, and is made with the circuit for a fresh candle, which is thereby kindled, and thus successively, as candle after candle becomes consumed, fresh candles are kindled automatically to take their place."

But as this patent is not seriously claimed as an anticipation, no further reference to it will be made. The main questions in this case turn upon the proper construction of the Brush patent. While the claims are undoubtedly broad, they ought not to be interpreted as for a function or result, since there is nothing novel in substituting one pair of carbons for another, and thus securing a successive combustion of two or more pairs. It was done long before the Brush patent, and may still be done by manual interference, by replacing one set of carbons with another, or by any mechanism which does not involve the dissimultaneous and dissimultaneously separating and feeding movement. What the claims purport to cover are briefly all forms of mechanism constructed to separate the two

or more pairs or sets of carbons "dissimultaneously" (a word coined for the occasion, but readily understood) or successively, in order that the light may be established between the members of but one pair or set at a time, while members of the remaining pair are maintained in a separate relation. It is claimed by the defendant, however, that the words "dissimultaneously or successively," contained in the first six claims of the patent, refer only to the exact instant, the very *punctum temporis*, of the separation of the carbons; and that as the Scribner patent, under which the defendants are operating, provides for the initial simultaneous separation of the carbons, there is no infringement, though the light is formed between but one pair, the other being held in reserve to await their consumption. If this contention be correct, then it necessarily follows that Brush, who is acknowledged to be the actual inventor of the double carbon, and whom defendants' expert, Mr. Lockwood, frankly admits (page 243) to be justly regarded as having done more than any one else to make electric arc lighting on a large scale a practical success, secured by his patent the mere shade of an idea,—a wholly immaterial and useless feature,—abandoning to the world all that was really valuable in his invention. In determining the proper construction of his claims, two considerations ought to be kept prominently in view: (1) The declared object of the inventor; (2) the state of the art.

1. That he intended to secure for himself all he now claims, is evident upon the most cursory reading of his patent. In the introduction to his specifications he says that his invention consists—

"*First*, in a lamp having two or more sets of carbons, adapted by any suitable means to burn successively; that is, one set after another. *Second*, in a lamp having two or more sets of carbons, each set adapted to move independently in burning and feeding. *Third*, in a lamp having two or more sets of carbons, adapted each to have independent movements, and each operated and influenced by the same electric current. *Fourth*, in a lamp having two or more sets of carbons, adapted each to have independent movements, and each operated and influenced by the same electric current; said carbons, by any suitable means, being adapted to be separated dissimultaneously, whereby the voltaic arc between a single set of carbons is produced."

—This last clause apparently for the very purpose of removing any doubt as to the object of the non-coincident separations of the carbons. Again he says:

"I do not in any degree limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished. * * * This function of dissimultaneous action upon the carbons or their holders, whereby one set of carbons shall be separated in advance of the other, constitutes the principal and most important feature of my present invention."

These peculiar functions and results are subsequently described as follows:

"One pair is separated before the other; it matters not how little nor how short a time before. This separation breaks the current at that point, and the electric current is now passing through the unseparated pair of carbons,

A^1, and now, when the lifter, continuing to rise, separates these points, the voltaic arc will be established between them, and the light thus produced." "It will be apparent by the foregoing that it is impossible that both pair of carbons, A, A^1, should burn at once. * * * This function, so far as I am aware, has never been accomplished by any previous invention; and by thus being able to burn independently, and one at a time, two or more carbons in a single lamp, it is evident that a light may be constantly maintained for a prolonged period without replacing the carbons or other manual interference."

This function is again restated in the second and third claims. It would seem that no language could make the object of the inventor clearer than that which he has chosen.

2. A reference to the state of the art, as already shown, demonstrates that Brush was a pioneer in this branch of electrical construction. As an experienced electrician, it could hardly have escaped his attention that it is practically impossible, with the most delicate adjustment of mechanism, to keep up, with the same current of electricity, two distinct voltaic arcs for any length of time, owing to the inevitably different resistance of the two sets of carbons. If there had been any doubt upon that point, a reference to the Day patents would have solved it. These patents exhibit two pairs of carbons separated apparently simultaneously, but as the patentee states—

"The current selects the route offering the least resistance, and therefore follows that pair of carbons in closest impact. When the points are separated, it continues to follow the same pair until the distance between them, resulting from waste, is too great, when the current weakens or breaks. * * * The current chooses another pair of carbons, the magnets come into play, and the light is re-established."

Indeed, it is quite apparent from all the experiments connected with the arc lighting that the establishment of the arc between one pair of carbons, instead of both, was not necessarily due to the initial non-coincidence in the separation of the carbons, but also to the different powers of resistance of different carbons of low resistance, which seems inevitable, however delicately the mechanism be made or adjusted. In this view it is difficult to see what object Brush could have had in patenting this feature, and we think, therefore, that the word "dissimultaneous" used in his claims should be construed as referring to that separation which results in the production of a single arc.

It is argued, however, by the defendants, that, while the claims originally presented by Brush were broad enough to cover the feature of the successive burning of the two pairs of carbons, these claims having been rejected as functional, he subsequently accepted narrower claims, and that, under the familiar principle that a patentee who has once acquiesced in the rejection of a claim cannot thereafter claim it by construction, applies in this case. If the premises be true, the conclusion is undoubtedly correct. The specifications were originally filed May 15, 1879, and the first three claims were rejected as "too broad or functional," but no objection was made to the fourth. These claims were again presented, with a very slight and immaterial change, and were

again rejected July 8th, as "not materially changed." This called forth a protest from the patentee, who reformed his claims, but says in his letter that "these claims, being fully as broad as any yet presented, we anticipate the same objection, and will therefore endeavor to show wherein the examiner has erred." He then enlarges upon the importance of the invention, denies that the claims are too broad or functional, states that his invention is a principle or method of moving the carbons in a double carbon lamp, and that "to prolong the time that any electric lamp will continue its light without any manual interference or attention is a vitally important matter," and urges the allowance of the claims. The new claims were presented July 14th and 16th, apparently in person, and the patent was allowed on the following day. On comparing the claims as originally presented with those finally allowed, we find the changes to be of little consequence. The first claim was changed only by erasing the words, "whereby the voltaic arc is established between the members of but a single pair, to-wit, the pair last separated," but, as these words are substantially contained in the second and third claims, the change was not an abandonment of this feature. Certainly the first claim is no narrower than it was before. In the second original claim the words, "each pair or set adapted to have independent separating and feeding movements," are erased, and the words, "in combination with mechanism constructed to separate said pairs dissimultaneously or successively," substituted, but with words added showing the object to be "to establish the electric light between the members of but one pair." In the third claim the word "dissimultaneous" is combined both with "separating "and "feeding" movements, indicating very clearly the object of the patentee. But it is quite unnecessary to analyze these claims at length. Taken in connection with the correspondence, they show that the examiner yielded to the views of the patentee, and allowed the claims in such terms as to express his theory of the invention.

In the view we have taken of the proper construction of this patent, the question of infringement presents no difficulty. The defendant company admits that it used in Toledo, in the course of its business, for the purpose of commercial lighting, a number of double carbon lamps similar to the complainant's exhibit, "defendant's lamp;" but insists that such exhibit has been injured or changed by the twisting of the lifting lever and the bending of the clutch lever, so that it is in an abnormal condition. This exhibit shows a complicated piece of mechanism, by means of which the electric current entering the lamp is divided, a portion being used to energize two magnets, AA, the object of which is, through a system of levers, to raise the two carbon rods. When the arc is established between one pair of these carbons, the other is lifted, and held in reserve by a retaining magnet until the first pair is consumed. In this exhibit there is a perceptible dissimultaneous initial separation of the two pairs of carbons, and hence an infringement of complainant's lamp, even according to the narrow interpretation put upon it by the defendants; but it is insisted that this is an accident in the construction or use of this particular lamp. The testimony of Mr. Nolen, however, a wit-

ness for the complainant, shows that in February, 1887, he examined a lamp at defendant's station in Toledo similar to complainant's exhibit, "defendant's lamp," and that the mechanism was such that one of the carbons was raised a little before the other, and that he noticed about 18 other similar lamps in operation in Toledo. Mr. Adams, another witness, swears that he visited Toledo the following year, and saw these lamps, and that all he observed were burning on the same side; that the next morning he looked at the same lamps, and always found the burned-out pair of carbons upon one side, and the other only partially consumed, and that, upon manual manipulation of some of these lamps, one or two separated their carbons with a visible want of coincidence. This is certainly strong evidence to indicate a purpose on the part of the designer or the manufacturer of these lamps that the separation of the carbons should be simultaneous. This testimony, however, is denied by defendants' witness Warner, who examined the same lamps, and found but two in which the separation did not take place simultaneously, which he judged to be due to rough handling by those having charge of them. We do not care, however, to discuss this testimony at length, or to dispose of this case upon the theory that defendant has made use of a few lamps which in practical operation may have separated their carbons dissimultaneously, and thus have infringed the Brush patent upon defendants' own interpretation of it.

The Scribner lamp, which defendants are using, undoubtedly contemplates an initial simultaneous or coincident separation of the two pairs of carbons, and in this particular differs from the Brush patent. They are alike, however, in the vital feature that the final or arc-forming separation is dissimultaneous, and in the total consumption of one pair of carbons before the other. In the Brush patent the order of combustion is *predetermined* by the initial non-coincidence of the separation. In the Scribner patent it is a matter of *chance*, or of the retaining magnets, depending upon the relative resisting power of the two carbons, which is first consumed; in other words, the non-coincidence is a function of both patents, but in one it is a matter of calculation, and in the other a matter of accident. Undoubtedly if the Scribner patent had preceded that of Brush, the latter would have to be limited to the initial non-coincidence of separation; but, as it precedes the other, we think it entitled to a liberal interpretation. If we are correct in this view, then as the Scribner patent contemplates a dissimultaneous arc-forming separation by mechanism, certainly not radically different from that of Brush, we are constrained to hold it an infringement. It is unnecessary to go into the details of the Scribner device, so long as by *mechanism* it accomplishes automatically the function of the Brush patent. We think the language of the supreme court in the case of *Sewing-Machine Co.* v. *Lancaster*, 9 Sup. Ct. Rep. 299, is applicable to this patent:

"He was not a mere improver upon a prior machine which was capable of accomplishing the same general result, in which case his claim would properly receive a narrower interpretation. This principle is well settled in the patent law both in this country and in England. Where an invention is one of a

primary character, and mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same results are infringements, although the subsequent machines may contain improvements in separate mechanisms which go to make up the machine."

We should have felt fully justified in disposing of this case by a simple reference to the opinion of Judge GRESHAM in the *Brush Electric Co.* v. *Ft. Wayne Electric-Light Co.*, 40 Fed. Rep. 826, in which the same construction was placed upon the Brush patent; but, in view of the importance of the questions involved, and of the elaborate preparation of counsel, we have deemed it proper to give it an independent consideration.

We are clearly of opinion that complainant is entitled to relief in this case, and a decree will therefore be entered for an injunction, and the usual reference to a master to assess and report its damages.

KIERNAN *et al.* *v.* STAFFORD *et al.*

(*Circuit Court, D. New Jersey.* September 26, 1890.)

COLLISION—TUG AND STEAM-SHIP.

A tug, with a bark in tow, and a steam-ship were approaching nearly head on when first discovered. The tug signaled that she proposed to pass on the starboard side. The steam-ship signaled in reply to port helm, and pass each other on the port side. The tug accepted this signal, but the steam-ship, when so near as to render a collision almost inevitable, changed her signals, and the tug, to avoid being run down, turned quickly to the left, and escaped by a distance of about a dozen feet. The bark was unable to get out of the way, and was struck by the steam-ship. At the place where the collision occurred there was no material obstruction to the view. *Held*, that the tug was not in fault.

In Admiralty. On appeal from district court. See 38 Fed. Rep. 767.

De Lagnel Berier and *Henry G. Ward*, for libelants.

Owen, Gray & Sturges, for James E. Stafford.

Sidney Chubb, for F. O. Matthiessen & Wiechers Sugar Refining Company, respondents.

BRADLEY, Justice. After carefully reading the evidence in this case, I am unable to agree with the judge of the district court as to the tug Leonard Richards being in fault in regard to the collision between the steamer Ludwig Holberg and the bark Quickstep. The only direct evidence in the case as to the position and movements of the three vessels at the time of and preceding the collision was given by McDevitt and Devlin, the master and mate of the tug, by Woods, the pilot in charge of the bark and tug, and by the officers and crew of the Quickstep; and from this evidence, taken together, it seems to me that the Holberg was solely to blame. Had the people in charge of the Holberg been brought in to testify, the case might have had a different look; but they were

not, and the omission to produce them rather raises a presumption against the respondents. The account given by the captain and mate of the tug is substantially confirmed by the pilot, and the testimony of the officers and crew of the Quickstep does not materially affect it. That account is that the tug, with the Quickstep in tow by a hawser of 80 fathoms in length, about half-past 4 o'clock in the afternoon of the 24th of May, 1887, had just issued from the Swash channel, on their way to New York, and had entered the main channel, and were heading north by east on the course of that channel, when they discovered the Holberg coming down the channel, about half a mile distant, nearly ahead, but slightly on their port bow; she (the Holberg) heading a little more south-easterly than the reverse course of the tug and bark, so as to show her starboard bow and side. Thereupon the tug, as was proper to do, blew two blasts of the whistle to signify that she proposed to pass to the left; that is, on the starboard side of the Holberg. But the latter did not accept this offer, and replied with a single blast, signifying to port helm, and pass each other to the right, or each on the port side of the other. The tug at once accepted this signal, and replied by a single blast to that effect, and immediately ported her helm accordingly, and the Quickstep did the same; but the Holberg, after porting her helm sufficiently to bring her head-on to the tug and bark, steadied her helm so as to run directly towards them. Seeing this, the captain of the tug repeated the single blast to call the attention of the Holberg to the maneuver agreed on. But then the Holberg, when so near as to render a collision almost inevitable, blew two blasts, and the tug, to escape being run down, turned quickly to the left, and just escaped by a distance of only ten or a dozen feet. The bark was absolutely unable to get out of the way. The Holberg kept on her course, running between the tug and the bark, cut the towing hawser in two, and struck the bark on her port quarter, abaft the mizzen-topmast back-stay, cutting into her several feet, which caused her to sink, and produced the loss in controversy.

It is clear from this evidence that the disaster was caused by the Holberg not complying with the signals agreed on, and changing the signals at an inopportune moment, and that no fault can be attached to the tug Undoubtedly, the vessels were far enough apart when first seen by each other to have avoided all danger of collision. The channel was wide enough to have enabled either of them to bear away at a safe distance. The tug, by sheering off greatly out of her course, could have kept away from the Holberg, if the latter contumaciously refused to give way. But the ordinary rules of navigation do not require any such anomalous course. It may be presumed that each vessel will observe the rules laid down for passing each other, and which are abundantly sufficient to obviate collisions, without requiring them to make wide and useless circuits. The after wisdom which points out what might have been done, but which the ordinary rules of human conduct do not expect to be done, is no criterion for judging of culpability.

Considerable evidence was taken by the respondents the F. O. Matthiessen & Wiechers Sugar Refining Company, after the other evidence

was closed, to show that there was a thick fog at the place of collision at the time it occurred, and that this fact materially affected the duties of the parties by enhancing the care and caution required of them in speed, and in making and distinguishing the signals made by the steamer whistles; a degree of care and caution which the colliding parties on both sides failed to exercise. But all the witnesses who were present and witnessed the disaster agree that, while the weather was somewhat thick and hazy, there was not sufficient fog to prevent a clear view of vessels and objects a mile or two away, and that the Holberg was distinctly seen and noted from the tug and bark when she was half a mile off. Drifts of fog were coming in from the sea about that time, and some vessels were enveloped in fog banks occasionally, which made it necessary for them to slow up and make fog signals. But at the place where the collision occurred, and when it occurred, there was no material obstruction to the view. This is testified to not only by the master and mate of the tug, but by the dozen witnesses who were on the bark, and were produced by the owner, the respondent Stafford.

I am of opinion that the tug Leonard Richards was not in fault, and that a decree to that effect should be made in favor of her and her owners against the respondents, discharging them from all liability for loss occasioned by the collision in question.

HAMBLIN *v.* THE ROCKAWAY.

(*Circuit Court, S. D. New York.* August 18, 1890.)

COLLISION—BETWEEN STEAMERS—FAILURE TO ANSWER SIGNAL—DUTY TO STOP—CROSSING COURSE.

The steam-lighter L., going up the East river near the New York shore, came in collision, near Eighth-Street dock, with the ferry-boat R., bound from Hunter's point to the Seventh-Street slip, and having the right of way. The R. three times gave a signal of one whistle, when off Thirteenth street, Twelfth street, and Eleventh street, when she received a signal of two whistles from the L., which attempted to go near the shore; and the two collided port bow to port bow. *Held*, both in fault; the L. for crossing the R.'s course, and keeping to the left near the shore, without reason; the R. for not backing sooner, under inspector's rule 3, or as soon as the L.'s intent was made known. Affirming 38 Fed. Rep. 856.

In Admiralty. Appeal from district court.

Rice & Bijur, for appellant.

Anson Beebe Stewart, for appellee.

LACOMBE, Circuit Judge. Decision of district court affirmed, with costs.

LEHIGH ZINC & IRON CO. *v.* NEW JERSEY ZINC & IRON CO.

(*Circuit Court, D. New Jersey.* September 23, 1890.)

1. COURTS—JURISDICTIONAL AMOUNT—QUIETING TITLE.
   For the purpose of determining the jurisdictional amount in a bill to quiet title, the whole value of the property, the possession or enjoyment of which is threatened by defendant, is the measure of the value of the matters in controversy.
2. EQUITY PLEADING—MULTIFARIOUS BILL.
   A bill alleged that complainant's title to certain ores claimed by it had been so thoroughly adjudicated that further litigation would be vexatious, and prayed that defendant might be enjoined from taking any proceedings to take said ores, or from disturbing complainant's title thereto. In another portion of the bill complainant claimed a statutory right to require the title or claim of defendant to the ores to be "now" set up, tried, and finally determined. *Held*, that the bill was multifarious.

In Equity.

Charles D. Thompson, *Richard Wayne Parker*, and *George Northrop*, for complainant.

John R. Emery and *Thomas N. McCarter*, for defendant.

GREEN, J. This matter comes before the court upon demurrer interposed by the defendant to the bill of complaint filed by the complainant. The demurrer is general, and the following causes were assigned as its justification:

"*First.* That the said bill is a bill filed in a circuit court of the United States, held in and for the district of New Jersey, and the complainant has not by its said bill shown the jurisdiction of the court, in that it has not averred or shown that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. *Second.* That the complainant in and by its said bill claims under two distinct and inconsistent rights, which cannot be joined in a single bill of complaint, and the discovery and relief sought by said bill relate to two several, distinct, and inconsistent rights, which cannot be joined in one bill; and especially that the complainant in and by one portion of its said bill alleges and claims that the title and rights of the complainant to the ores claimed by it in said bill have been finally settled and determined by the decrees, judgments, suits, proceedings, and acts mentioned in said bill, and that by virtue thereof the defendant is precluded and barred from setting up or asserting any right or claim to the said ores claimed by the complainant, and prays that the defendant may be perpetually restrained and enjoined from taking any action, suit, or proceedings in law or equity to take from it said ores, or from disturbing complainant's title thereto, and may be restrained from attempting to obtain possession of the said premises, or removing the ores, metals, and minerals claimed by the complainant. And, by another portion of said bill, the said complainant relies upon and sets up another, and a different, distinct, and inconsistent, equitable right or title, under the statute of the state of New Jersey, entitled 'An act to compel the determination of claims to real estate, and to quiet title to the same,' approved March 2, 1870, under which the complainant claims the right to require the title or claim of the defendant to said ores, claimed by the complainant, to be now set up, tried, and finally determined under said act, in this suit, and prays such distinct and inconsistent relief. And this defendant says that complainant's supposed right, based on the allegations that its right and title to said ores claimed by it hath been already finally settled and deter-

mined by said deeds, proceedings and judgments, decrees and orders, set out in said bill, cannot be joined with the supposed statutory right to have the claim and title of the defendant to said ores, now set out, tried and determined in this suit. *Third.* That the said bill is multifarious, in that it joins two separate and distinct causes of suit or action which ought not to be joined in one bill of complaint. *Fourth.* That the said bill is uncertain, in that it does not sufficiently state and disclose the nature of the equitable right or interest upon which the complainant relies for relief; and, especially, it does not especially and clearly appear by the bill whether the complainant claims that defendant should be perpetually enjoined from setting up any right or title to said ores claimed by complainant, on the ground that the right and title to the ores claimed by complainant has been already settled and determined by the decrees, judgments, orders, and proceedings set out in said bill, and should not be retried in the present or any other suit, or whether it relies upon a supposed statutory right to require the defendant now, and in this suit, to set up its title and claim to said ores, and to have the same finally determined in this suit, under the said statute. *Fifth.* That the said bill is vague and uncertain, and the equitable right upon which the complainant relies for relief is not stated with sufficient clearness. *Sixth.* That the complainant has not in and by its said bill made or stated such a case as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from and against this defendant."

When the matter was heard, the arguments of counsel took a very wide range, but I shall not attempt to judge of the merits of the case at this time. The only question now before the court is one of pleading, and to that I shall confine myself. I do this with the lesser hesitation, because very many of the statements and allegations made by counsel, and upon which very acute and learned arguments were founded, do not appear upon the record, in the condition it now is, and were in fact contradicted and denied, or affirmed and insisted upon, with equal tenacity by the respective counsel. The question then to be considered is, has the demurrer been well taken? The bill of complaint in its general aspect and tenor may be called a "bill of peace." The complainant avers that it is the rightful owner of certain ores, in a certain locality; that it is in full, peaceable, and quiet possession thereof; that its right and title to these ores have been derived from certain deeds of conveyance, leases, and agreements, and have been confirmed to it by formal adjudications of courts in actions in which they were the subject-matter of the litigation; that the defendant is threatening to disturb the complainant in the possession of this property by commencing suits in which the title of the complainants is to be attacked; that as the title of the complainant has been fully established and settled, especially by the judgments of courts of competent jurisdiction, any further litigation of the same title would be vexatious and oppressive, and should be restrained.

The first objection to this bill made by the defendant is that the matter in controversy does not exceed in value the sum of $2,000. It is well settled that the requisite value of the matters in controversy is a jurisdictional fact, and it must be properly averred in the bill, or the court will refuse to assume jurisdiction of the cause. There is in the complainant's bill an averment, in the language of the statute defining the

jurisdictional limits of this court, that the matters in dispute exceed the sum of $2,000, exclusive of interest and costs; but counsel for defendant insists that, notwithstanding such averment, the objection taken is fatal, because, if the case made by the complainant's bill is true, no pecuniary damage can accrue to it, for the suit threatened by the defendant would fall as utterly groundless. Without stopping now to invoke, in answer to this objection, the effect of a demurrer to the well-pleaded averment of a jurisdictional fact, it is sufficient to say that I think the proper criterion of the "value of the matters involved in the controversy" is to be found in the value of the property, the possession or enjoyment of which will be affected by the result of the litigation. For the purposes of this suit I should not hesitate to hold that the whole value of the property, the possession and enjoyment of which is imperiled by the threatening acts of the defendant, is the measure of the value of the matters put in controversy by it. If any other test than this should be substituted, very many suitors would be debarred from seeking the protection of the federal courts, and those tribunals would be stripped of a very important branch of their hitherto acknowledged jurisdiction, especially upon their equity side. What would become of suits for the reformation of a written agreement, for the cancellation of alleged forged or fraudulent deeds, for the specific performance of contracts to convey lands, and many others of like character, if, upon the question of jurisdictional value of the matters in controversy, the courts were limited to the pecuniary value of the deed, the contract, the agreement as such, and were barred from considering the value of the thing affected by, or the subject-matter of, those various writings. Take, for instance, the case of a forged deed of conveyance. Suits to compel the surrender and cancellation of such dangerous documents are not uncommon in the federal courts. But on what principle can jurisdiction be maintained if the question of the "value of the matters in controversy" be raised? What is the value of a "forged deed?" Simply nothing. If it be forged, it is absolutely valueless; but, for jurisdictional purposes, it must be held to have, to the rightful owner of the premises pretended to be conveyed by it, the whole value of the premises themselves, the possession and enjoyment of which are menaced and put in peril by its existence. The application of this test to the case at bar is obvious. It may, indeed, be true that the claims of the defendant to the property in possession of the complainant are groundless; it may be held that the deeds, leases, agreements, and adjudications of the courts, upon which and from which the complainant base and claim its right, are invulnerable to any attack which, in pursuance of its threats, the defendant may make. That will appear at the end of the litigation, but the "matter in controversy" is not the result of the litigation, but the property which will be affected by that result, and its value is the value which does or does not confer jurisdiction as it may be summed up. I do not think this cause for demurrer can be sustained

A more serious question is raised by the second and third causes of demurrer. It is insisted that as a pleading the bill is vicious, because

it is multifarious. Multifariousness means the joining together, improperly, in one bill of complaint, distinct and independent matters, and thereby confounding them. To render a bill of complaint liable to the objection, it must contain more than one good, distinct, and severable ground for the maintenance of a suit in equity. It is well-nigh impossible to lay down any rule or abstract principle as to what constitutes multifariousness which can be universal in application, but it may be said that a bill will be considered multifarious if the distinct and separate claims made in it are so different in character that the court ought not to permit them to be litigated in one suit. Two or more distinct objects cannot be embraced in the bill; its double character destroys it. Thus in *Reed* v. *Reed*, 16 N. J. Eq. 248, a bill asking an injunction to restrain waste, and also an account for rent due, was held demurrable on ground of multifariousness. Recent cases seem to show an increasing tendency to avoid the application of strict and technical rules of pleading to a bill objected to as multifarious, and to deal with the objection as addressed to the sound discretion of the court. Thus, in a late case, where from the bill of complaint it appeared that the complainant had in fact two causes of action, each furnishing the ground for a suit, one the natural outgrowth of the other, or growing out of the same transaction or subject-matter, and the defendant had interest in every question raised on the record, but the suit had but a single object, it was held that the causes were properly joined, and the bill was not for that reason multifarious. The only fair deduction to be made from this and other similar cases is that each case must be adjudged and governed by its own peculiar circumstances. The discretion of the court must be appealed to, but that discretion will be exercised always within the limits of the principles which govern good pleading.

Upon a critical examination of this bill of complaint it does appear to be open to the criticism which has been made upon it. The *gravamen* of the complainant's case is that its title to certain ores has been so thoroughly and satisfactorily adjudicated in this and other courts that no further litigation can be tolerated. If such litigation should be commenced, it would be unjustifiably vexatious, and should be enjoined. In other words, the complaint is that the defendant refuses to recognize the conclusive character of the proceedings by which complainant's title has been established, and threatens to bring a suit to reopen and retry issues which are *res adjudicata* by the solemn judgment of the court. The remedy which complainant seeks is the absolute prevention of the defendant's threat thus again to call in question his title. The prayer is for an injunction to accomplish that end. The very last thing that the complainant desires is a suit to determine whether the title to the property in question is in it or in its opponent. Its insistment is that there is no ground for such a suit; that the title to the property in question is forever removed from the forum of litigation, and cannot rightfully be brought back. And this is the solid basis of equity which underlies a bill of peace. When the title of a complainant has been finally adjudicated by a court of competent jurisdiction, and determined, it is

evident that a renewal of the litigation in the same or a different forum by the defeated party would be vexatious, inequitable, oppressive, and a court of equity will enjoin it. Hence, when a bill of peace is presented to the court, the sole issue is, has this title been finally settled as is alleged? It is the adjudication, and not the title, which the bill concerns itself with, and with which the court deals. If the court finds that the judgment relied upon does finally determine the title, it interferes to prevent the complainant being called upon again to maintain it. But the complainant, out of abundant caution, perhaps, or to meet some anticipated line of defense, seeks the aid of this court upon a different ground from that first stated. It invokes the statute law of New Jersey in its behalf, and appeals to the provisions and requirements of an act entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," approved March 2, 1870. It is not necessary to quote this act. Its object is clearly and tersely stated by Chief Justice BEASLEY, of the supreme court of New Jersey, in *Jersey City* v. *Lembeck*, 31 N. J. Eq. 255. On page 272, the chief justice says:

"The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce; and the hardship was that the person so in possession could not force his adversary to sue, and thus put the claim to the test. The title of the act indicates that this is its purpose, for it is an act to compel the determination of claims to real estate."

This clearly expresses the spirit of the act. Its plain intent was to compel, in the way and by the method which it provided, a litigation of adverse claims to lands. He who boasted of an interest in or a claim to lands in the quiet possession of another must proceed to make that claim good, or suffer a judgment to go against him. The issue concerned the title to the lands. It was to be made up immediately. It was to be tried promptly. The result was to be final and conclusive. In invoking the aid of the statute, and in bringing itself within the protectorate of its provisions, the complainant seeks to compel a legal assertion by the defendant of any title it may have, or claim to have, in and to the property of which the complainant is in possession, so that the truth of such assertion may be litigated, and the validity of the title be determined, in the proper tribunal. Complying with the mandate of the act, the complainant, with the subpœna directed to the defendant in this cause, issued a ticket, describing with precision the property in question, stating the object of the suit, and that, if the defendant claims any title or interest to or incumbrance upon the lands, it is required to answer, but not otherwise; and in such ticket the object of the suit is stated to be to settle the title to lands thereinafter mentioned. This purpose, so formally declared, is manifestly inconsistent with and repugnant to the insistment of the complainant that the title to lands in question has been heretofore finally settled, and which final settlement justifies the bill, as a bill of peace. If there has been a final settlement, there can be *no other* settlement. If there has been no final settlement, there can

be no "*res adjudicata.*" A bill of peace requires the one. A bill for the statutory relief, under the act mentioned, requires the other. In the one case, the claim of the complainant is that the defendant threatens to harass and vex it, injuriously and inequitably, by bringing a suit to test the validity of the complainant's title and possession of lands. In the other, the plaint of the complainant is that the defendant will not bring such suit for such purpose. As to the first claim, the relief sought is for an enjoining order, absolutely restraining the prosecution of the suit which is so vexatious. In the other, it is a mandate to compel the prompt and immediate prosecution of the suit which is ardently desired. Clearly, such claims are too contradictory and diverse to stand together. The demurrer is sustained for the cause alleged. As upon either branch of the case, as stated in the bill, complainant would have a *prima facie* claim to proper relief in a court of equity, it will be permitted to amend the bill, if it shall so elect, so as to avoid the charge of multifariousness, within 15 days; the injunction heretofore granted to stand until the further order of the court.

GLENN *v.* DIMMOCK *et al.* SAME *v.* LOCKWOOD *et al.* SAME *v.* LUCAS *et al.*

(*Circuit Court, E. D. Missouri, E. D.* October 10, 1890.)

1. REHEARING IN EQUITY—TIME OF GRANTING.
Equity rule 88 declares that a rehearing shall not be "granted" after the lapse of the term at which the final decree is entered, and provides that in non-appealable cases a petition for a rehearing may be "admitted" before the end of the next term after final decree. *Held*, that the word "admitted," as used therein, is synonymous with the word "granted," and that the effect of the rule is to deprive the court of the power to grant a rehearing in any case after the lapse of the term next succeeding the entry of a final decree.

2. SAME—AFTER TERM SUCCEEDING DECREE—WAIVER.
An order sustaining a petition for a rehearing after the lapse of the term next succeeding the entry of a final decree is utterly void, and cannot be validated by any action of defendant in taking leave to plead, etc.

In Equity. On motions to set aside orders overruling petitions for rehearing.

Thomas K. Skinker, for plaintiff.

John W. Dryden, *Noble & Orrick*, *Lee & Ellis*, and *W. H. Clopton*, for defendants.

THAYER, J., (*orally.*) The opinion heretofore expressed in these cases (the same not being appealable) that the court could not, under equity rule 88, grant a rehearing after the lapse of the term succeeding that at which the final decrees were entered, has been challenged in two respects. In the first place, chiefly on the strength of a remark made in the case of *Giant-Powder Co.* v. *Cal. Vigorit Powder Co.*, 5 Fed. Rep. 202, it is contended that, if a petition for a rehearing is filed during the term at

which the final decree is rendered, the petition may be granted at any subsequent term. That particular question, however, was not before the court for determination in the case referred to; hence the remark made ought not to control the disposition of a case where the precise point is presented for decision, any further than it is found to be supported by reason or authority. The first clause of rule 88 declares that a rehearing shall not be "granted" after the lapse of the term at which the final decree is entered, and the last clause provides that in non-appealable cases a petition for a rehearing may be "admitted" before the end of the next term after final decree. The first clause of the rule is not open to controversy as to its meaning, because the language is explicit that no rehearing shall be granted after the term. To my mind the meaning of the last clause is equally manifest, notwithstanding the use of the word "admitted" in place of the word "granted." The object of the rule was to put an end to litigation,—to fix a time after final decree beyond which the prevailing party should not be kept in court; and surely there was and is as much reason for limiting the time within which a rehearing might be granted in non-appealable cases, as in cases that were subject to appeal. It must also be borne in mind that in legal parlance the word "admitted" is frequently used as synonymous with the words "granted" and "allowed." Furthermore, the eighty-eighth rule, as a whole, is a modification of the old rule of procedure in the English chancery court, which did not permit a petition for rehearing to be entertained after the enrollment of a decree; and, according to well-known canons of construction, the defendants are entitled to invoke a strict interpretation of the rule. All of these considerations lead me to the conclusion that the word "admitted" and the word "granted," as used in the eighty-eighth rule, have the same meaning, and that the effect is to deprive the court of the power to grant a rehearing in any case after the lapse of the term next succeeding the entry of a final decree.

The precise point under consideration does not appear to have arisen in any adjudged case, but, from expressions found in numerous decisions it is manifest that the views above stated are in harmony with the opinion generally entertained as to the meaning and effect of the eighty-eighth rule. *Cameron* v. *McRoberts*, 3 Wheat. 591; *McMicken* v. *Perin*, 18 How. 508; *Scott* v. *Blaine*, 1 Baldw. 287; *Scott* v. *Hore*, 1 Hughes, (U. S.) 163; *Sheffey* v. *Bank*, 33 Fed. Rep. 315; and see decisions formerly cited; *Roemer* v. *Simon*, 91 U. S. 149; *Brown* v. *Aspden*, 14 How. 27. The case of *Clarke* v. *Threlkeld*, 2 Cranch, C. C. 408, is so imperfectly reported that it is not entitled to much weight as an authority. The motion in that case appears to have been acted upon by consent of parties.

It is next insisted that in any event the defendants in the case of *Glenn, Trustee*, v. *Lucas et al.*, have waived their right to insist on the finality of the decree entered at the March term, 1887, in consequence of action by them taken at the present term. Such contention is based on the following facts: Early in the present term (September, 1890) complainant's solicitor moved that the petition for a rehearing be sustained, and the motion was granted. Afterwards, and on the same day, the defend-

ants took leave to answer the original bill. Some days later in the term, and before an answer was filed, the court vacated the order sustaining the petition for a rehearing, its attention having in the mean time been directed to the mandatory character of equity rule 88. Viewing the case as one in which the decree became final at the September term, 1887, and in which the court had lost all jurisdiction over the defendants for the purpose of either vacating or altering the decree, I am of the opinion that the order made at the present term, on complainant's motion only, sustaining the petition for a rehearing, was utterly void, and that such order was not validated, or in any manner affected, by the subsequent action of the defendants in taking leave to plead.

The case at bar stands on a different footing from that of *Toland* v. *Sprague*, 12 Pet. 300, and other like cases, in which a defendant having an election to appear and defend in a given court, or not to appear, voluntarily entered his appearance therein, and thus waived his privilege. In the present case the court had no control over the final decree at the time it attempted to vacate the same; and, even though it be conceded to complainant that the court may vacate a decree after it has become final by consent of parties made and entered of record, yet in the case at bar no act was done tantamount to giving such consent. The former orders made in these cases, overruling the petitions for rehearing filed at the March term, 1887, appear on further consideration to have been proper, and they will be permitted to stand.

CHRISMAN *et al.* *v.* HAY *et al.*

(Circuit Court, S. D. Iowa, W. D. October 7, 1890.)

1. VENDOR'S LIEN—QUITCLAIM DEED.
   Under Code Iowa, § 1940, which provides that no vendor's lien shall be enforced after a conveyance by the vendee, unless such lien is reserved by written instrument, acknowledged and recorded, or unless such conveyance is made pending suit to foreclose the lien, a quitclaim deed by the vendee is sufficient to bar a vendor's lien not evidenced by writing.
2. MORTGAGE—FORECLOSURE.
   A mortgage for $25,000 on a large number of lots provided for the release of "any five or more lots at any time hereafter" upon payment of $32 per lot. *Held*, that purchasers from the mortgagor, after his default in paying the mortgage debt, but before foreclosure suit was begun, might have their lots released for $32 each; but that the mortgagor's right to a release on those terms expired when such suit was begun.

In Equity. Bill for foreclosure of mortgage and enforcement of vendor's lien. Submitted on pleadings and proofs.

Flickinger Bros., for complainants.

Stone & Sims, *Wright & Baldwin*, and *Sapp & Pusey*, for defendants.

SHIRAS, J. In the spring of 1887 the complainants, James S. Chrisman and George W. Robards, were the owners of certain realty in Pot-

tawattamie county, Iowa, known as "Manawa Park," and in May of that year they sold the same to Hattie A. Hay. To secure the payment of $25,000 of the purchase price, said Hattie A. Hay executed six promissory notes; three thereof, aggregating $8,333.33, being payable to the order of George W. Robards, and three, aggregating $16,666.67, being payable to the order of James S. Chrisman, and coming due in one, two, and three years, with interest at the rate of 7 per cent. To secure these notes the said Hattie A. Hay and her husband executed a mortgage upon blocks 1 to 32, inclusive, "of the lots contained in Manawa park as per plat thereof," which contained the following stipulation:

"And it is hereby agreed and part of this contract that, upon the payment of $32.80 per lot and accrued interest, said James S. Chrisman and Geo. W. Robards agree to release any five or more lots, at any time hereafter when called upon to do so, at expense of 2nd party."

The mortgage also contained a stipulation to the effect that, upon a failure to pay any part of the principal or interest, then the whole of the sum secured should become due and payable. August 10, 1889, the present bill was filed for the foreclosure of the mortgage in question; the notes maturing in April, 1887, and 1888, being unpaid. It is also averred in the bill that the premises in the mortgage described, to-wit, the 32 blocks therein named, do not include all the property sold by complainants to said Hattie A. Hay; that the mortgage should have included the same, but that, through the misrepresentation of Hattie A. Hay and her husband, complainants accepted the same in the belief that the mortgage covered the entire property; and it is therefore prayed that complainants may be decreed to have a vendor's lien upon that part of the premises not covered by the mortgage.

It appears from the evidence that the portion of the premises on which the lien is sought to be established, was conveyed by the vendee before this suit was brought, and therefore, under the provisions of section 1940 of the Code of Iowa, the lien is defeated. That section provides that—

"No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument, duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendee, his executor or assign, to enforce such lien."

On behalf of complainants, it is urged that the premises sought to be subjected to the lien were conveyed by a mere quitclaim deed, and that the party holding under the same cannot assert any right thereunder as against complainants. It is true that a party holding under a mere quitclaim deed cannot be heard to assert that he is an innocent purchaser for value. *Oliver* v. *Piatt*, 3 How. 410; *May* v. *Le Claire*, 11 Wall. 217. The statute just cited changes the usual rule applied to equitable liens for the unpaid purchase price of property sold. In the absence of a statute, it is held that the vendor's lien affects all purchasers from the original vendee who had notice of the existence of the lien when they bought the premises; and hence one holding under a quitclaim deed would be held to be charged with notice of the lien. The statute of Iowa

declares that, unless reserved in some written recorded instrument, a vendor's lien cannot be enforced after a conveyance of the property. The question of notice is eliminated from the case. The difference in the language used in this section and that found in the section in regard to recording instruments affecting real estate clearly indicates the different rule to be applied in construing the same. The latter declares that "no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded," etc. Under this section an unrecorded instrument is invalid as against a subsequent purchaser for value without notice. Under the former section, a vendor's lien cannot be enforced after a conveyance by the vendee. To sustain the view of complainants, the court would be compelled to interpolate the words "to a purchaser for value without notice" after the word "conveyance," found therein, and this cannot be done. The statute expressly declares that, unless the lien is reserved in a written recorded instrument, such lien cannot be enforced after a conveyance of the property, unless such conveyance is made after suit for the enforcement of the lien has been brought; and the court cannot, by mere construction, radically change the meaning of the words used in the section. As a quitclaim deed will transfer the title and right actually held by the grantor therein, it is a conveyance, within the meaning of the section regulating vendor's liens. As the premises upon which it is sought to fasten a vendor's lien were conveyed to third parties by Mrs. Hay before the bringing of this suit, such conveyance defeats the right to a lien, and it is not necessary to consider the question made in argument, whether such lien could be enforced as against Mrs. Hay; it appearing that complainants had taken a mortgage to secure the purchase money upon part of the property.

The evidence also shows that a number of the lots included in the mortgage have been sold by Mrs. Hay and her husband, and the main question in dispute between the litigants is as to the effect of the agreement in the mortgage for the releasing the lien of the mortgage upon payment of the sum of $32.80, and interest, per lot. On part of the defendant, Mrs. Hay, it is contended that the right thus secured continues in force until the expiration of the year of redemption after sale; that, in effect, the mortgage creates a separate lien upon each lot for said sum of $32.80, and that any one or more of the lots may be redeemed by paying this sum, regardless of the total sum due. On part of complainants it is contended that this stipulation is in the nature of a privilege, and that, when Mrs. Hay failed to meet the payments provided for in the mortgage, she lost the right to exercise this privilege, and that parties purchasing lots from her since the date of the failure to pay the first note coming due stand in no better position, but must be deemed to have purchased subject to the lien of the mortgage for the full sum due thereon. From the evidence in the case, it is clear that, when the mortgage was executed, it was well understood between the parties that it was intended to sell the lots to purchasers, the premises having been platted for that purpose; and it is equally clear that sales could not be made if each small

lot was to remain subject to the lien of the entire mortgage debt. The stipulation found in the mortgage was evidently placed therein so that purchasers could be assured that the payment of the sum fixed, *i. e.*, $32.80 and interest, to the mortgagees, would release the lot purchased from the lien of the mortgage. So far as purchasers from Mrs. Hay are concerned, it must be held that all who became such before the bringing of the present suit are entitled to the benefit of the agreement found in the mortgage; and by paying, if not already paid, the fixed price named in the mortgage, are entitled to hold the lots purchased free from the lien of the mortgage.

As already stated, the evidence shows that Mrs. Hay has failed to meet the payments she bound herself to make, and complainants are now compelled to resort to the mortgaged property to secure the sum due them. If it were held that Mrs. Hay could now select out the more valuable lots, and redeem them from the lien of the mortgage by paying the stipulated sum of $32.80 and interest, it would enable her to secure the benefit of the contract without meeting fully the obligations thereof. The mortgage she executed was, in terms, upon the entire property, to secure the entire debt; but following the granting clause is found the stipulation already cited, which, as already said, was inserted in order to enable her to sell the lots to purchasers, and for the protection of such purchasers. It now appears that she is no longer endeavoring to carry out her contract with complainants. The payments are largely in arrears, and the case is ripe for a decree of foreclosure and sale. Under such circumstances, it would work a fraud upon the rights of complainants if it were held that the mortgagor, while wholly in default on her part, should be permitted to select out the more valuable lots from the mortgagor's tract, and redeem them, leaving the less valuable unredeemed. As between Mrs. Hay and complainants, it must be held that the right to procure the release of portions of the mortgaged premises by paying the price named terminated when the present suit for the foreclosure of the mortgage was brought. The complainants are therefore entitled to a decree establishing the amount due them, respectively, upon the notes secured by the mortgage; due credit being given for all sums heretofore received from the mortgagors, or from purchasers under them of any portions of the property, and for all sums paid hereafter by parties who had purchased portions of the lots before the bringing of this suit, as hereinafter provided. Such purchasers of lots, in cases wherein the stipulated price of $32.80 and interest has not yet been paid to the complainants, must pay the same within 30 days from the date of this decree. At the expiration of said 30 days, the amount then due upon said notes will be computed, and, unless the sum due is by that time fully discharged, a final decree will be entered, foreclosing said mortgage upon all parts of said realty in the bill described as shall then remain unredeemed by purchasers, and ordering the sale thereof. As the mortgage provides that in case of foreclosure a reasonable attorney's fee shall be allowed, provision will be made in the final decree for the allowance of such sum as the parties may agree upon, or, if such agreement cannot be had, for such sum as the court may award.

In re RAHRER.

(*Circuit Court, D. Kansas.* October 17, 1890.)

INTOXICATING LIQUORS—INTERSTATE COMMERCE—RETROACTIVE EFFECT OF WILSON ACT.

Act Cong. Aug. 8, 1890, known as the "Wilson Act," and declaring "that all fermented, distilled, or other intoxicating liquors or liquids, transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent, and in the same manner, as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is permissive, and not mandatory, upon the different states, and requires additional legislation to be had by a state to bring the provisions of the act into operation within the state.

This is an application for the writ of *habeas corpus*. From the agreed statement of facts in this case it appears that the petitioner, Charles A. Rahrer, was the agent at Topeka, Kan., of Maynard, Hopkins & Co., citizens of the state of Missouri, doing a general wholesale business at Kansas City, Mo., in the sale of intoxicating liquors. The petitioner was appointed agent of said house in June, 1890, and from that time to the date of his arrest, on the 9th day of August, 1890, he continued, as said agent, to sell said liquors at Topeka, Kan., in the original package, as imported, and not otherwise. For a sale thus made by him on the 9th day of August, 1890, he was arrested by the state authorities, for a violation of what is known as the prohibitory law of the state, and he petitions this court for his discharge therefrom, on the ground that he is restrained of his liberty in violation of his rights under the federal constitution. By order of the United States circuit judge, Hon. JOHN F. PHILIPS, judge of the United States district court for the western district of Missouri, sat with Judge FOSTER on the hearing of this petition.

David Overmyer and *Hazen & Isenhart*, for petitioner.

L. B. Kellogg, Atty. Gen., and *R. B. Welch*, Co. Atty., for respondent.

PHILIPS and FOSTER, JJ. Two principal questions have been discussed by counsel in this case: *First*, as to the constitutionality of what is known as the "Wilson Bill," passed by congress on the 8th day of August, 1890; and, *second*, whether, if said bill be valid, the existing prohibitory law of the state of Kansas applies, or is it needful that additional legislation should be had by the state to bring into action in the state the provisions of the Wilson bill. Under the view taken of the last question, we deem it unnecessary to enter upon any discussion of the first proposition, as with or without the constitutionality of the Wilson bill the result to the petitioner is the same. The first section of the prohibitory law of Kansas is as follows: "Any person or persons who shall manufacture, sell, or barter in spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor," etc. Gen. St. 1889, par. 2521. Under the decision of the supreme court of the

United States in *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, this statute, in so far as it attempted to prohibit the sale of intoxicating liquors imported into the state, and sold by the importer or his agent in the original package, was inoperative and void, being in conflict with section 8, subd. 3, art. 1, of the federal constitution, which places the power exclusively in congress to regulate commerce with foreign nations and among the states. Incident to this decision, congress, on the 8th day of August, 1890, enacted the Wilson bill, which declares:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent, and in the same manner, as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It is not claimed nor pretended by the attorneys for the state that the petitioner, previous to the passage of the Wilson bill, was engaged in a business violative of any law of the state; but they do claim that, immediately after the passage of said bill by congress, the petitioner's business became and is a violation of the prohibitory law of the state. So that the proposition stands in this form: On the 7th day of August, 1890, sales made by the petitioner were permissible and lawful under the constitution of the United States, the prohibitory law of the state to the contrary notwithstanding; therefore, if on the 9th day of August, 1890, the same act of the defendant is taken from under the protection of the constitution, and is a violation of the same prohibitory law of the state, the conclusion would seem to be inevitable that this changed condition of liability is because of the enactment of congress on the 8th day of August, 1890. In brief, the contention of the state is that the act of congress enlarged the scope and operation of the act of the state legislature, making that which was a legitimate business one day a crime the next, not under any law of congress, but against the law of the state. There is nothing in the wording of the act implying that congress assumed such a power, or intended to give such effect to this enactment. At the time congress passed the Wilson bill, it was well known and recognized that the supreme court had decided that such a state prohibitory law was void in so far as the dealer in imported liquors in the original package was concerned; in other words, there was no law, and could be no law, in existence, making such a business a crime. It cannot be assumed that congress desired to introduce into the present police laws of the state an article or subject hitherto not included by those laws. How could congress know that the people of all or any of the states on the 8th day of August 1890, desired to have such subject or article embraced in their police laws? The contention of counsel for the state is that it is for the several states themselves to determine the scope and purpose of their police laws, and congress has not undertaken to arrogate to itself any power or control over that subject. In employing the words,

"shall be subject to the operation of the laws of the state," congress did not use them in a mandatory, but in a permissive, sense. The most ardent and enthusiastic advocate of a strong central government would spurn the idea that congress assumed to dictate or convey a mandate to the several states in the matter of the exercise of their police powers. On the contrary, the Wilson bill left it to the free and untrameled action of the several states to determine whether they would or would not include within their police laws this particular article of commerce. Every state in the Union probably has upon its statutes some police regulation of the traffic in intoxicating liquors. These statutes, as a rule, exempt from their operation, either in express terms or by implication, imported liquors and their sale in original packages. In some of the states the exception was expressed, as in the Iowa prohibitory law prior to 1888, and the old New York law of 1855, and in all cases where not expressly reserved the law of the land, as declared by the supreme judicial tribunal, supplies the exception; thus indicating the general *consensus* that hitherto it was not recognized as among the police powers of the state to regulate or interdict among the states the traffic in imported liquors. The decision in *Leisy* v. *Hardin*, *supra*, but emphasizes this fact and principle. The prohibitory law of the state of Kansas where it touched upon interstate commerce was no law at all at the time of this enactment nor since. Judge COOLEY says:

"The term 'unconstitutional law,' as employed in American jurisprudence, is a misnomer, and implies a contradiction; that enactment, which is opposed to the constitution, being in fact no law at all." Cooley, Const. Lim. 3.

Again, at page 188, this same author says:

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their construction are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been passed and in legal force."

How then can the act of congress in question have the effect and operation claimed for it by the attorneys for the state? For it must be kept in mind that a legislative act in conflict with the constitution is not only illegal or voidable, but it is absolutely void. It is as if never enacted, and no subsequent change of the constitution removing the restriction could validate it or breathe into it the breath of life. For illustration: Section 10, art. 1, of the federal constitution declares that "no state shall pass any bill of attainder, *ex post facto* laws, or law impairing the obligation of contracts." Suppose a state should pass any of these prohibited acts, and after its passage the constitution should be amended by the assent of the requisite number of states and the foregoing section dropped altogether, so that there was no longer any restriction on the states in this particular. Would any one contend that a prior enactment in the face of the constitution, dead at the time of its

enactment for want of life-giving power, would at once arise from its tomb, and become a living, actual, lawful thing? Or suppose the legislature of Kansas in these times of imputed financial distress should enact a law providing that, in all cases of judicial sales of real estate hereafter made on foreclosure of mortgages, there should be a stay of execution for one year after judgment. Such a law would seem fair on its face, and would be in general terms like that of a prohibitory law of the state. The courts unquestionably would hold that as to judgments rendered or mortgages executed prior to such enactments the statute was inoperative and void, because it impaired the obligation of contracts, and was in violation of section 10, art. 1, of the constitution; although it might be held to be a valid law as to subsequent contracts, good in part and bad in part. Now, suppose the constitution should be amended, and section 10 should be excluded, could it be maintained that this act of the legislature would become a valid law as to prior contracts without further legislation? Where is the distinction between the supposed case and the one at bar? In either case the legislature undertook to legislate on a matter forbidden to it by the constitution,—in the one case prohibited in terms, and in the other taken away and denied to it by a delegation of all power over the subject-matter to congress. If the constitutionality of the Wilson bill is to be upheld upon the theory, as claimed by its advocates in the debate thereon in the senate of the United States, and in the argument at this hearing, that congress, in the exercise of its power to regulate commerce among the states and with foreign nations, simply decided or declared that its jurisdiction should be confined to certain subjects-matter of commerce, or that certain subjects-matter and things which may be considered subjects of commerce should thereafter be excluded from its jurisdiction, under the commercial clause of the constitution, and the traffic in intoxicating liquors should thereafter be classified and remitted to the subjects within the police power of the state, such a law, under every rule of construction, must be prospective in its operation. And it must further be conceded that, as the right of the state to treat such an article of commerce as subject to laws passed by the state in the exercise of the police power comes for the first time and alone from the enactment of the Wilson bill, until the state passes a law thereafter forbidding such traffic, it has never exercised the power or the discretion, call it what you may, lodged in it by congress. From this conclusion we see no logical escape. The operation and scope of criminal laws should not be enlarged by implication, but they should be strictly construed; and, where there is any well-founded doubt as to any act being a public offense, especially one not *malum in se*, it should not be declared such, but should rather be construed in favor of the liberty of the citizen.

It follows that the petitioner is entitled to be discharged, and it is accordingly so ordered.

HARMON *v.* UNITED STATES.

(*Circuit Court, D. Maine.* September 23, 1890.)

1. CLAIMS AGAINST UNITED STATES—ALLOWANCE—COMPTROLLER'S DECISION.
Act Cong. March 3, 1887, c. 359, (24 St. 505,) § 2, gives the circuit and district courts concurrent jurisdiction, within certain limits as to amount, of all matters which by section 1 "the court of claims shall have jurisdiction to hear and determine," including all claims founded on any law of congress, except for pensions, or on any contract with the government: "provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims * * * which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." By Rev. St. U. S. § 269, it is made the duty of the first comptroller of the treasury "to superintend the adjustment and preservation of the public accounts, subject to his revision." Section 191 provides that "the balances which may from time to time be stated by the auditor, and certified to the heads of departments by the commissioner of customs, or the comptrollers of the treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts." *Held*, that the proviso must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of parties, and that therefore the disallowance of a marshal's account for fees by the first comptroller of the treasury was not within the proviso, as his decision was conclusive only within the executive department.

2. UNITED STATES MARSHAL—EXPENSES—REIMBURSEMENT.
A marshal is entitled to be reimbursed for money paid, with the approval of the attorney general, to whom Rev. St. U. S. § 368, gives general supervisory power over the accounts of the court officers, on a requisition of the district attorney, for blanks for the necessary use of the district attorney.

3. SAME—MILEAGE—ATTENDING COURT.
Under Rev. St. U. S. § 829, cl. 24, allowing a marshal "for traveling from his residence to the place of holding court, to attend a term thereof, 10 cents a mile for going only," the marshal is not restricted to a single travel at each term; but, where court adjourns over one or more days, he may return home, and charge travel for going to attend the term at the day to which it is adjourned. He may also charge travel for going to each special term.

4. SAME—SERVING PROCESS.
Rev. St. U. S. § 829, cl. 25, allowing a marshal "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others," and providing, "But, when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs," where the marshal serves several precepts against different persons for different causes, he is entitled to full travel on each, though they are all served on the same trip.

5. SAME—TRANSPORTATION OF PRISONER.
The clause of the fee-bill allowing for travel in going only as a compensation for actual travel in going and returning being independent of the clause allowing fees for transportation of officer and prisoner only while the officer has the prisoner in custody, he is entitled both to transportation for himself and prisoner and to travel in going to serve a warrant of removal or warrant to commit.

6. SAME—SERVING SEVERAL WRITS.
Act Cong. Feb. 22, 1875, c. 95, § 7, after making certain provisions for the allowance of the accounts of attorneys, marshals, and clerks, further provides that "no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under provisions of existing law." *Held*, that the act did not preclude a marshal from full mileage on each of two of more writs served at the same time and place on different persons, but applied only to cases in which there was no actual travel, as where a writ was sent through the mail to be served by a deputy near the place of service.

7. SAME—FEES—SERVING WRITS.
The marshal's duty to serve, and right to compensation for the service of, precepts which are agreed to have been "duly issued by the court or a commissioner, in accordance with established usage," cannot be affected by the opinion of the comptroller that the issue of such precepts was unnecessary.

8. SAME—TRANSPORTATION OF PRISONERS—HACK HIRE.
The hire of hacks to transport prisoners to and from court being agreed to have been in accordance with the usual practice, and to have always before been allowed, it will be presumed to have been required by the court for the prompt dispatch of business.

9. SAME—ATTENDING HEARING BEFORE COMMISSIONER.
Under Rev. St. U. S. § 829, cl. 23, allowing a marshal for attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day," the number of officers necessary to preserve order, not exceeding the marshal and two deputies, is a matter to be decided by the commissioner in the honest exercise of his discretion.

10. CRIMINAL LAW—EXAMINATION OF POOR CONVICT.
The examination by a commissioner of a poor convict, on his application for discharge from custody, under Rev. St. U. S. § 1042, is a proceeding in a criminal case.

Edward M. Rand, for petitioner.
Isaac W. Dyer, U. S. Atty.
Before GRAY and COLT, JJ.

GRAY, J. This is a petition under the act of March 3, 1887, c. 359, (24 St. 505,) to recover $1,770.60, fees and disbursements of the petitioner, while marshal of the United States for this district, from March 9, 1886, to October 1, 1888, which were included in his account presented to the district court, proved to its satisfaction by his oath, and approved by that court, and forwarded to the first auditor of the treasury, and by him to the first comptroller, and disallowed by the latter, and are set forth in detail in schedules annexed to the petition. The United States, by a plea in the nature of *non assumpsit*, put in issue the petitioner's right to recover. The United States filed the following admission in writing, signed by the district attorney:

"In the above-entitled cause it is admitted on behalf of the respondents that the services charged in the petition and schedules were actually rendered, that the disbursements charged were actually made in lawful money, and that the sums charged as paid to witnesses were actually and in every instance paid upon orders issued in due form, either by the court, or by a commissioner of the circuit court, in the respective cases."

The counsel for both parties signed and filed the following agreement and stipulation, entitled "Agreed Statement of Facts:"

"In this case it is hereby stipulated and agreed as follows, viz.:"

"*First.* As to jurisdiction: Of the total amount claimed by the petitioner, items amounting to $140.32 were disallowed by the first comptroller prior to March 3, 1887.

"*Second.* As to the items claimed: They are correctly classified and set forth in the abstract of schedules annexed to the brief of the petitioner, the substance of which is as stated below.

"*Third.* As to the several classes of claim: (1) Distributing *venires*, paid constables, $20. Said amount was so paid. (2) Distributing *venires*, marshal's fees, $186. If the marshal is entitled to a fee of $2 for each *venire* distributed to the several constables, he is entitled to the amount claimed. But it is claimed by the respondents that said amount was erroneously charged in

the marshal's account as mileage, and was for that reason disallowed by the comptroller. (3) Paid for blanks for U. S. attorney, $14. Upon requisition of the U. S. attorney, approved by the attorney general, this amount was paid by the marshal for blank indictments and informations for the necessary use of the U. S. attorney. A similar charge has since been allowed by the comptroller. (4) Marshal's travel to attend court, $156.60. Of the amount claimed, $118.80 is for travel to attend regular terms of the circuit and district courts; and one travel, $1.80, has been allowed and paid to the marshal for travel at each of said terms. Said $118.80 is charged for travel on days when said courts were held by adjournment over an intervening day, and were not held on consecutive days. The remaining sum of $37.80 is charged for travel to attend twenty-one special courts or special terms of the district court. The docket of the district court shows that said twenty-one special courts or special terms were duly held. (5) Expenses endeavoring to arrest, $4. This charge for two days at $2 was disallowed by the comptroller, solely because he claimed it was not charged in the proper account. (6) Travel to serve precepts, $227.60. In some instances the officer had in his hands for service several precepts against different persons for different causes, and made service of two or more of such precepts in the course of one trip, making but one travel to the most remote point of service, but charging full travel on each precept. The following item, viz., '1886, April 24. In U. S. v. Jeffrey Gerroir, travel to serve subpœna from circuit court, Massachusetts district, at Cranberry Isle, 314 miles, $18.84,' is suspended by the comptroller because the only actual travel was from Portland to Cranberry Isle, say 206 miles. If travel as charged is not to be allowed, then this charge should be for 206 miles, $12.36. In serving a warrant of removal (in every instance within this district) or warrant to commit, the marshal has charged travel, while the comptroller claims that, transportation of officer and prisoner being allowed, no travel can be charged. (7) Service of precepts, $63. The several precepts were duly issued by the court or a commissioner, in accordance with established usage. It is claimed by the comptroller that the issue of such precepts was unnecessary. (8) Transportation of officer and prisoner, $31.30. Of this amount $31.10 was for the transportation of several prisoners, at ten cents a mile for each. The remaining sum of twenty cents was for transportation of the officer in charge of a prisoner, ten cents a mile on two different days. (9) Transporting prisoners to and from court, $78. This amount was actually paid for hack hire in accordance with the usual practice, and the charge had always before been allowed. The comptroller claims that the amount was excessive and the use of hacks unnecessary. (10) Attendance before commissioner, $144. Two, and sometimes three, officers attended in some cases before a commissioner upon the examination of a person charged with crime or a poor convict. The comptroller claims that the attendance of more than one officer was unnecesary; and that in the case of poor convict hearings under Rev. St. § 1042, no attendance is to be allowed, as they are not persons charged with crime. (11) Witness fees paid, $836.10. This point is covered by the admission previously filed in this case.

"*Fourth.* As to allegations in the petition; The marshal duly rendered his accounts as stated, and the same were duly presented to the court and approved, and forwarded to the accounting officers of the treasury, as alleged."

This court, pursuant to section 7 of the act of March 3, 1887, c. 359, under which this petition is filed, (24 St. 506,) specifically finds the facts of the case to be as above admitted and agreed, and states, as a conclusion of law, that the whole of the petitioner's claim, excepting the sum of $6.48, part of item 6, must be allowed, for the following reasons:

The most interesting question in the case is whether this court has jurisdiction to pass upon those items of the claim, amounting to $140.32, which were disallowed by the comptroller before March 3, 1887. By section 2 of that act, the circuit and district courts of the United States are vested with concurrent jurisdiction within certain limits as to amount, of all matters which by section 1 "the court of claims shall have jurisdiction to hear and determine," including—

"All claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected, or reported on adversely, by any court, department, or commission authorized to hear and determine the same."

Upon the question whether a disallowance of an account by the first comptroller of the treasury is within the latter part of this proviso, there has been a diversity of judicial opinion. The circuit court for the eastern district of Missouri held that it was, and its decision was followed by the district court in this district, as well as in the eastern district of Missouri. *Bliss* v. *U. S.*, 34 Fed. Rep. 781; *Rand* v. *U. S.*, 36 Fed. Rep. 671; *Preston* v. *U. S.*, 37 Fed. Rep. 417. But the opposite view has since been maintained, on fuller consideration, by the district court in Connecticut, in Georgia, and in Illinois. *Stanton* v. *U. S.*, Id. 252; *Erwin* v. *U. S.*, Id. 470; *Hoyne* v. *U. S.*, 38 Fed. Rep. 542. The earlier decisions are based upon section 269 of the Revised Statutes, by which it is made the duty of the first comptroller "to superintend the adjustment and preservation of the public accounts, subject to his revision;" and upon section 191, which is as follows:

"The balances which may from time to time be stated by the auditor and certified to the heads of departments by the commissioner of customs, or the comptrollers of the treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a comptroller, may, however, submit to such comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the comptroller thereon shall be final and conclusive, as hereinbefore provided."

The clause of section 269, as to the general duty of the comptroller to superintend the adjustment and preservation of public accounts subject to his revision, is a re-enactment of a provision of earlier acts, reaching back to the foundation of the government. Acts Sept. 2, 1789, c. 12, § 3, (1 St. 66;) March 3, 1817, c. 45, § 8, (3 St. 367;) March 3, 1849, c. 108, § 12, (9 St. 396.) Section 191 is a re-enactment of the act of March 30, 1868, c. 36, (15 St. 54.) Before that act, it was settled by

a series of opinions of successive attorney generals that the action of the comptroller, or of the commissioner of customs, was subject to the revision of heads of departments. See opinion of Attorney General Stanbery, of September 15, 1866, and earlier opinions therein referred to. 12 Op. Attys. Gen. 43. The action of accounting officers of an executive department was never considered as a conclusive determination when the question was brought before a court of justice. Acts of March 3, 1797, c. 20, (1 St. 512;) May 15, 1820, c. 107, § 4, (3 St. 595;) Rev. St. § 3636; *U. S.* v. *Jones*, 8 Pet. 375, 384; *U. S.* v. *Bank of Metropolis*, 15 Pet. 377, 401; 1 Op. Attys. Gen. 624; 5 Op. Attys. Gen. 650.

The sole purpose and effect of the act of 1868 were to regulate the business of the executive departments; to define the comparative powers of the comptrollers or the commissioner of customs on the one hand, and of the heads of departments on the other, in the performance of their executive and ministerial duties, and to make the decision of a comptroller, or of the commissioner of customs, final and conclusive so far as the executive department was concerned, but not to affect the powers of the legislature or of the judiciary. 13 Op. Attys. Gen. 5; 14 Op. Attys. Gen. 65; 15 Op. Attys. Gen. 192, 596, 626; *Steam-Boat Co.* v. *U. S.*, 5 Ct. Cl. 55. The act itself, after providing that the balances certified to the heads of departments by the comptroller, or by the commissioner of customs, upon the settlement of public accounts, "shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government," adds, in equally unequivocal terms, "and be subject to revision only by congress or the proper courts;" and the further provision, which makes the decision of the comptroller upon facts submitted to him by the head of a department "final and conclusive," reserves the legislative and judicial authority with equal clearness by the qualifying words "as hereinbefore provided." Act of March 30, 1868, c. 36, (15 St. 54;) Rev. St. § 191. The judgments of the court of claims, and of the supreme court on appeal from its decisions, accord with this view, and uniformly treat the action of the accounting officers as not conclusive in a suit between the United States and the individual. *McElrath* v. *U. S.*, 12 Ct. Cl. 201, 102 U. S. 426, 441; *Chorpenning* v. *U. S.*, 11 Ct. Cl. 625, 94 U. S. 397, 399; *Pittsburgh Sav. Bank* v. *U. S.*, 16 Ct. Cl. 335, 351, 352, 104 U. S. 728, 734; *Wallace* v. *U. S.*, 20 Ct. Cl. 273, 116 U. S. 398, and 6 Sup. Ct. Rep. 408; *Saunders* v. *U. S.*, 21 Ct. Cl. 408, 120 U. S. 126, and 7 Sup. Ct. Rep. 467.

In section 1 of the act of March 3, 1887, c. 359, the words "hear and determine" are used four times; once as applied to the court of claims, twice as applied to that court and to the circuit and district courts, and again as applied to "any court, department, or commission." These words must be taken to be used in each instance in the same sense, and as implying an adjudication conclusive as between the parties, in the nature of a judgment or award. The proviso that nothing in this section shall be construed as giving to either of the courts named in the act jurisdiction to hear and determine any claims

"which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission, which determines the rights of the parties, such as the approval by the secretary of the treasury of an account of expenses under the captured and abandoned property acts, as in *U. S.* v. *Johnston*, 124 U. S. 236, 8 Sup. Ct. Rep. 446, or the decision of an international commission, as in *Meade* v. *U. S.*, 9 Wall. 691. Moreover, the court of claims even before the passage of the act of 1887, had jurisdiction of claims under an act of congress or under a contract, and could therefore hear and determine claims for legal salaries or fees. *Mitchell* v. *U. S.*, 18 Ct. Cl. 281, 109 U. S. 146, and 3 Sup. Ct. Rep. 151; *Adams* v. *U. S.*, 20 Ct. Cl. 115; *U. S.* v. *McDonald*, 128 U. S. 471, 9 Sup. Ct. Rep. 117; *U. S.* v. *Jones*, 131 U. S. 1, 16, 9 Sup. Ct. Rep. 669.

We cannot believe that the act of 1887, entitled "An act to provide for the bringing of suits against the government of the United States," and the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before.

The other questions in the case may be more briefly disposed of. Many of the objections of the comptroller appear to be conceived in disregard of the express terms of the statutes, or of the orderly and efficient administration of justice, and, if sustained, would greatly embarrass the courts as well as the marshals of the United States in the performance of their appropriate duties.

1, 2. In this district, the jurors being drawn by constables in accordance with the laws of the state, the fees paid by the marshal to the constables for their services, as well as those charged by him for his own services, in distributing *venires*, are in accordance with the express words of the Revised Statutes, (section 829, cl. 3,) and with the settled course of decision in this circuit. *U. S.* v. *Cogswell*, 3 Sum. 204; *U. S.* v. *Smith*, 1 Woodb. & M. 184; *U. S.* v. *Richardson*, 28 Fed. Rep. 61, 73.

3. The sums paid by the marshal, upon the requisition of the district attorney, approved by the attorney general, for blank indictments and informations for the necessary use of the district attorney, having been paid by the marshal with the approval of the attorney general, exercising the general supervisory power conferred by Rev. St. § 368, the marshal is entitled to be repaid those sums.

4. By Rev. St. § 829, cl. 24, the marshal is to be allowed "for travelling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only." This allowance is not expressly, or by any reasonable implication, restricted to a single travel at each term, but extends to every time when he may be expected to travel from his home to attend a term of court. If the court sits for any number of days in succession, he should continue in attendance, and is en-

titled to only one travel. But, if the court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court, but may return to his home, and charge travel for going anew to attend the term at the day to which it is adjourned. His right to charge travel for going to each special court or special term, is, if possible, still clearer, and is scarcely contested.

5. The charge for expenses in endeavoring to make an arrest was no more than the statute permits to be allowed. Rev. St. § 829, cl. 18.

6. The general rule prescribed by Rev. St. § 829, cl. 25, allows the marshal "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service." The explanatory or restrictive provisions as to the cases of two persons served with the same precept, and of more than two writs in behalf of the same party against the same person, emphasize the general rule, and confirm its application to several precepts against different persons for different causes, although served at the same time. This clause of the fee-bill, which allows for travel in going only, as a compensation for actual travel in both going and returning, is wholly independent of, and unaffected by, the distinct clause allowing fees for transportation of officer and prisoner, only while the officer has the prisoner in custody, and without regard to any additional distance which he may be obliged to travel out and back in serving the warrant of arrest or removal. The United States rely on the act of February 22, 1875, c. 95, § 7, which, after providing that all accounts of attorneys, marshals, and clerks for mileage and expenses shall be audited, allowed, and paid as if the act of June 16, 1874, c. 285, had not been passed, further provides that "no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under provisions of existing law." 18 St. 334, 72. We concur in the opinion of Attorney General Devens, that this last provision, which manifestly includes marshals, does not deny a marshal full travel on two or more writs in his hands at the same time, and served at the same place on different persons, inasmuch as his travel is actual and necessary to serve each and every of those writs; but that "that provision was intended to apply to cases in which no actual travel is performed in serving process, as, for instance, where the writ is sent through the mail to be served by a deputy at or near the place of service." 16 Op. Attys. Gen. 165, 169. It follows that, by the statute of 1875, the travel to be allowed to the marshal for serving at Cranberry Isle a subpœna from the circuit court for the district of Massachusetts must be limited to his actual travel within his district from Portland to Cranberry Isle, and cannot include the constructive travel from Boston to Portland, amounting to $6.48; and that the marshal is entitled to recover the rest of the sums charged for travel to serve precepts.

7. The marshal's duty to serve, and right to compensation for the service of, precepts which are agreed to have been "duly issued by the

court or a commissioner, in accordance with established usage," cannot be affected by the opinion of the comptroller that the issue of a precept was unnecessary.

8. The fees charged for transportation of officers and prisoners are in exact accordance with Rev. St. § 829, cl. 20.

9. The hire of hacks to transport prisoners to and from court is agreed to have been in accordance with the usual practice, and to have always before been allowed, and must be presumed to have been required by the court for the prompt dispatch of business.

10. The fees charged for the attendance of a marshal and his deputies before a commissioner of the circuit court were in accordance with the provision of the statutes allowing "for attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars a day; and for each deputy not exceeding two, necessarily attending, two dollars a day." Rev. St. § 829, cl. 23. Within the number, thus restricted, of the marshal and two deputies, the question how many officers were necessary to preserve order was a matter to be decided by the commissioner, in the honest exercise of his discretion, and according to the existing exigency. No evidence has been produced to control the presumption that the commissioner was governed by a due regard to efficiency and economy in the administration of justice, or to affect the weight of the approval by the district court of the charge for these services, upon satisfactory proof by the marshal's oath that they were actually and necessarily performed. Act Feb. 22, 1875, c. 95, § 1, (18 St. 333.) The duty of the marshal to obey the commissioner's order, and his right to recover fees for the attendance of himself and his two deputies accordingly, were not dependent upon the subsequent opinion of the comptroller. The commissioner's examination of a poor convict, on his application for discharge under Rev. St. § 1042, is a proceeding in a criminal case. *U. S.* v. *Jones*, 134 U. S. 483, 10 Sup. Ct. Rep. 615.

11. The objection of the comptroller to the recovery of witness fees paid by the marshal under order of court is in the face of the statute, which provides that "no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs." Rev. St. § 846.

The result is that the petitioner is entitled to recover the sum of $1,764.12; and, considering the frivolous and vexatious nature of the objections taken to the greater part of the petitioner's claim, it is ordered by the court, in the exercise of the discretion conferred by section 15 of the act of March 3, 1887, c. 359, (24 St. 508,) that there be judgment for the petitioner for that sum, and costs.

FADDEN *v.* SATTERLEE *et al.*

(Circuit Court, S. D. Iowa. September 27, 1890.)

1. LIMITATION OF ACTIONS—PERSONAL INJURIES—PHYSICIANS.
An action against a physician for damages occasioned by his malpractice in treating plaintiff under a verbal contract is barred in two years, under Code Iowa, § 2529, subd. 1, providing that "actions founded on injuries to the person or reputation, whether based on contract or tort," shall be brought within two years, and subdivision 4 of that section, providing that "those founded on unwritten contracts" shall be brought within five years, does not apply to an action for injury to the person resulting from the breach of an unwritten contract.

2. SAME—COMMENCEMENT OF ACTIONS.
Where the petition is filed on the 16th, and the summons placed in the hands of the officer for service on the 23d, of November, 1889, the action is barred where the petition alleges that the contract was made on September 1, 1887, on which day defendants set and bandaged plaintiff's leg, and continued treating him till November 17, 1887, and that by reason of their negligence in setting and bandaging the leg plaintiff was injured; for Code Iowa, § 2532, declares an action commenced at the time the writ is placed in the hands of the officer for service.

At Law. Action to recover damages. Demurrer to petition.

Breen & Duffie, for plaintiff.

Harl & McCabe and *Chas. McKenzie*, for defendant.

SHIRAS, J. In the petition filed in this cause it is averred that the defendants are physicians and surgeons, engaged in the practice of their profession at Dunlap, Iowa; that on the 1st day of September, 1887, the plaintiff met with an accident, whereby he fractured the bone of his left leg at the thigh; that on the date named he entered into a contract and agreement with the defendants, whereby, for a valuable consideration, they agreed to set and heal said leg, and attend upon him as physicians and surgeons until said leg was cured and restored to its normal condition; that the defendants entered upon said work under said contract, and attempted to set the bone of said leg, reduce the fracture, and restore said leg to its normal condition, and attended upon and served plaintiff in said work and treatment until about November 17, 1887; that defendants so carelessly, negligently, and unskillfully set the fractured bone, and dressed and bandaged the same, that by reason thereof the injured leg is permanently maimed and deformed, to the damage of plaintiff. The petition was filed November 16, 1889, and the summons was placed in the hands of the marshal for service November 23, and was served November 27, 1889. A demurrer on behalf of defendants is interposed upon the ground that the petition of plaintiff shows that the action is barred by the statute of limitations. The Code of Iowa (section 2529) provides that—

"The following actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially limited: (1) Actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within two years. * * * (4) Those founded on unwritten contracts, those brought for injuries to property, or for relief on ground of fraud in cases heretofore

cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years."

The first point to be decided is whether the case comes under the first or fourth clause of the section; the defendants claiming that the first clause governs the case, while the plaintiff contends that it falls under the fourth clause, the contention being that plaintiff declares upon a special contract, and for the breach thereof, and therefore it is an action on an unwritten contract.

The first clause, however, declares that actions founded on injuries to the person, whether based on contract or tort, shall be barred within two years. The meaning of this is, if the tort or breach of contract results in an injury to the person, suit to recover damages for such an injury must be brought in two years. If the breach of the contract does not result in an injury to the person or reputation, but causes other injury or loss, then the case comes under subdivisions 4 or 5, depending upon the fact whether the contract is unwritten or written. In *Sherman* v. *Stage Co.*, 22 Iowa, 556, it was held that an action by a husband against the stage company to recover damages for the loss of his wife, who was killed through the negligence of the common carrier, was an action for a personal injury, and came under the provisions of the first clause of the act. So, also, it is held that an action under the provisions of the Iowa statute for damages to the wife resulting from sale of intoxicating liquors to the husband is for a personal injury, within the meaning of the first clause of the section in question. *Emmert* v. *Grill*, 39 Iowa, 690. It thus appears that this clause of the section is broadly construed to include all cases wherein an injury to the person is the basis of the damages sought to be recovered, although the right to maintain the action may be founded upon a statute, a contract, or a tort.

It is also urged in argument that, even if it be held that the action comes under the first clause of the section, it does not appear from the averments of the petition that the period of two years had elapsed before the action was brought. The averments of the petition show that the contract with defendants was made September 1, 1887, and that defendants continued their treatment of him until about November 17, 1887. Whatever negligence and want of skill the defendants may have been guilty of in the premises must, of necessity, have taken place on or before November 17, 1887, and this action should have been brought, therefore, before the expiration of two years from that date. Section 2532 of the Code of Iowa provides that, as respects the statute of limitations, the action is deemed to be commenced when the original notice is delivered to the sheriff with intent to have it served. The return upon the summons in this cause shows that it came to the hands of the marshal on the 23d of November, 1889, so that more than two years had elapsed since the defendants had ceased to attend upon plaintiff. According to the averments of facts in the petition, it would seem that the negligence and want of skill charged against defendants inhered in the setting of the fracture and the bandaging of the limb, which were done on the 1st of September. The statute as to actions for personal injuries

begins to run at the time the injury is received, although its results may not be then fully developed. *Gustin* v. *Jefferson Co.*, 15 Iowa, 158.

There is no view that can be taken of the facts as alleged in the petition that would justify the holding that the cause of action accrued within two years before the bringing of the action, and hence it follows that the petition on its face shows that the bar of the statute is applicable thereto.

Demurrer is sustained.

UNITED STATES *v.* COBB. SAME *v.* SMITH. SAME *v.* FOX.

(*District Court, W. D. Virginia.* June 24, 1890.)

1. INFAMOUS CRIME—INFORMATION—STATE-PRISON.
   An offense punishable by imprisonment for more than one year is an infamous crime, and cannot be prosecuted by information; Rev. St. U. S. § 5541, providing, in case of a sentence for a longer period than one year, the court may order it to be executed in any state jail or penitentiary within the district or state.
2. SAME—IMPRISONMENT NOT MORE THAN ONE YEAR.
   An offense punishable by imprisonment not exceeding one year, without hard labor, is not infamous, and may be prosecuted by information.
3. CRIMES AGAINST UNITED STATES—SENTENCE LESS THAN A YEAR—STATE-PRISON.
   One sentenced for a term not exceeding one year, without hard labor, cannot be confined in a state penitentiary of another district, under Rev. St. U. S. § 5546, providing that any one sentenced to imprisonment in a district in which there is no suitable jail or penitentiary shall be confined in a convenient state or territory to be designated by the attorney general.

At Law.

On demurrer to information, theretofore filed by leave of court, for violation of election laws. Rev. St. U. S. §§ 5506, 5512.

W. E. Craig, U. S. Atty.

Green & Miller, for defendants.

PAUL, J. The prosecutions in these cases were commenced by informations filed at the November term, 1889. To these informations the defendants in each case demurred on the ground that the informations are in violation of the fifth amendment to the constitution of the United States, which declares that—

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

These prosecutions are for violations of the federal election laws. The cases against John Smith and H. A. Cobb are for violating the provisions of section 5506 of the Revised Statutes, which is as follows:

"Sec. 5506. Every person who by any unlawful means hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election in any state, territory, district, county, city, parish, township, school-district, municipality, or other

territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment."

The case against T. A. Fox is for violation of the provisions of section 5512 of the Revised Statutes. The charge in the information is that he, the said T. A. Fox, "did, at a registration of voters for an election for a representative or delegate in the congress of the United States, at the First ward of the said city of Danville, Va., he, the said T. A. Fox, being the registrar of the said First ward of the said city of Danville, unlawfully, knowingly, and willfully, well knowing the same to be unlawful, neglect and refuse to retain upon the registration books of his said ward various, and a number of, citizens of the said ward, who were duly qualified to vote therein, and whose names were properly registered therein, and on the registration books thereof, and did unlawfully, knowingly, and willfully, well knowing the same to be unlawful, strike from the registration books the names of a number of persons duly qualified to vote in the said ward, and whose names were duly and properly registered on the registration books of the said ward." The punishment prescribed for the offense herein charged is that the offender "shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution." *Vide* sections 5511, 5512, Rev. St.

What an infamous crime is, as contemplated by the fifth amendment to the constitution, above quoted, had not been clearly defined before the decisions rendered by the supreme court of the United States in the cases, respectively, *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935, and *Mackin* v. *U. S.*, 117 U. S. 348, 6 Sup. Ct. Rep. 777. In the latter case the court decided, Judge GRAY delivering the opinion of the court, that—

"A crime punishable by imprisonment in a state-prison or penitentiary, with or without hard labor, is an infamous crime, within the provision of the fifth amendment of the constitution, that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.'"

This case was followed by the case of *U. S.* v. *De Walt*, 128 U. S. 393, 9 Sup. Ct. Rep. 111, in which, on the authority of *Mackin* v. *U. S.*, *ubi supra*, it was again held that "imprisonment in a state-prison or penitentiary, with or without hard labor, is an infamous punishment." The question, then, which this court has to decide, is, if the defendants, or any of them, should be convicted on the charges alleged in the information, can they be "sentenced to a state prison or penitentiary, with or without hard labor?" Section 5541 of the Revised Statutes provides that—

"In every case where any person convicted of any offense against the United States is sentenced * * * for a longer period than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

Under this provision, when a statute prescribes a punishment by confinement not exceeding one year, the convict cannot be confined in any state-prison or penitentiary.

In the case against T. A. Fox, who is prosecuted under the provisions of section 5512 of the Revised Statutes, in which the punishment defined may be confinement for a period of three years, and under which, if convicted, he may be confined in a state-prison or penitentiary, according to the provisions of section 5541, Rev. St., above quoted, it is clear that he cannot be prosecuted by information, but only on a presentment or indictment of a grand jury. The demurrer in this case is therefore sustained. In the cases against John Smith and H. A. Cobb, who are prosecuted under the provisions of section 5506 of the Revised Statutes, the imprisonment prescribed by the statute cannot exceed one year; and therefore, if convicted, their confinement in any state jail or penitentiary is inhibited by the provisions of section 5541, quoted above.

Counsel for the defendants contend that section 5546 of the Revised Statutes removes the inhibition prescribed in section 5541, and allows the court to send the convict to a state-prison or penitentiary where the period of confinement prescribed by the statute is for the term of one year or less. The court does not concur in this view. Section 5546 reads as follows:

"Sec. 5546. All persons who have been, or who may hereafter be, convicted of crime, by any court of the United States, whose punishment is imprisonment in a district or territory where, at the time of conviction, * * * there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced * * * in some suitable jail or penitentiary in a convenient state or territory to be designated by the attorney general, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred; and, if the conviction be had in the District of Columbia, [in such case,] the transportation and delivery shall be by the warden of the jail of that District; the reasonable, actual expense of transportation, necessary subsistence and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the attorney general out of the judiciary fund. But if, in the opinion of the attorney general, the expense of transportation from any state, territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the state, territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences."

Section 5546 neither by express words nor by implication repeals, modifies, or changes the provisions of section 5541. Section 5546 is legislation on a subject entirely different from that of section 5541. Its object is to define the duties of the attorney general when there is no jail or penitentiary in the district or state where the person is convicted in which such person may be confined. It preserves throughout the distinction between jail, as one class of prisons, and state jail or penitentiary, as another class of prisons. It could not have been contemplated

that a person convicted under a statute where the punishment prescribed is confinement in jail could, by reason of being sent to another state, because there was no jail in the district or state where he was convicted where he could be confined, be confined in a state-prison or penitentiary of the other state to which he is sent. The mere fact of the attorney general engaging prisons in another state than that in which the convict is sentenced cannot change the character of the convict's punishment, or make that infamous which was not so by the sentence, nor authorize the court to confine in a state prison or penitentiary, with or without hard labor, a person who has been convicted and sentenced under a statute which prescribes imprisonment alone as the punishment, and excludes the idea of imprisonment in a state jail or penitentiary, with or without hard labor. Any other construction would lead to the unreasonable conclusion that a person convicted under a statute that imposes confinement for a term not exceeding one year, and that does not impose hard labor as a part of the punishment, and sentenced to confinement for one month, could be sent to a state jail or penitentiary. The only case where a person can be sentenced to a jail or penitentiary not exceeding one year is where the statute prescribes hard labor as part of the punishment, and leaves the term of imprisonment in the discretion of the court, as in the *Case of Robinson*,[1] cited by counsel for defendants, which was an indictment under section 5406, tried at a former term of this court. In such a case, from the very character of the punishment inflicted, the convict has to be sent to a state jail or penitentiary. If the theory advanced by counsel for defendants was correct, that, under the provisions of section 5546, a person sentenced to imprisonment for a period not exceeding one year can be sent to a state-prison or penitentiary, it would follow that there are no crimes against the United States, the punishment for which is imprisonment, that can be proceeded against by information.

Counsel for defendants also rely on a recent decision rendered by the judge of the eastern district of Virginia. *U. S.* v. *Smith*, 40 Fed. Rep. 755. It will be observed that the learned judge in that case bases his decision in part upon the practice which obtains in that district. He says:

"Convicts of this district are sent to penitentiaries outside of Virginia, under the authority of section 5546 of the Revised Statutes, which does not, like section 5541, limit the class of persons sent to those who are sentenced for 'longer than one year.' The practice of the court, when sentencing for as long a term as one year, is to order the confinement to be in a penitentiary. Section 5546, and this practice of the court, clearly bring the case at bar within the purview of the *Cases of Wilson*, [5 Sup. Ct. Rep. 935;] *Mackin*, [6 Sup. Ct. Rep. 777,] and *De Walt*, [9 Sup. Ct. Rep. 111.]"

As the practice referred to is not followed in this district, it is unnecessary to discuss the question, if it did prevail, how far the provisions of the statute heretofore quoted can be changed, or modified by the practice of the court. The court has already expressed its view that section

[1] No opinion filed.

5546 does not, expressly or impliedly, repeal, modify, or change the provisions of section 5541. The demurrer in the case of *U. S.* v. *Smith* and in the case of *U. S.* v. *Cobb* is therefore overruled.

UNITED STATES *v.* CLARK.

(*District Court, S. D. Iowa, W. D.* September 27, 1890.)

OFFENSES AGAINST THE MAILS—INDECENT LETTERS.

Under Rev. St. U. S. § 3893, declaring that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * are hereby declared to be non-mailable matter," and declaring that any person who knowingly mails any such matter shall be liable to punishment, the mailing of a letter of indecent character, but which is not obscene, lewd, or lascivious, is not an offense, for it is not a "publication" within the meaning of the statute.

At Law. Indictment for sending indecent letters through the mails.

Lewis Miles, Dist. Atty., for the United States.

W. F. Sapp, for defendant.

SHIRAS, J. The indictment in this case is based upon section 3893 of the Revised Statutes, as amended by the act of September 26, 1888, and which enacts that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * are hereby declared to be non-mailable matter;" and further declares that parties who knowingly mail any such matter are liable to punishment. The charge in the indictment is that the defendant knowingly deposited in the post-office, to be forwarded and delivered to a party named, a letter of an indecent character, the contents being set forth in the indictment. The demurrer presents the question whether a letter of an indecent character is within the terms of the statute. As set forth in the indictment, the letter contains threats against the party to whom it is addressed, and also contains indecent epithets, the whole production being of a highly reprehensible character, clearly bringing it within the description given it in the indictment; that is, a letter of indecent character. There is, however, nothing of an obscene, lewd, or lascivious nature contained in the letter. In support of the demurrer it is urged that the words, "or other publication of an indecent character," do not provide a further or distinct class of non-mailable matter, but that these words are intended to be a further limitation upon the obscene, lewd, or lascivious publications named in the first part of the sentence; and that to come within the statute the book, writing, letter, or other matter must be obscene, lewd, or lascivious, and of an indecent character.

On behalf of the government it is contended that these words, "or other publication of an indecent character," are intended to define a new or

additional class of non-mailable matter; and that if the publication is of an indecent character it falls within the prohibition of the statute, although it may not be obscene, lewd, or lascivious. It is not necessary in this case to decide which of these views of the section is correct. If it be admitted that the words named do define a further class of non-mailable matter, as is claimed by the district attorney, nevertheless the class thus defined includes only publications of an indecent character, and a letter is not a publication within the meaning of this clause. In the case of *U. S.* v. *Chase*, 135 U. S. 255, 10 Sup. Ct. Rep. 756, the question whether the sending a letter from one person to another made it a publication within the meaning of the statute is discussed, and the conclusion reached that "the statute prohibits the conveyance by mail of matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed;" and therefore that a letter was not included within the words "other publication." This case arose under the statute as it was before the amendment of 1888 was passed; but the construction of the phrase, "other publication," as found in the statute before the amendment, is applicable to it as it now stands, after the amendment. The letter, therefore, set up in the present indictment, not being a publication within the meaning of the statute, and not being of an obscene, lewd, or lascivious character, does not fall within the prohibition of the statute, and the indictment fails to show the commission of an offense against its provisions. Demurrer is therefore sustained.

CONSOLIDATED ROLLER-MILL CO. *v.* WALKER.

(Circuit Court, W. D. Pennsylvania. September 12, 1890.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—MECHANICAL SKILL.
   The first claim of letters patent No. 228,525, granted June 8, 1880, to William D. Gray for improvements in roller grinding-mills, namely, "(1) In a roller grinding-mill, the combination of the counter-shaft, provided with pulleys at both ends, and having said ends mounted in vertically and independently adjustable bearings, the rolls, C, E, having pulleys connected by belts with one end of the counter-shaft, and the rolls, D, F, independently connected by belts with the other end of the counter-shaft, as shown," does not disclose any patentable subject-matter. The application of belting to drive roller grinding-mills did not originate with Gray, and his peculiar arrangement resulted at most in an improvement in degree merely, and said combination evinced only the exercise of ordinary mechanical or engineering skill.
2. SAME—PRIOR STATE OF ART.
   In view of the terms of the specification and the prior state of the art, said claim could not be so construed as to cover a roller-mill manufactured in accordance with letters patent No. 334,460, granted January 19, 1886, to John T. Obenchain.
3. SAME—FOREIGN PATENT.
   By the Austrian patent law, the fixed longest duration of a patent for an invention is 15 years, and every patentee whose privilege has been granted for a shorter period than the longest may claim its prolongation for one or more years within the fixed longest period, provided such prolongation be demanded before the privilege has become extinct. In the original grant of an Austrian patent, the allowance of the franchise was for one year, but on request it was four times extended, from year to year, and at the end of the fifth year the franchise was suffered to expire.

A United States patent to the same patentee, and for the same invention, was issued after the Austrian patent was granted and during the first year it was in force. *Held*, that by the original grant of the Austrian patent the patentee was invested with the right, at his mere option, to have the patent prolonged for the full term of 15 years, and that, under section 4887 of the Revised Statutes, the United States patent ran for that term, notwithstanding the expiration of the Austrian patent at the end of its fifth year.

4. SAME—DECISION OF FOREIGN PATENT-OFFICE.

Under the Austrian patent law, the ministry of commerce, in deciding the question of the length of the term which appertains to every Austrian patent, exercises a judicial function, and its opinion on that subject will be followed here, agreeably to the established rule that the courts of the United States adopt the construction of a statute of a foreign country made by the courts of that country.

In Equity.

R. Mason, for complainant.

Parkinson & Parkinson, for defendant.

Before MCKENNAN and ACHESON, JJ.

ACHESON, J. The bill in this case charges the defendant with the infringement of two patents relating to roller-mills,—one issued to William D. Gray, and the other to Udolpho H. Odell; but at the final hearing the suit was pressed only as respects the former patent, and hence the Odell patent may be dismissed from consideration. The patent to William D. Gray is No. 228,525, and was granted June 8, 1880, upon an application filed May 2, 1879. Gray's invention relates to that class of mills in which horizontal grinding-rolls arranged in pairs are employed, and consists, the specification declares, "in the improved arrangement of belts and pulleys for communicating motion to the rolls, and in other minor details." The patent contains several claims, but infringement of the first claim only is here charged. That claim is in these words:

"(1) In a roller grinding-mill, the combination of the counter-shaft, provided with pulleys at both ends, and having said ends mounted in vertically and independently adjustable bearings, the rolls, C, E, having pulleys connected by belts with one end of the counter-shaft, and the rolls, D, F, independently connected by belts with the other end of the counter-shaft, as shown."

The answer sets up, among other defenses, want of novelty and want of patentability and non-infringement. After stating in his specification that driving the rolls by gearing occasions great noise, and also a jarring of the parts of the apparatus and trembling of the mill-floor, in turn causing an unevenness in grinding, and a rapid and uneven wear of the rolls, Gray adds:

"To obviate these difficulties, and produce an even, steady motion, I discard the gearing hitherto employed, and substitute therefor a system of belting arranged in a peculiar manner, to give the proper direction and speed to the rolls."

And he mentions, as incident to his arrangement of belting, the further advantage that, by simply removing the pulley of any shaft and replacing it with another of proper size, any desired difference in the speed of the rolls may be obtained, which he states cannot be accomplished, except by a complicated arrangement of intermediate wheels, where gear-

ing is used. The specification, after referring to the accompanying drawings, explains the arrangement of the belts thus:

"N represents the main driving belt, which passes to and around the pulley, *c*, of the roll, C, thence downward, and around pulley, *b*, of the counter-shaft, B, thence upward, and around pulley, *e*, of the roll, E, and back to the source of power, imparting to the rolls C and E a motion in one direction, and to the counter-shaft a motion in the reverse direction. From the pulleys, *b*, *b*, on the rear end of the counter-shaft, B, belts, P and R, pass upward and around pulleys, *d* and *f*, of the rolls, D and F, as shown in Fig. 2, imparting to said rolls a motion the reverse of that of the rolls, C, E. In this way the two rolls of each set are caused to revolve towards each other while being all driven from a common source primarily."

To fully understand the particular claim of the patent involved in this controversy, one other paragraph of the specification must be quoted:

"In order to adapt the counter-shaft, B, to perform the double purpose of reversing the motion of certain of the rolls, and of acting as a belt-tightener, it is mounted, at opposite sides of the frame or body, A, in boxes swiveled or hung in yokes, L, sliding vertically in guides or boxes, K, and adjusted up and down therein by screw rods or stems, S; the swivel-boxes permitting a slightly greater movement of the shaft, B, at one end than at the other, without interfering with its free rotation, and thereby permitting the tightening of the belt or belts at one side of the machine without disturbing those at the other."

Gray's specification, as our quotations therefrom indicate, suggests the idea that he was the first to apply belt-drives to roller grinding-mills. But the fact is otherwise, as the proofs abundantly show. Nor was he the first to discard from such mills cog-gearing and friction gears altogether, and substitute therefor belt-driving. Confining our attention here to Mechwart's Austrian patent, granted August 3, 1875, we find therein distinctly set forth the disadvantages resulting from the use of spur-gearing in roller grinding-mills, viz.: the disagreeable rattling, the rapid wearing away of the gears, and the unequal movement and unequal wearing away of the rollers, and also the inefficiency of driving by means of frictional contact between the rolls, which latter, it is set forth, is only practical when the chop passes the rollers in very thin layers, and not in coarse particles, and is not applicable when an unequal peripheral speed of the rolls is required. All these disadvantages, it is declared, are avoided by Mechwart's invention, which consists in driving both co-operating rolls by means of belts, whereby, also, can be obtained an equal and also an unequal peripheral speed, while the diameter of the rolls, as well as the diameter of the belt pulleys, can be varied relatively to each other for different objects. Mechwart's drawings show as examples six different arrangements of belting, which he states are intended to illustrate "only some of the different arrangements of the belt-drive for roller-mills, without exhausting the possible variations in its application." Fig. 3, sheet A, shows a machine having two pairs of grinding-rolls, the pairs being vertical, and arranged side by side. A shaft, mounted in the machine frame in fixed bearings, carries two pulleys, one at each side of the machine. A belt from one of these pulleys passes around a tightening pulley at the upper right-hand corner of the

machine, thence around a pulley on the upper left-hand roll-shaft, thence around a pulley on the lower right-hand roll-shaft, and thence back to the driving-pulley, and by this belt one roll of each pair is driven. From the other pulley, on the other side of the machine, a belt is arranged in a similar manner, so as to drive the other two rolls of the pair. Without further description of the Mechwart system, it is enough to say that his patent disclosed roller grinding-mills, single and double, with both vertical and horizontal pairs of rolls arranged side by side, driven by means of belts exclusively; his machine being equipped with adjusting or tightening pulleys, and having a shaft journaled directly into the machine frame, and receiving its motion from the prime mover of the mill, either directly or by belt.

But, turning now to machinery employed in the arts generally, it is certain that the use of belt-gearing interchangeably with or as a substitute for cog-gearing was very old and common before Gray's alleged invention. It was, too, an old and familiar expedient to keep the belt adjusted to a proper degree of tightness by means of tightening pulleys, the shaft of which in revolving sometimes did other work about the machine; and shafts had been made movable in such manner as to tighten belts passing over pulleys on other shafts. It was also old, and very common in machine-shops and factories of various kinds, to provide an individual machine with a counter-shaft, mounted directly in the machine-frame, the counter-shaft being driven by a belt from the line-shaft and the machine by a belt from the counter-shaft. Furthermore, it was no new thing to provide the journal boxes or hangers in which counter-shafts are mounted with means for independently adjusting the ends of the shaft.

In view of these things, then, we are unable to discover any patentable subject-matter in the first claim of Gray's patent. The case, it seems to us, falls directly within the established principle that the application of an old process, machine, or device to a like or analogous purpose, with no change in the mode of application, and no result substantially different in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Pennsylvania R. Co.* v. *Locomotive E. S. T. Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220; *Blake* v. *San Francisco*, 113 U. S. 679, 5 Sup. Ct. Rep. 692. Moreover, it is quite clear that the application of belting to drive roller grinding-mills, to obviate the difficulties incident to the use of cog-gearing, and to secure the advantages set forth in Gray's specification, did not originate with him. Therefore, even were it conceded that his peculiar arrangement is attended with better results than had been attained previously, still this would not sustain the patent; for the mere carrying forward of an original conception, resulting in an improvement in degree simply, is not invention. *Burt* v. *Evory*, 133 U. S. 349, 10 Sup. Ct. Rep. 394. After the most careful study of the subject, we think the conclusion is unavoidable that the combination set forth in Gray's first claim evinces only the exercise of ordinary mechanical or engineering skill, as the same has been defined by the supreme court and illustrated by so many recent decisions of that tribunal. *Hollister* v. *Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep.

717; *Thompson* v. *Boisselier*, 114 U. S. 1, 5 Sup. Ct. Rep. 1042; *Aron* v. *Railway Co.*, 132 U. S. 84, 10 Sup. Ct. Rep. 24; *Hill* v. *Wooster*, 132 U. S. 693, 701, 10 Sup. Ct. Rep. 228; *Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388, 10 Sup. Ct. Rep. 570.

It seems to be proper for us to add that our judgment is with the defendant upon the defense of non-infringement also. To understand the nature of the invention intended to be covered by the first claim, resort must be had to the specification, and we there find that the "swivel-boxes" are essential to the contemplated greater movement at one end of the shaft than at the other, whereby is effected "the tightening of the belt or belts at one side of the machine without disturbing those at the other." This is apparent on the face of the paragraph hereinbefore quoted at length; and the expert testimony is direct and convincing that, to the practical working of the described device as a belt-tightener, this swiveling feature is indispensable. Without the swiveled boxes Gray would not have "independently adjustable bearings." True, those boxes are not expressly mentioned in the claim, but we think they are to be regarded as entering therein by necessary implication, for the reason just stated, as well as by force of the words "as shown." Moreover, the prior state of the art would limit the claim to the specific organization shown and described. *Caster Co.* v. *Spiegel*, 133 U. S. 360, 369, 10 Sup. Ct. Rep. 409. But that organization the defendant does not use. His alleged infringement consists in the use of a roller-mill, manufactured under and in accordance with letters patent No. 334,460, granted January 19, 1886, to John T. Obenchain. In the defendant's machine the journal boxes are rigidly supported, so as to be always horizontal, and incapable of any tilting or swiveling motion; and this is essential to the working of the apparatus. A continuous counter-shaft is not employed, but three coupled base-shafts; the outer shafts or sections being each journaled at the outer end in a vertically adjustable non-swiveling box, and the inner end of each being forked and carrying a loosely pivoted ring. These two rings are connected by a tumbling-rod, forked at each end and pivoted to the rings, thus forming a universal coupling; and thereby, through the central shaft or tumbling-rod, rotary motion is transmitted from one of the end-shafts or sections to the other, no matter how much they may differ in vertical position.

Now, for the reasons already given, we are of opinion that such a construction of Gray's first claim as would embrace the Obenchain device is inadmissible. The foregoing views being decisive of the case, we deem it unnecessary for us to consider the other grounds of defense.

I am authorized by Judge McKENNAN to state that he concurs in the conclusions announced in the foregoing opinion.

(October 10, 1890.)

ACHESON, J. Since the filing of our opinion we have been requested by the plaintiff's counsel, with a view to the final determination of the rights of the parties under a contemplated appeal to the supreme court after decree entered, to consider and pass on the question raised by the

answer as to the effect of the expiration of two foreign patents, viz., a German patent and an Austrian patent, granted to William D. Gray upon the term of his United States patent, and, as the proofs are full, and the question was elaborately argued, we accede to the request.

As to the German patent, little need be said. It was granted March 5, 1879, for the usual term of 15 years, and expired and was canceled in consequence of the failure to pay the tax for the seventh year of the term. The case, then, as respects this patent, comes directly within the ruling of the supreme court in *Pohl* v. *Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. Rep. 577, in which it was held that, under section 4887 of the Revised Statutes, a United States patent runs for the term for which the foreign patent was granted, notwithstanding the lapse or forfeiture of the foreign patent by the non-observance of a condition subsequent prescribed by the foreign patent law.

By the fourth section, cl. 25, of the Austrian patent law, (the imperial decree of August 15, 1852; 1 Abb. Pat. Laws, 15,) in force when Gray's United States patent was granted, "the longest duration of privileges is fixed at fifteen years." Clause 27 provides as follows:

"Every patentee whose privilege has been granted for a shorter period than the longest may claim its prolongation for one or more years within the fixed longest period, provided they demand such a prolongation before the privilege has become extinct. To obtain such a prolongation, a petition for the same must be delivered in due time, together with the original patent, and the tax in full for the required term of prolongation, or the receipt for the same from a public treasurer."

The Austrian patent to Gray was granted December 17, 1879. The term of the franchise as originally allowed was for one year, but on request it was four times extended, from year to year, and at the end of the fifth year the franchise was suffered to expire. The seventh section, cl. 42, of the Austrian patent law, provides thus:

"The ministry of commerce and trades alone decides the question whether a patent, from any legal cause whatever, is to be considered as null and void, or as extinct. It therefore especially decides the question of the novelty of a discovery, invention, or improvement; moreover, the question as to whether it had only been imported from abroad, and was not appropriate for a privilege. Finally, in contestations arising between two patentees, the ministry decides the question of the total or partial identity of their privileges."

The plaintiff has put in evidence a duly authenticated copy of the official opinion of the Austrian ministry of commerce, dated October 10, 1888, from which we quote:

"The imperial and royal ministry of commerce certifies herewith: (1) That according to sec. 25 of the imperial decree of August 15, 1852, No. 184 of the Publication of the Laws of the Realm, the longest term of duration for all patents granted is indiscriminately fixed at 15 years, which longest term of duration runs on uninterruptedly, provided the patentee fulfills the conditions mentioned, (sub. 2;) and that this original term of 15 years appertains to every Austrian patent granted in accordance with the imperial decree of August 15, 1852, No. 184 of the Publication of the Laws of the Realm, without exception. * * * (3) That in so far as in the deed of an Austrian patent granted according to the above-mentioned law one or more years are

named in connection with the statement of the grant of the patent, this reference to one or more years has exclusively the purpose of stating that the annuity has been paid in advance for one or more years, and that by such reference the actual term of the patent is by no means touched upon, this term being, as above mentioned, fixed at the term of 15 years."

It is, we think, clear that under the Austrian patent law the ministry of commerce, in deciding the question when patents terminate, exercises a judicial function; and, if so, then its opinion on that subject, cited above, is controlling here, agreeably to the established rule that the courts of the United States adopt the construction of a statute of a foreign country made by the courts of that country. *Cathcart* v. *Robinson*, 5 Pet. 264. And upon that view it would follow that by the original grant of the Austrian patent to Gray he was really invested with the lawful term of 15 years, although the grant of the franchise purported to be for one year only. But, upon an independent consideration of the question, the same practical result, in our opinion, must be reached. In *Refrigerating Co.* v. *Hammond*, 129 U. S. 151, 9 Sup. Ct. Rep. 225, it was held that where, under the Canada act, a patent was originally granted January 9, 1877, for the period of five years, but there was an extension for a further period of five years, and then a second extension for a like period, the extensions being a matter of right at the option of the patentee, a United States patent granted during the first period of the Canadian patent did not expire before the end of the 15 years. Now that the fact that the Canadian patentee exercised his option, and thus kept the patent in force, was not a controlling circumstance, appears from the declaration of Mr. Justice BLATCHFORD, who, after reciting the the facts, says: "Therefore, the Canadian patent does not expire, and it never could have been properly said that it would expire, before January 9, 1892." This observation was the subject of special comment in the opinion of the court, delivered by the same learned justice, in *Pohl* v. *Brewing Co.*, *supra*, which established the principle that the duration of a United States patent is not affected by the fact that a prior foreign patent has been suffered to lapse by non-payment of a tax, or for other failure to comply with the requirements of the foreign patent law. It seems, therefore, to be the logical and necessary conclusion from these two decisions of the supreme court, that, if by the foreign law under which a patent is granted, the patentee, by virtue of the original grant, is invested with the right, at his mere option, to have the patent extended or prolonged for a fixed term, it is this latter term which limits the United States patent, under section 4887 of the Revised Statutes. Thus is the life of the United States patent definitely fixed when it is granted, and its duration is not left in perplexing uncertainty, depending upon the future exercise of an option in a foreign country, or the observance there of conditions subsequent. We have only to add that Gray's right to prolong his Austrian patent for the full term of 15 years was as clear as was the right of the Canadian patentee in *Refrigerating Co.* v. *Hammond*, *supra*.

Our conclusion here does not conflict with the decision in *Commercial Manuf'g Co.* v. *Fairbank Canning Co.*, 135 U. S. 176, 10 Sup. Ct. Rep. 718, for in that case the question ruled, both in the court below (27 Fed. Rep. 78) and in the supreme court, was as to the identity of the United States patent with the Austrian patent. Upon this branch of the case, then, our judgment is favorable to the plaintiff; but, for the reasons expressed in our original opinion, the decree must be for the defendant.

Let a decree be drawn dismissing the bill of complaint, with costs.

McKENNAN, J., concurs.

WESTINGHOUSE *et al.* *v.* CHARTIERS VAL. GAS CO.

(*Circuit Court, W. D. Pennsylvania.* August 28, 1890.)

1. PATENTS FOR INVENTIONS—NATURAL GAS LINES—WANT OF NOVELTY.
Claims 1 and 2 of letters patent No. 345,463, dated July 13, 1886, granted to George Westinghouse, Jr., assignee of Morris S. Verner, relating to pipe joints and lines for conveying liquids and gases, and, more particularly, natural gas, namely: "(1) The combination of a pipe-line composed of sections of pipe connected at the joints by couplings, with a separate gas-tight chamber surrounding a single joint thereof, adapted to receive any leakage therefrom, and a vent pipe leading from such chamber, substantially as and for the purpose set forth. (2) In combination with a main pipe-line composed of sections of pipes connected at the joints by couplings, independent gas-tight chambers inclosing, respectively, single joints thereof, and a vent pipe or pipes leading from such chambers, substantially as and for the purpose set forth,"—were destitute of patentable novelty, and, moreover, do not, upon any allowable construction, cover the defendant's device.

2. SAME—INVENTION—EVIDENCE.
In a suit for infringement, upon the issue whether the plaintiffs' assignor was the original and first inventor of the thing alleged to be within the claims of the patent in suit, a prior and still pending application of a third person for letters patent is competent evidence.

In Equity.

George H. Christey and *J. Snowden Bell*, for plaintiffs.

James I. Kay, *George Harding*, and *Francis T. Chambers*, for defendant.

ACHESON, J. This is a suit in equity by George Westinghouse, Jr., and his licensee, the Philadelphia Company, against the Chartiers Valley Gas Company, for the infringement of letters patent No. 345,463, dated July 13, 1886, granted to Westinghouse as assignee of Morris S. Verner, the inventor. Verner's invention was made in July, 1884, about the 15th of the month, and his application for letters patent was filed August 6, 1884. But in fact he had not then reduced the invention to any practical use, and he never did so. Pending his application, on February 2, 1885, he assigned his rights to Westinghouse. The invention "relates to pipe joints and lines for conducting liquids and gases, and more particularly to those used for conveying natural gas." The specification recites letters patent No. 301,191, for improvements in

systems of conveying and utilizing gas under pressure, which had been granted to George Westinghouse, Jr., on July 1, 1884, and points out certain superior advantages which appertain to Verner's invention over Westinghouse's system as set forth in that patent. To understand, then, what Verner's improvement really was, it is necessary to refer to the specification of the Westinghouse patent, No. 301,191. Mr. Westinghouse therein states that, owing to the high pressure under which natural gas is conveyed through pipes, it makes its way through comparatively tight joints, and through pores, cracks, and other minute openings, and, being extremely subtle, and usually destitute both of color and odor, its leakage is difficult of detection; and the gas, when mixed with atmospheric air, being highly explosive, such leakage, in addition to the waste which it entails, subjects life and property in the vicinity of the line of conveyance to the risk of serious accidents, against which it is very important, particularly within city limits, to provide an efficient safeguard. It is further stated that the employment of the gas for household and light manufacturing purposes is desirable and practicable only at pressures practically constant, and materially lower than that which is exerted in the main line of the conducting pipe. To meet these requirements is the declared object of Mr. Westinghouse's invention, which consists (his specification sets forth) in inclosing the high-pressure conducting pipe or main within a tight protecting casing of larger diameter, so as to form around the main a chamber or receptacle which receives and retains for use any leakage from the main, and which is also designed to be continuously charged with gas at low pressure, delivered from the main by means of communicating pressure regulating valves. It is stated that said chamber or receptacle is, by preference, made in "separate sections," "of any desired or convenient length," thus forming a series of "independent chambers," each inclosing a series of the connected sections of the main, and each compartment or chamber being provided with "a vent or escape pipe" leading therefrom to a point at which gas may be discharged into the atmosphere, said vent-pipe being closed by a safety-valve which is loaded so as to open upon any excess of pressure above a determined point. The Verner specification, while admitting that Westinghouse's outer casing, if properly made, will suffice to prevent the escape of gas, suggests two objections to his form of conduit, viz.: *First*, "that the outer pipe prevents access to the inclosed high-pressure main, except at long intervals, where the latter is exposed between the compartments;" and, *secondly*, the great cost involved in providing an exterior pipe so large in diameter as would be necessary, and so long. The declared object of Verner's invention is to provide an efficient and inexpensive pipe joint and conduit, whereby the escape of gas from the high-pressure main into the ground may be prevented, and, if desired, the gas leaking from its joints may be retained in a small low-pressure parallel pipe for utilization, or be permitted to escape into the air at "suitable determined points," while direct connections may be made with the high-pressure main at all points along the conduit. The specification then proceeds thus:

"To this end my invention, generally stated, consists in the combination with a main pipe-line, of a gas-tight chamber surrounding a single joint of said line, and a vent-pipe leading out of said chamber, and also in the combination, with the main pipe-line, of a series of such chambers, each surrounding a joint of the line, and a supplemental pipe-line formed of sections of tubing communicating with the chambers surrounding the joints, thus constituting a low-pressure line, from which connections can be made for any desired purpose, or from which gas may be allowed to escape at determined points."

By Verner's construction, as described with minute detail in his specification, and illustrated by the accompanying drawings, his supplemental pipe is connected with the several chambers surrounding the joints of the high-pressure main either directly, at each end of each chamber, or through the intermediation of T joints, the vertical member thereof opening out of each chamber into the supplemental pipe, and no other vent-pipe leading out of the chamber is described or shown. After explaining how gas at low-pressure may be drawn for use from the supplemental pipe, the specification adds: "Or from which, at suitable intervals, pipes may be led to points above the surface of the ground to allow the escape of gas." Again it is stated:

"As all the chambers communicate with the supplemental pipe-line, *m*, a substantially uniform pressure is maintained therein, whether all the joints leak, or only some of them, and the chambers around the joints form reservoirs to store the gas at low pressure. In case sufficient gas does not escape into the supplemental line, suitable valve connections may be arranged between the two lines to maintain the required pressure therein."

The patent in suit has five claims, but the only ones the defendant company is alleged to infringe are the first and second, which are as follows:

"(1) The combination of a pipe-line composed of sections of pipe connected at the joints by couplings, with a separate gas-tight chamber surrounding a single joint thereof, adapted to receive any leakage therefrom, and a vent-pipe leading from such chamber, substantially as and for the purpose set forth. (2) In combination with a main pipe-line composed of sections of pipe connected at the points by couplings, independent gas-tight chambers inclosing, respectively, single joints thereof, and a vent pipe or pipes leading from such chambers, substantially as and for the purpose set forth."

The sections of the defendant company's natural-gas main are not united by the screw couplings shown and described in the Verner patent, but by the well-known bowl and spigot joint made tight by a lead packing, outside of which is placed a ring or sleeve with plaster of Paris packing between it and the pipes. There is thus formed a small annular cavity around the lead-packed joint to catch any leakage therefrom that may possibly occur, and an escape orifice is formed in the ring, and a vent-pipe is connected therewith, leading above ground into the open air, without connecting with any low-pressure pipe, but simply for the free discharge of any leakage of gas. This venting device is used at each joint of the defendant's main, and constitutes the alleged infringement of the Verner patent. In this connection it is a fact worthy of mention that the first practical application ever made of a freely-vented joint cas-

ing was upon the defendant's lines. This was in January, 1885, when David E. Adams, by the company's leave, placed, and for some time kept, on its gas-conducting main, a device consisting of a jacket tightly fitting around each joint, with a vent-pipe therefrom leading into the open air. Adams was an original inventor, but his invention was not made until about November, 1884.

Two questions lie on the surface of the case, viz.: (1) Whether the claims of the patent here involved disclose any patentable subject-matter in view of the prior state of the art; and (2) whether the defendant's device comes within the scope of those claims upon any allowable construction of the same. These questions are closely related, and, under the proofs, are to be considered rather together than apart. Now, avowedly, Verner was an improver upon Mr. Westinghouse's system for the conveyance and utilization of natural gas, as set forth in his letters patent of July 1, 1884, and, upon a careful examination of Verner's entire specification, even in the form which it finally took after numerous amendments, it is not difficult to see that his substantial invention consisted in dispensing with the enveloping casing along the body of the high-pressure main, and confining the inclosing chambers to the several joints of the main, and in providing an auxiliary parallel low-pressure pipe communicating with those chambers. The venting into the open air, of the leaking gas, was a mere incident of the improvement, while the important matter of the ascertainment of the exact location of a leak is not mentioned at all in the specification. I do not overlook the opening clause of the general statement of the invention hereinbefore quoted at length. But the language there employed, especially when read, as it must be, in connection with the context, does not disclose nor suggest a system in which a vent-pipe leads from each inclosing chamber directly to the open air. Verner illustrates the application of his invention with different forms of chambers by no less than eight drawings or figures, but not one of them shows any vent-pipe leading out of the chamber other than the supplemental low-pressure pipe itself, or the small perpendicular pipe of the T joint, which opens into the supplemental pipe. Unmistakably Verner's invention contemplates the venting of the inclosing chambers through the supplemental low-pressure pipe, and not otherwise. According to his described method, the gas leaking from the joints, if not utilized, is to be permitted to escape into the air, not at points where the joints of the main occur, but at "suitable determined points." As already seen, after describing the supplemental pipe, and stating its function as a low-pressure supply line, the specification adds: "Or from which gas can be allowed to escape at determined points." And elsewhere it is said: "From which, at suitable intervals, pipes may be led to points above the surface of the ground, to allow the escape of gas." Again, in a passage above quoted it is stated that, as all the chambers communicate with the supplemental pipe-line, the pressure therein is substantially the same "whether all the joints leak or only some of them." Thus is it manifest that, in the practice of Verner's invention, as he conceived and describes it, the leakages from all the

joints pass, in the first instance, into the low-pressure line as a common conduit for use, if needed, but if not, then to be vented into the open air by pipes leading from that line to the surface of the ground "at suitable determined points." It follows, then, that unless the patentee is to be accorded rights broader than the invention disclosed by the patent, the first and second claims must be so construed as to restrict them to a system in which the casings or chambers surrounding the joints of the main are vented through a supplemental pipe-line, substantially as set forth in the specification.

But the necessity of so limiting those claims, if they are to be sustained at all, becomes the more evident when we look beyond the patent, and regard the prior state of the art. As already noticed, Mr. Westinghouse's patent of July 1, 1884, provides efficient means against the escape of the gas into the ground, and the consequent dangers therefrom, by surrounding the conducting main with a tight casing made in compartments, or "independent chambers," each of which is furnished with a "vent or escape pipe" leading therefrom to a point above ground, at which (to quote the language of the specification) "gas may be discharged, without injury or inconvenience, into the atmosphere." True, inasmuch as in this system the leaking gas is to be utilized as part of the low-pressure supply, Mr. Westinghouse's vent-pipe is kept closed, ordinarily, by a loaded safety-valve, which will open only to a pressure beyond a determined point. But it can scarcely be asserted, seriously, that it would involve invention to unload the valve, and permit the free escape of the gas leakage into the atmosphere if this should be thought advisable. Indeed, the language just cited from the specification suggests that very idea. But, besides the prior patent just referred to, letters patent No. 306,566, for an invention of means whereby the particular joint of the main which is leaking may be determined, and each joint independently vented, were granted to George Westinghouse, Jr., on October 14, 1884. The application for this patent was filed after Verner's application, namely, on August 21, 1884; but it is an admitted fact that this invention by Westinghouse preceded that of Verner. The declared object thereof is the ready detection of the existence, location, and extent of leaks from a gas-main, to the end of preventing accidents by explosions; and, as set forth in the specification and claim of the patent, it consists in the combination, with an under-ground gas-main, of bodies of packing composed of loose fragments of solid material, such as broken stones, small scrap metal, or the like, surrounding the several joints of the main, and inclosed by the ground in which the main is laid, and a series of detector pipes, each leading from one of said bodies of packing to a point above ground, so that, in the event of a leakage at the joint of the main, the escaping gas will permeate the interstices of the loose packing, and pass therefrom up through the detector pipe, and out into the air. It is within common knowledge that the earth is rammed hard around a gas-main in the trench in which it is laid, and as these bodies of packing are connected respectively with the atmosphere by open pipes, there would be no pressure to cause the leak-

ing gas to work its way through the ground, but it would pass up freely through the pipes into the open air. Now, with these two Westinghouse inventions already occupying the field, (even if they were the only prior ones,) Verner was necessarily restricted to his specific mechanical construction, and it was not open to him to set up any broad claims which would embarrass other independent improvers, and subject them to tribute. *Railway Co.* v. *Sayles*, 97 U. S. 554, 556. Moreover, what invention would be involved in reducing a compartment of the exterior casing of Mr. Westinghouse's first patent to a size adapted to cover only a single joint of the main, and substituting each casing for the surrounding body of packing of his second patent? Edward S. Renwick, the plaintiffs' expert, states that the Westinghouse patent of October 14, 1884, "undoubtedly contains the germ of the Verner invention." But that patent is much more than this language imports. It discloses a practical system for locating leaks at the joints of a gas-main, and for the safe and free escape of the leaking gas into the open air, by surrounding each joint with an incasement with which a separate vent-pipe is connected. Upon this system a skilled mechanic or engineer might ingraft improvements, but they could scarcely rise to the plane of invention. At any rate it may be safely affirmed that Verner's method of venting through an intermediate supplemental pipe-line, would not amount to a patentable improvement.

But again, on February 17, 1885, letters patent No. 312,470, for improvements in systems for distributing gas under pressure, were granted to William A. Hoeveler and Thomas J. McTighe upon an application filed August 28, 1884, which was 22 days after Verner's application was filed. There is, however, satisfactory evidence to show that the invention of Hoeveler and McTighe was earlier in date than Verner's invention. In their specification and accompanying drawings they show and describe two separate parallel pipes or conduits, one for the conveyance of gas under high, and the other under low, pressure, these conduits being connected at intervals by pipes having automatic pressure regulating valves. In their specification the inventors state:

"We also inclose the joints of the high-pressure conduit in casings or boxes which are connected to the pipes leading to the low-pressure conduits, or directly to the latter, whereby any leakage of the joint is utilized as a source of supply for the low-pressure conduit."

And again:

"At each of the high-pressure conduits, A, we place boxes, I, which entirely surround said joints, and are packed carefully so as to guard as much as possible against leaking, and we connect each of the boxes by a pipe, *i*, with the low-pressure conduit, B, to as to lead off any gas which may escape through the joints of the high-pressure pipe."

The patent has no claim for the box or casing, I, by itself, but it has a claim for a combination of which the casing, I, is a constituent. Furthermore, this patent shows a lamp-post connected to the low-pressure conduit by a small pipe, to which is attached a weighted valve to allow the gas to flow to the burner of the lamp-post when the pressure in the

low-pressure conduit passes a determined point. Certainly, then, we find in the Hoeveler and McTighe patent everything which appertains to Verner's apparatus except express provision for the free escape of the leaking gas into the air when it is not to be utilized. Here is a tight chamber surrounding a single joint of the high-pressure main to receive any leakage therefrom, with an open pipe from the chamber leading into a low-pressure conduit. Now, in the face of this prior invention, how is it possible to sustain Verner's far-reaching pretensions? In my judgment, it would not be patentable change to disconnect Hoeveler and McTighe's pipe, *i*, from the low-pressure conduit, and provide for the free escape of the gas from the box or casing, I, into the open air.

Once more, on January 10, 1884, John Nicholson, Jr., filed in the patent-office an application for letters patent for an improvement for gas-pipe protection. In the specification accompanying this application, and constituting part thereof, the invention is described as consisting in combining with a gas conduit pipe an exterior pipe, box, case, or cover in which to collect such gas as may escape from the conduit pipe proper, such outer box, case, or cover being provided with vent-pipes extending up through the surface of the ground to carry off the escaping gas. After a particular description of his structure, the specification contains the following language:

"I do not limit myself to a construction in which the outer pipe, box, or case extends continuously through the entire length of a gas conduit pipe, since it will be within my invention to apply this system or method of protection to any desired portions of such pipe, whether the same be long or short, or even by separate chambers properly vented to the separate joints of the gas conduit pipe, since at the joint the greatest danger of leakage exists."

Such proceedings were had in the patent-office that an interference was declared between Nicholson and Verner, and others; and on December 26, 1885, as between Nicholson and Verner, judgment of priority of invention was rendered in favor of Nicholson, from which there was no appeal. But letters patent have not yet actually issued under Nicholson's application.

The plaintiffs contend that the Nicholson application is inadmissible as evidence. Is this a sound position? That a rejected or withdrawn application is not a prior publication, within the meaning of the statute, nor of itself a bar to a patent to an independent inventor, is settled. *Lyman V. & R. Co.* v. *Lalor*, 12 Blatchf. 303; *Northwestern Fire Ex. Co.* v. *Philadelphia Fire Ex. Co.*, 6 O. G. 34; *The Corn-Planter Patent*, 23 Wall. 181. But it by no means follows that Nicholson's application is not to be received for any purpose. It has neither been withdrawn nor rejected. Abandonment by him cannot be alleged. In the interference proceeding he was awarded priority of invention over Verner. That he was prior to Verner is indisputable under the proofs before the court. The utility of the device in question is demonstrated. It would then be most extraordinary if Nicholson's application could not be shown as affecting Verner's title to the monoply here set up against the defendant and the public. I think the cases of *Northwestern Fire Ex. Co.* v. *Philadelphia Fire*

Ex. Co., *supra*, and *The Corn-Planter Patent*, *supra*, are direct authorities to show that the Nicholson application is competent evidence as bearing on the question whether Verner was in fact the original and first inventor of the thing alleged to be within the first and second claims of his patent. And I have only to add that, in my opinion, Nicholson's application clearly described the identical mechanical construction or combination here claimed to be covered by the Verner patent.

But much stress is laid upon the fact that Verner's inclosing chambers are made "gas-tight," and the plaintiffs' expert, Mr. Renwick, finds in this feature, which he assumes to be peculiar to Verner's construction, an essential distinction between his device and Nicholson's. As a matter of fact the term "gas-tight" was first brought into Verner's specification and claims by an amendment made June 23, 1886, when it was certainly too late to enlarge their scope, in view of what other improvers had been doing. *Railway Co.* v. *Sayles*, *supra*. But I do not deem this amendment as of any special importance, for it is to be supposed that it was the intention of Verner from the start to make his chamber sufficiently gas-tight to answer the purpose for which it was designed. And the same reasonable presumption is to be entertained in behalf of others who had devised protecting casings or boxes to catch the leaking gas. In Mr. Westinghouse's earlier patent, his enveloping or outer pipe is described as "tight casing," commenting upon which Verner in his specification says: "The pressure in the pipe being comparatively low, the ordinary joints, when properly made, will suffice to prevent the escape of gas therefrom." For the same reason, and because of the open vent-pipe, even the earthen walls of the incasements of Mr. Westinghouse's second patent are sufficient to hold the leaking gas. Hoeveler and McTighe describe their boxes or casings which surround the several joints as "packed carefully so as to guard as much as possible against leaking." And Nicholson says that if the inclosure is made of wood it may "be packed or luted at the joints." After all, the quality of tightness to restrain the leaking of gas from the inclosing chamber is a mere matter of degree, and a variation in that regard would not amount to a patentable difference.

About the time of Verner's application for a patent, before and afterwards, a number of persons were engaged, simultaneously and independently of each other, in devising safely appliances against leakage in pipes used in the then comparatively new business of conveying natural gas long distances, and the remarks of Judge BRADLEY, in *Atlantic Works* v. *Brady*, 107 U. S. 192, 199, 2 Sup. Ct. Rep. 225, apply with great force to the present case:

"The process of development in manufactures [says that learned and experienced jurist] creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering

skill is distinctly shown, is unjust in principle and injurious in its consequences."

And now, it only remains for me to state, as the result of my examination and study of the proofs bearing upon the questions I have here treated, that, in my judgment, the device used by the defendant company does not infringe either the first or second claim of the patent in suit, upon any construction of those claims which is permissible; and I am further of the opinion that said claims are destitute of patentable novelty. These conclusions end the case, and I am thus relieved of the necessity of considering some other questions which the counsel for the respective parties discussed with so much zeal, and with such signal ability. Let a decree be drawn dismissing the bill of complaint, with costs.

GRINNELL v. WALWORTH MANUF'G CO.

(Circuit Court, D. Massachusetts. August 27, 1890.)

PATENTS FOR INVENTIONS—NOVELTY—FIRE-EXTINGUISHER.

Letters patent No. 248,827, issued October 25, 1881, to Frederick Grinnell, for an improvement in automatic fire-extinguishers, is void for want of novelty, since the alleged improvement merely consists in applying to an automatic extinguisher a deflector, which had formerly been in use on hand hose.

In Equity.

Benjamin F. Thurston and *Wilmarth H. Thurston*, for complainant.

Chauncey Smith and *James J. Myers*, for defendant.

COLT, J. This suit is brought for the infringement of letters patent No. 248,827, granted October 25, 1881, to the complainant, Frederick Grinnell, for an improvement in automatic fire-extinguishers. The specification says:

"This invention has reference to an improvement in devices for distributing water supplied through a system of pipes, which water is retained by means of a seal secured by a solder made of a material fusible at a low temperature, so that by the action of heat on the solder the seal is released and removed by the pressure of the water. The invention consists in securing opposite the outlet thus sealed a deflector, by which the water rushing from the outlet is deflected and distributed over a large area, as will be more fully set forth hereinafter. Distributers for automatic fire-extinguishers have been heretofore provided with perforations through which the water is discharged. Such perforations are liable to become obstructed by sediment if the device is constantly filled with water, or they are as liable to be obstructed by dust, and more particularly so in factories where the air is filled with impurities, when the same are exposed. To avoid all these defects and reduce the cost of construction is the object of this invention. * * * Having thus described my invention, I claim as new and desire to secure by letters patent, in an automatic fire-extinguisher, the combination, with the outlet, of a deflector fixed in front of the outlet, and constructed to disperse the water over a large area, and a seal held by a solder fusible at a low temperature, as described."

I have quoted at length from the specification of the patent to show that the Grinnell invention was a very simple one, and that it consisted in substituting a deflector, secured opposite the sealed outlet of the pipe, for a distributor with perforations commonly known as the "rose head." It is admitted that all the elements, including the deflector, which make up the claim of the patent, are old. What Grinnell did was to take an old deflector which had been in use on hand hose, and apply it to an automatic fire-extinguisher. If he had been the first to construct the deflector it would without question have been an invention. If, to make a practically operative automatic fire-extinguisher, it had been found necessary to use a deflector, and Grinnell had been the first to conceive this, there might be some ground for sustaining the patent. But it is admitted that the prior Parmelee extinguisher was operative, and used commercially. At most the Grinnell extinguisher is only an improvement upon Parmelee's, and the improvement consisted in substituting an element which was old and well known in the art. In patent No. 151,227, granted to G. E. Jenks, May 26, 1874, we find described a deflector similar to that found in the Grinnell patent. It was there used in connection with hand hose, or fountain nozzles, but its functions were the same as when applied to an automatic fire-extinguisher. Under the rules of law as laid down by the courts in cases of this character, I must hold the Grinnell patent void for want of patentable novelty, in view of the prior state of the art at the time of the alleged invention. With the Jenks patent, the Parmelee patents, and the whole prior art as disclosed in the record before me, I do not think that it required more than the ordinary skill of the mechanic to place a Jenks deflector upon a Parmelee sprinkler; or, in other words, in doing this I do not think there was any exercise of the inventive faculty under the patent laws of the United States. This point seems to me so clearly decisive of the case that I do not deem it necessary to consider the other questions raised in defense or to further review the state of the art. Bill dismissed.

BULLOCK *v.* DREYFUSS.

(Circuit Court, S. D. New York. October, 1890.)

PATENTS FOR INVENTIONS—PATENTABILITY—ANTICIPATION.

Claims 1 and 4 of patent No. 228,939, issued June 15, 1880, to Lebbeus H. Rogers for a die of an appropriate configuration to do the work of ornamentation for perforating and scalloping paper, or of ornamentation and dividing the paper,—either or both,—were anticipated by George Franke by the use of a die of substantially the same pattern, and with similar configuration and perforations, and, except in the result of the embossing, accomplishing just what is done by the patented die.

In Equity.

Thos. H. Wagstaff and *Frost & Coe*, for complainant.

Herbert W. Grindal, for defendant.

WALLACE, J. The complainant alleges infringement by the defendant of claims 1 and 4 of letters patent No. 228,939, granted to Lebbeus H. Rogers June 15, 1880. It is apparent from the specification that the essence of the invention patented, as far as the two claims in controversy are concerned, consists in a die of an appropriate configuration to do the work of ornamentation for perforating and scalloping paper, or of ornamentation and dividing the paper,—either or both. The configuration of the die must be such as will enable it to punch the paper into the desired pattern of perforations and interlocking scallops, and it may be such as will also enable it to sever the paper along the line of the interlocking scallops. The first claim is for the method of making the perforated and scalloped paper by the use of the die. The second claim seems to be one for a die having only the ornamenting function, but it may be capable of an interpretation which will restrict it as one for a die having both the ornamenting and dividing functions. Both claims are met and their novelty overthrown by the knowledge and use by George Franke, prior to the date of the invention by the patentee, of a die essentially in configuration like the die of the patent. The silver strips of embossed paper made by Franke with his die show the interlocking pattern and perforations which are substantially those made by the use of the patented die; and it is plain, as he testifies, that such die is operative when used upon several sheets of paper, except in the result of the embossing, to accomplish just what is done by the patented die. There is no reason to doubt that this die was imported by him and used, as he states, in 1878.

In view of this conclusion, it is unnecessary to consider the other defenses which have been interposed by the defendant.

The bill is dismissed, with costs.

THE A. HEATON.

(*Circuit Court, D. Massachusetts.* September 9, 1890.)

1. SHIPPING—INJURIES TO SEAMEN—LIABILITY OF OWNER OF VESSEL.

A petition to recover for injuries sustained by a seaman, by reason of the alleged negligence of the master and owners of the vessel in not providing a suitable gasket for the foresail, cannot be sustained on the ground of actual personal negligence of the owners, where it appears that there was plenty of spare rope on board, which it was the duty of the master to use in keeping the rigging in repair, and there is nothing to show that the owners sent the vessel to sea in an unseaworthy condition, or were themselves negligent, either in the selection of a master or otherwise.

2. SAME—EVIDENCE.

The mate testified positively that, before the accident, he examined the gaskets, and reported to the master that they were in poor condition, especially the one in question, and that the latter replied "that it lasted the last voyage, and he thought it would do this, and that he did not intend to spend much on it, but run it as cheap as he could, because on his return * * * he would be off, and the ship sold." *Held*, that testimony of the master that he did not recollect being notified of the condition of the gasket, raised no doubt of the truth of the positive testimony of the mate, especially as the master professed equal forgetfulness of other circumstances attending the accident.

3. SAME—MEASURE OF DAMAGES.
A seaman, permanently injured in the performance of his duty on shipboard, in consequence of the negligence of the master in not keeping a rope in proper condition and repair, can maintain a libel against the ship to recover damages for the injury, beyond his wages to the end of the voyage and the expenses of his cure, so far as the injury is susceptible of cure.

4. SAME—EXCESSIVE DAMAGES.
When it appears that petitioner's left hip and arm were fractured, and that he was permanently disabled from pursuing any calling requiring bodily exertion, $1,500 damages are not excessive.

In Admiralty. Appeal from district court.

T. J. Morrison, for petitioner.

George M. Reed and *M. J. McNeirney*, for claimants.

Before GRAY, Justice, and COLT, J.

GRAY, Justice. The schooner A. Heaton having been sold by order of the district court for $2,150 upon a libel for seamen's wages, and about $1,500 of the proceeds of the sale remaining in the registry of the court, after payment of such wages and costs, Julius Hanson filed a petition, in the nature of a libel *in rem*, to recover damages for injuries sustained, while serving as a seaman on board the schooner on her last voyage, by reason of the negligence of her master and owners in not providing a suitable gasket for the foresail. The district court held that the petitioner was entitled only to his expenses in the hospital, which had been paid by the owners, and to his wages to the end of the voyage, with interest from the return of the vessel, and entered a decree accordingly; and he appealed to this court.

The petitioner shipped as an able seaman, at Gloucester, in this district, for a voyage to the British provinces, and thence to the Mediterranean, and back to a port of discharge in the United States, on the A. Heaton, a three-masted schooner, carrying a square foresail, the method of furling which was by sliding it along the yard, and making it fast to the mast with brails, and winding gaskets around it to avoid bagging between the brails. On the third day out from Gloucester, the petitioner was ordered aloft to take part in furling the foresail, and in performing that duty was obliged to let himself down from the yard, holding the sail between his knees, and the gasket in his hands; and, while he was so compressing the sail and winding the upper gasket around it, the gasket broke, and he fell to the deck, whereby his left hip and left arm were fractured, and he was permanently disabled from pursuing any calling requiring bodily exertion. The accident happened by reason of the defective condition of the gasket, which by long use had become rotten and weak, and the petitioner had no notice or knowledge of its condition until it gave way in his hands. There being no evidence of any negligence on his part, we have no occasion to consider how far such negligence, if proved, might affect his right to recover. The gaskets are a part of the rigging, which requires frequent renewal at sea. There was plenty of spare rope on board, which it was the duty of the master to use in keeping the rigging in repair; and there is no evidence that the owners sent the vessel to sea in an unseaworthy condition, or were themselves negligent, either in the

selection of a master or otherwise. This petition cannot, therefore, be maintained on the ground of actual personal negligence of the owners.

But it is equally clear to our minds that the accident was caused by the master's gross, not to say reckless, neglect of the duty which he owed to the crew under his command and care. The mate distinctly and positively testified that before the accident, having been up in the rigging and examined the gaskets, he reported to the master that the gaskets, and especially the upper one, were in poor condition, and in want of repair; and that the master replied "that it lasted the last voyage and he thought it would do this, and that he did not intend to spend much on it, but run it as cheap as he could, because on his return to the United States he would be off, and the ship sold." The words attributed to the master by the mate are in accord with the subsequent action of owners in allowing the vessel to be sold to pay the wages of the crew. Although the master, on his direct examination by the counsel for the owners, testified that he did not recollect any such conversation, yet on cross-examination he admitted that it might be that the mate had called his attention to the defective condition of the gasket, and it had slipped his mind. And the master professed equal forgetfulness of other circumstances attending the accident, and especially of the fact, proved by the concurring testimony of the mate, the petitioner, and three of the four other seamen on board, that the petitioner, when he fell, held up the broken gasket, and cried out, "Captain, this is your fault." Taking all this into consideration, the master's want of recollection, whether real or assumed, the previous notice to him of the defective condition of the gasket, raises no doubt of the truth of the distinct and positive testimony of the mate upon that point.

The case is thus resolved into the question of law, whether a seaman, permanently injured in the performance of his duty on ship-board, in consequence of the negligence of the master in not keeping a rope in proper condition and repair, can maintain a libel in admiralty against the ship to recover damages for the injury, beyond his wages to the end of the voyage and the expenses of his cure, so far as the injury is susceptible of cure. This question, both as to the jurisdiction and as to the merits, appears to us to be substantially determined by the decisions of the supreme court. In England, indeed, it appears to be unsettled whether a libel *in rem* can be maintained in admiralty for a personal injury. But on principle, as observed by a recent English writer, it would seem difficult to deny the justice of the view that personal injuries inflicted by a ship might confer a maritime lien, or to formulate a satisfactory reason why damages occasioned to a man's property should give rise to rights of a higher nature, or be the subject of a more effective remedy, than an injury occasioned under the same circumstances to his person. 4 Law Quar. Rev. 388. In this country, it has been established by a series of judgments of the supreme court of the United States, that a libel in admiralty may be maintained against the ship for any personal injury, for which the owners are liable under the general law and independently of any local statute; accordingly passengers have often maintained libels, as well

against the ship carrying them as against other ships, for personal injuries caused by negligence for which the owners of the ship libelled were responsible. *The New World*, 16 How. 469; *The Washington*, 9 Wall. 513; *The Juniata*, 93 U. S. 337; *The City of Panama*, 101 U. S. 453, 462. The sixteenth rule in admiralty, which directs that "in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only," does not affect libels for negligence. It was argued in behalf of the owners that they were not responsible to the seaman for the negligence of the master, because the two were fellow-servants; and a Scotch case was cited, where in an action at law it was so held. *Leddy* v. *Gibson*, 11 Ct. Sess. Cas. (3d Ser.) 304. But we are unable to reconcile that decision with the recent judgment of the majority of the supreme court in *Railway Co.* v. *Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, which conclusively binds this court. The point there decided, as stated by Mr. Justice FIELD in delivering judgment, was that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, and at what speed it shall run, and has the general management of it, and control over the persons employed upon it, is in no proper sense a fellow-servant with the firemen, the brakemen, the porters, and the engineer upon the train; but represents the company, and therefore, for injuries resulting from his negligent acts, the company is responsible. 112 U. S. 390, 394, 5 Sup. Ct. Rep. 190, 192. The reasoning, upon which it was there held that the engineer might maintain an action against the owners of a railroad train for the negligence of the conductor, applies with greater force to a suit by a seaman against the owners of a vessel for negligence of the master, while she is at sea, beyond the reach of the owners, and the seaman is subject to the absolute control of the master, and cannot, if he would, leave the vessel or throw up his engagement. No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law. Courts of admiralty have always considered seamen as peculiarly entitled to their protection. Seamen may recover their wages by libel *in personam* against either the owners or the master, or by libel *in rem* against the ship. *Sheppard* v. *Taylor*, 5 Pet. 675, 711; *Bronde* v. *Haven*, Gilp. 592; *Temple* v. *Turner*, 123 Mass. 125, 128; Rule 13 in Admiralty. Their lien on the ship or its proceeds takes precedence of all other claims, except, perhaps, claims for salvage, or for damages by collision owing to the fault of their ship. Hen. Adm. § 69, and cases cited; *Norwich Co.* v. *Wright*, 13 Wall. 104, 122. A seaman, taken sick or injured or disabled in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. That right, indeed, grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for or a restriction of other rights and reme-

dies. *Harden* v. *Gordon*, 2 Mason, 541; *The George*, 1 Sum. 151; *Reed* v. *Canfield*, Id. 195, 199, 202. It does not, therefore, displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts. In *Sherwood* v. *Hall*, 3 Sum. 127, Mr. Justice STORY, sitting in admiralty, held that the act of the master in shipping a minor as a seaman, knowing it to be against the will of his father, was a tort for which the owners of the ship were responsible in damages to the father, although positive and direct knowledge of the facts was not brought home to them; and said:

"Constructive notice is brought home to them by the knowledge of their agent, the master. * * * Upon the well-established principles of the maritime law, in cases of this sort, the owners are responsible for the torts of the master in acts relative to the service of the ship, and within the scope of his employment in the ship. * * * In cases of collision, and injuries from negligence and illegal captures, and other torts from the fault of the master, the owners are, by the maritime law, made responsible for his acts and omissions of duty." Id. 131, 132.

In *Leathers* v. *Blessing*, 105 U. S. 626, 628, a merchant, who had gone on board a vessel expecting to find goods consigned to him, and had been there injured by the fall of a bale of cotton which, as the master knew, had been insecurely stowed, maintained a libel against the owners as well as the master; and it was assumed that the libelant's case would have been clear if he had been an officer, seaman, passenger, or freighter. In the high court of admiralty of England, Dr. LUSHINGTON, in a collision cause, while awarding damages to the owners of the vessel not in fault, denied them costs, because her master had not ordered out a boat to save the life of a seaman who had fallen overboard from the guilty vessel, and was drowned; and said:

"I must hold here, and I ever shall hold, that the owners of a vessel are responsible for the whole conduct of the master whilst on board his vessel, and in command of that vessel. I do not mean to say that they can be responsible, criminally speaking, for any act he may have committed of a criminal nature, for, of course, in that case the responsibility and the punishment can attach only to the wrong-doer; but, civilly speaking, the owners are responsible for any deviation from that line of conduct which it behooves a master to perform, not simply in the navigation of the vessel, and in the care of his own seamen, but in the care of those who may be thrown on board his ship by an accident of this description, and for the performance of any office of humanity." *The St. Lawrence*, 7 Notes Cas. Adm. & Ecc. 556, 559, 14 Jur. 534.

For these reasons, and upon these authorities, we are of opinion that the appeal must be sustained.

This conclusion is in accordance with the general current of opinion in other circuits. *The Ben Flint*, 1 Biss. 562, 568; *The Sea Gull*, Chase, 145; *Brown* v. *The Bradish Johnson*, 1 Woods, 301; *The Tulchen*, 2 Fed. Rep. 600; *The Clatsop Chief*, 7 Sawy. 274, 8 Fed. Rep. 163; *The Noddleburn*, 12 Sawy. 129, 28 Fed. Rep. 855; *Olsen* v. *Flavel*, 13 Sawy. 232, 34 Fed. Rep. 477; *The Edith Godden*, 23 Fed. Rep. 43; *The Guillermo*, 26 Fed. Rep. 921. The decisions in *The Sea Gull* and *The Clatsop Chief* were disapproved and overruled by the supreme court in *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, only because they awarded damages

for the death of the person injured. In those cases, in England or America, cited for the claimants, which most resemble the case at bar, the negligence which caused the injury was not shown to be that of the master. But it was either, as in *The Bernina*, 12 Prob. Div. 58, and L. R. 13 App. Cas. 1, and in *The Queen*, 40 Fed. Rep. 694, left in doubt by whose individual fault the accident happened; or else the negligence proved was, as in *Halverson* v. *Nisen*, 3 Sawy. 562, and in *The Egyptian Monarch*, 36 Fed. Rep. 773, of a mate, or, as in *The City of Alexandria*, 17 Fed. Rep. 390, of a steward, neither of whom was *dominus navis*, but each was employed under the master in a common service with the libelant, and therefore rightly held to be a fellow-servant. *Steam-Ship Co.* v. *Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397; *Benson* v. *Goodwin*, 147 Mass. 237, 17 N. E. Rep. 517; *Searle* v. *Lindsay*, 11 C. B. (N. S.) 429.

Considering the extent of the petitioner's injuries, $1,500 is not too large a sum to be awarded to him as damages. Decree of the district court reversed, and the sum remaining in the registry ordered to be paid to the petitioner in satisfaction of his damages and costs.

HOOD v. THE LEHIGH.

(Circuit Court, N. D. Illinois. October 6, 1890.)

1. COLLISIONS IN FOGS—SPEED OF VESSELS.
Respondent, a propeller laden with grain, while running in a fog at night at the rate of about nine miles an hour, nearly her full speed, collided with and sunk libelant, a coal-laden schooner, whose speed was four or five miles an hour. The regulation lights on respondent were burning brightly, the lookouts properly stationed, the captain and mate on watch, and her fog-whistle was being sounded once a minute. *Held*, that respondent was at fault in maintaining a dangerous and unreasonable rate of speed in the fog.

2. SAME—TORCHES—CONTRIBUTORY NEGLIGENCE.
Libelant, the schooner, failed to show a torch on first hearing respondent's fog-whistle, and made no attempt to do so, as required by Rev. St. U. S. § 4234, in such cases, and it was in evidence that a torch could have been seen further than the schooner's lights, and that the display of a torch would probably have kept the vessels apart. *Held*, that libelant was guilty of contributory negligence in not displaying a torch and that the damages should be divided.

In Admiralty. Appeal from district court.

W. H. Condon and *T. H. Hood*, for libelants.

Schuyler & Kremer, for respondent.

GRESHAM, J. The propeller Lehigh ran into and sunk the schooner Van Valkenburgh in Lake Huron, off Thunder Bay island, between 12 and 1 o'clock on the night of May 31, 1887. The schooner was on a voyage from Ashtabula to Manitowoc, laden with coal. Her course was N. N. W., and her speed was four or five miles an hour. The propeller was on a voyage from Chicago to Buffalo, and at the time of the col-

lision was running nine or ten miles an hour, which, with a cargo of grain, was little, if any, less than her full speed. Both vessels had been running in fog for some time before the collision, and when the lights of each were sighted from the other they were only 400 or 500 feet apart, and the schooner was apparently emerging from a dense bank of fog.

The schooner's lookout testified that for two or three hours he had been on the top-gallant forecastle, blowing a fog-horn at intervals of a minute; that, although he had been vigilant in watching for vessels, the first knowledge he had of the approach of the propeller was the sound of her steam-whistle over the schooner's lee bow, forward of the cat-head; that he immediately reported a steam-boat to leeward, and the captain and mate on deck replied that they heard the whistle; that he heard the propeller whistle four or five times before the collision; that when she was about 400 feet away he saw her starboard light come out of the fog, then her mast-head light, and then her port-light, and that after sighting her she blew one or two whistles.

The schooner's mate testified that he and the captain were on watch when the collision occurred; that for two hours the lookout had steadily blown the fog-horn at intervals of about one minute; that he reported a steamer blowing her whistle on the lee bow, and he (the mate) replied "All right; keep your horn blowing regularly;" that he was then between the fore main rigging and the cabin, and the captain was aft, walking; that when he heard the steamer's second blast he ordered the lookout to blow his horn a little oftener, which he did; that the fog was so thick he could not see more than 200 or 300 feet, at which distance he first saw the propeller's three lights at that same time, and she was then bearing straight for the schooner's fore-rigging, on the port side, where she struck, cutting into the schooner eight or ten feet, and sinking her in two or three minutes; and that he heard the propeller's whistle about ten minutes before he saw her lights.

The schooner's captain testified that for half an hour before the collision he was forward of the cabin on the port side; that when the vessels came together the fog was dense, and had been all night; that he did not hear the first whistle reported by the lookout, but heard a whistle directly, or within a minute or two later, when he rapidly walked forward to the main rigging, and saw the propeller's three lights not over 300 feet distant; that he immediately ordered the lookout to blow his horn constantly, and the wheelsman to port his wheel; that these orders were obeyed, and the schooner came up about two points; that it was not more than a minute and a half after he heard the first whistle until the collision; that the propeller was first heading for the schooner's midships, but struck her forward of the forecastle; that before the collision he heard the signals on the propeller to back; that he had a torch forward by the side of the cabin, and by his side, but he had no time to light and show it after he heard the propeller's whistle, her speed being such that collision was then inevitable; that he heard the propeller's whistle about a minute after the lookout's first report, and saw her lights about half a minute after hearing her whistle.

Several other witnesses testified on behalf of the libelants that the night was foggy, and that when the propeller was first sighted the vessels were about 400 feet apart. The schooner's captain was the only witness who was examined by the libelants on the subject of the torch.

The propeller's engineer testified that when the collision occurred the engine was backing strong, and the wheels had made about 120 or 130 backward revolutions; that she could be stopped when running at her usual speed (ten miles an hour) in about two minutes, and he thought she had been backing three minutes; that he could see stars overhead, but there was a fog-bank on the land side; that her fog-whistle had been sounded all night at intervals of a minute; and that when he received the order to back he was writing up his log, and his assistant was ten feet below oiling the engine.

The propeller's second mate testified that when the collision occurred he was on watch at the mast-head, and the captain was on the bridge, and they first saw the schooner's red light apparently flash up out of a fog-bank over the propeller's starboard bow, about 500 feet away; that the captain immediately gave the order "Hard a-port," which was promptly obeyed; that the propeller was backing at the time of the collision; that he heard Thunder Bay whistle several miles distant just before the collision, and saw Thunder Bay light just afterwards; that he heard no signal from the schooner; that a torch could have been seen three times as far as a red light, and he had no doubt the collision would have been avoided if the schooner had shown a torch; that the propeller's speed was nine miles an hour when she struck the schooner; that the fog was not dense; that the propeller had been running in fog all night; and that he saw a fog-bank from which the schooner apparently suddenly emerged when he observed her light.

One of the propeller's watchmen testified that for some time before the collision he had been on duty on the starboard bow; that the fog seemed to be in banks; that at times he could see under it, and again he could not; that he saw the schooner's bright red light immediately after the second mate reported it; that he heard no fog-signal from the schooner; that if she had shown a torch it could have been seen far enough to avoid her; that for some time previous to the collision the propeller's fog-whistle had been sounded every minute, and that the vessels came together about two minutes after the schooner's red light was observed.

The propeller's other watchman testified that about the time of the collision he heard Thunder Bay whistle, three miles off, and just afterwards he saw Thunder Bay light; that he heard no fog-signal from the schooner, and that it was less foggy immediately after the collision.

The propeller's wheelsman testified that he was on duty at the time of the accident, and he first saw the schooner's red light when the vessels were 500 or 600 feet apart; that the captain at the same time ordered the wheel hard a-port, and directed the engine to stop and back, both of which orders were obeyed; that, before striking, the propeller swung about two points and a half on the port wheel and the engine was backing;

that she had been blowing her big fog-whistle, which could be heard several miles, for some time before; that he heard no fog-horn from the schooner; that he heard Thunder Bay whistle just before the collision, and a minute or less afterwards saw Thunder Bay light; that the schooner was not seen sooner because she was in a fog-bank; that if she had shown a torch she could have been avoided; that when the schooner was sighted the propeller's speed was about nine miles an hour; that the vessels were 200 feet apart when he got the wheel over; and that if he had rung to back at first he could have stopped the propeller, but he did not do so because he thought he could pass the schooner.

The propeller's captain testified that before and after the collision he could see stars overhead, but it was hazy, and a fog-bank was hanging along the shore; that he and the second mate saw the schooner's red light suddenly, and at the same time, about three points off his starboard bow, and 400 or 600 feet away; that he immediately ordered helm a-port, thinking he could pass under her stern, and rang the bells to back, which orders were obeyed; that he could have seen a torch on the schooner a mile or more, and if she had shown one he could have cleared her; that he had been blowing his fog-horn previously every minute; that he heard no fog-whistle from the schooner, and did not believe one was blown; that her light sprang up all at once; that the propeller was making nine or nine and a half miles an hour when the schooner was sighted; and that after the collision he asked the captain of the schooner why he did not show a torch, and he replied he might have done so, but did not, although he had one near by, and that he blew his fog-horn, but it was not a good one, and could not be heard any distance. The schooner's captain, however, testified in rebuttal that he did not make these statements.

The district judge found that the schooner was not in fault, and condemned the propeller for the entire damages. The propeller's regulation lights were burning brightly; two lookouts were properly stationed, the captain and second mate were on watch, and her fog-whistle had sounded once a minute before the schooner was sighted; but she was running in fog, and, however careful those who were navigating her may have been, they knew her speed was unreasonable and dangerous. If she had been running under check, as she should have been, the collision would not have occurred. I agree with the district judge that the propeller was at fault.

But more important questions remain for determination. Was the schooner at fault in not showing a torch-light before the propeller's lights were seen? If she was, did her negligence contribute to the disaster? The schooner's lookout thought he heard the propeller's whistle four or five times before the collision, and that one or two of the blasts were after he saw her lights emerge from the fog. Assuming that he was right in this statement, he heard the propeller whistle several times before he saw her lights, and all the witnesses for the respondent agreed that her fog-signals were sounded at regular intervals of a minute. The lookout promptly reported to the mate on deck a steam-boat whistling over the

schooner's forward lee-bow, and the latter testified that when he heard the propeller's second signal he ordered the lookout to blow his horn a little oftener, and that he heard the propeller whistle 10 minutes before he saw her. It is insisted, however, that in this latter statement the schooner's mate was mistaken; that it could not have been 10 minutes from the time he heard the propeller's first whistle until he saw her. But even if the mate was mistaken, as claimed, and he probably was, it is plain from his evidence that at least two of the propeller's steam-signals were heard before she was sighted from the schooner. It is significant in this connection that just before the collision Thunder Bay whistle, a mile or more distant, was heard from the deck of the propeller, and yet her steam-signals were not heard from the deck of the schooner until the vessels were within 400 or 500 feet of each other. The captain of the schooner did not hear the first whistle reported by the lookout, but he heard the propeller whistle "directly, or within a minute or two later." If, when the lookout first reported the approach of a steam-boat, the captain or mate of the schooner had promptly lighted and shown a torch, it might have been seen before the schooner's lights were observed, and notice thus given might have avoided the collision. The captain and mate on the schooner's deck were fairly notified of the approach of a steam-vessel in the fog, and section 4234 of the Revised Statutes made it their duty to promptly show a torch, which they did not do; and it cannot be said from the evidence that this neglect of a statutory duty did not in some degree contribute to the accident. The schooner's captain was the only witness who testified for the libelants on the subject of the torch. In his opinion, a collision was inevitable when he sighted the propeller, and the display of a torch then would have done no good; but he did not say it was too late to have shown a torch when the lookout reported the propeller's first signal. A number of the officers and crew of the propeller testified that in their opinion a torch could have been seen further in the fog than the schooner's lights, and that the display of a torch would have kept the vessels apart. The statute which the schooner violated was enacted to prevent just such accidents as the one that occurred, and the burden was upon the libelants to show by clear proof that the schooner's negligence did not, and could not, have contributed to the damage which she sustained. The testimony of the captain was not sufficient to relieve the schooner of that burden. The evidence does not show that, if the schooner had displayed a torch when her lookout first reported the propeller, it would not have been seen from the deck of the latter before the schooner's lights were observed; and it cannot be said that if a torch had been shown, the propeller could not and would not have taken proper precautions to keep out of the schooner's way. It was incumbent upon the libelants to show by clear and convincing proof that the situation justified the schooner in her failure to promptly show a torch. If the captain had a torch on the deck near by, and ready for use, it is certainly singular that he did not show it. *The Eleanora*, 17 Blatchf. 88; *The Pennsylvania*, 19 Wall. 125; *The Hercules*,

17 Fed. Rep. 606; *The Johns Hopkins*, 13 Fed. Rep. 185; *The Pennsylvania*, 12 Fed. Rep. 914.

I think the damages should have been divided between the two vessels, and the decree of the district court will be modified to that extent.

UNITED STATES *v.* SULLIVAN.

SAME *v.* SCOTT.

(*Circuit Court, D. Oregon.* October 8, 1890.)

SHIPPING—BOARDING ARRIVING VESSEL.

Section 4606 of the Revised Statutes, providing for the punishment of any person who, without the consent of the master, goes on board an arriving vessel before she reaches her place of destination, and is moored thereat, applies to foreign vessels.

(*Syllabus by the Court.*)

In Admiralty. Information for boarding arriving vessel.

Franklin E. Mays and *Edward N. Deady*, for plaintiff.

Raleigh Scott, for defendants.

DEADY, J. The informations in these cases charge the defendants with the violation of section 4606 of the Revised Statutes, on August 24, 1890, by unlawfully going on board the vessel Kate F. Troop, while she was in the Columbia river, near Astoria, and about to arrive at her port of destination, to-wit, Portland, Or., and before she was completely moored thereat.

The statute provides that:

"Every person who, not being in the United States service, and not being duly authorized by law for the purpose, goes on board of any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, without permission of the master, shall, for every such offense, be punishable by a fine of not more than two hundred dollars, and by imprisonment for not more than six months; and the master of such vessel may take any such person so going on board into custody, and deliver him up forthwith to any constable or police officer, to be by him taken before any justice of the peace, to be dealt with according to the provisions of this title." Rev. St. tit. 53.

This statute is section 62 of the act of June 7, 1872, (17 St. 262,) entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen."

In the Revised Statutes the word "vessel" is substituted for "ship," in the original.

The defendants demur to the informations on the ground:

"(1) That the same does not state facts sufficient to constitute a crime; and (2) that the court has no jurisdiction to authorize the filing of the information by the district attorney."

The cases were heard together. On the argument, the second ground of demurrer was abandoned.

In support of the first ground of demurrer, it is contended that the statute, taken in connection with section 4612, Rev. St., applies only to American vessels, of which the Troop does not appear to be one. And it is admitted by counsel that she is a British vessel.

In support of this proposition, *U. S.* v. *Minges*, 16 Fed. Rep. 657, is cited.

This case was an information under section 4601 of the Revised Statutes, taken from section 4 of the act of July 20, 1790, (1 St. 133,) entitled "An act for the government and regulation of seamen in the merchant service," for harboring a deserting seaman from a Norwegian vessel.

The court said that the section taken in connection with section 4612 (section 65 of the act of 1872) did not include a desertion from a foreign vessel, and sustained a demurrer to the information; but the court, in support of this conclusion, evidently relied on the fact that there is a treaty between the United States and Norway for the arrest and surrender of deserting seamen from the vessels of either nation in the waters of the other. Pub. Treaties, p. 740, art. 14. Section 5280 of the Revised Statutes furnishes the means for enforcing this treaty within the jurisdiction of the United States.

Section 4612 provides

—"That, in the construction of this title, (53,) every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve, in any capacity, on board the same, shall be deemed and taken to be a 'seaman;' and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable."

But, as I understand this section, it does not declare that the word "seaman," as used in the statute, is confined to one employed on a vessel belonging to a citizen of the United States; but rather, and only, that every person employed on such a vessel shall be considered a "seaman."

Nor does this section exclude foreign vessels from the operation of the statute, by declaring that a person in command of a vessel belonging to a citizen of the United States shall be considered the "master" thereof.

There is nothing to be inferred from either of these provisions that section 4606 does not include the boarding of a foreign vessel contrary thereto.

In *U. S.* v. *Minges*, *supra*, weight seems to have been given to the fact that title 53 of the Revised Statutes, in which these sections occur, is called "Merchant Seamen."

Now, merchant seamen are simply seamen in private vessels, as distinguished from seamen in the navy or public vessels. The seamen employed on private vessels of all nations are merchant seamen, and literally included in this phrase.

In *U. S.* v. *McArdle*, 2 Sawy. 367, I held, in the district court, that section 4596, (section 51 of the act of 1872, and included in title 53 of the Revised Statutes,) providing for the punishment of minor offenses committed by "seamen," lawfully engaged in the sea service, is applicable to a seaman engaged on a foreign vessel, who is guilty of "disobedience," within the waters of the United States.

Then, as now, section 4612 was relied on as qualifying the general language of the statute, "any seaman," so as to confine it to cases of seamen engaged on American vessels.

In answer to this argument, I said, and now repeat:

"The effect of all this (section 4612) is only to declare, in a certain class of cases, to-wit, ships 'belonging to any citizen of the United States,' two things already well established: (1) That a person having the command of such a ship shall be deemed the master thereof; and (2) that every person employed thereon shall be deemed a seaman. But the section does not declare that the term 'seaman' as used in the act, or that the act itself, shall be held to apply only to seamen serving on ships belonging to citizens of the United States, and therefore it does not affect the question under consideration."

But the section on which these informations are founded does not affect "seaman" as such, engaged in any service, foreign or domestic.

It provides for the punishment of any "person," be he sailor, boarding-house runner, or harbor or river pirate, who, without the authority of law, or the consent of the master, presumes to go on board of "any vessel" arriving in any water of the United States before she has reached her place of destination, her ultimate port, and been completely moored thereat.

Again, the last clause but one of section 4612 seems to be conclusive on the point that the word "vessel" as used in title 53 includes a foreign vessel, as well as a domestic one; for it declares that:

"The term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable."

When this occurrence took place, the Troop was navigating the Columbia, a river to which the provisions of the title are applicable. Indeed, being a general statute, containing no limitations upon its operation in this respect, it is applicable to all the waters of the United States.

The evil which this section is intended to prevent and remedy is apparent, and in this district notorious. For instance, lawless persons, in the interest or employ of what may be called "sailor-mongers," get on board vessels bound for Portland as soon as they get in the Columbia river, and by the help of intoxicants, and the use of other means, often savoring of violence, get the crews ashore, and leave the vessel without help to manage or care for her. The sailor thereby loses the wages of the voyage, and is dependent on the boarding-house for the necessaries

of life, where he is kept, until sold by his captors to an outgoing vessel, at an enormous price.

Can there be any reason assigned why the legislation of a civilized nation should limit the punishment for such practices to the case of the vessels of her own citizens, and leave those of foreign nations, which come here in pursuance of treaties of amity and commerce, to take care of themselves,—with the marline-spike, it may be?

Every commercial nation is directly interested in maintaining peace and order on its navigable waters, and affording reasonable protection to foreign vessels engaged in commerce thereon. The comity of nations requires that each one shall provide means for the arrest and punishment of all persons guilty of such depredations on commerce within its waters; and I have no doubt that such was the intention of congress in the enactment of section 4606. Its language, "any vessel," includes both foreign and domestic ones; and there is nothing in the context or the subject-matter to warrant its limitation to the latter, but the contrary.

Since I commenced the examination of these cases, my attention has been attracted to the case of *U. S.* v. *Anderson*, 10 Blatchf. 226, 228, in which Mr. Justice BENEDICT held (1872) that this section applies to foreign vessels. On this point he said:

"Considering the general language of section 62, (section 4606, Rev. St.,) and in view of the evil sought to be remedied thereby, and of the nature of the prohibition therein contained, the section is to be considered as intended to protect foreign vessels, as well as vessels of the United States; and the fact that the vessel boarded by the prisoner was a foreign vessel is, therefore, of no avail as a defense in a prosecution under this section."

In conclusion he said:

"I have thought proper to submit the questions raised to the consideration of the circuit judge, (Mr. Justice BLATCHFORD,) and he concurs with me in the opinion that the rulings stated are correct."

The demurrers are overruled.

UNITED STATES *v.* THE GEO. E. WILTON.

(*District Court, N. D. Washington.* July, 1890.)

CHINESE RESTRICTION ACT—FORFEITURE—MASTER OF VESSEL.

A vessel stolen from its owner, and used, while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of the law, does not for that cause become liable to seizure and forfeiture. To work a forfeiture of a vessel under the Chinese restriction act, the master must knowingly violate the statute. A person in control of a stolen vessel is not master of the vessel in the sense in which the term is applied to an officer in the statutes of the United States.

(*Syllabus by the Court.*)

In Admiralty.

This is a case of seizure of a vessel captured while engaged in bringing Chinese laborers into the United States contrary to law, and a forfeiture is claimed on the ground that the person who had actual possession and command of the vessel was guilty of knowingly violating the statutes of the United States which prohibit such immigration.

P. H. Winston, U. S. Atty., and *P. C. Sullivan*, Asst. U. S. Atty., for libelant.

C. D. Emery, for claimant.

HANFORD, J., (*orally.*) The evidence clearly establishes that Mr. Bertram is the owner of the vessel; that the six Chinese laborers who were brought into the United States were so brought by a person unauthorized by him, who at the time had the possession of the vessel without his knowledge or consent, having in fact stolen it from him. And on this state of facts the question is whether the vessel is to be forfeited to the United States. The statute that has been cited to me contains no provision whatever for the forfeiture of a vessel. However, there is a statute found on page 504 of this same volume (25 St. U. S.) which prohibits absolutely the bringing of Chinese laborers into the United States, and provides that the duties, liabilities, penalties, and forfeitures imposed and the powers conferred by the second, tenth, eleventh, and twelfth sections of the act to which this is a supplement are extended to and made applicable to this act. This refers back to sections 2, 10, 11, and 12 of what is known as the "Chinese Restriction Act of 1882." That act, as amended in 1884, contains a provision for the forfeiture of a vessel as follows:

"Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States in which said vessel may enter, or in which she may be found." 23 St. U. S. 117.

It is under this provision of the statute, if at all, that the vessel is to be declared forfeited. Now this forfeiture takes place only when the master of the vessel knowingly violates the law by bringing Chinese

into the United States, and landing or attempting to land them; but in this case the only persons whom it is claimed were guilty of any attempt to violate the law are persons who were trespassers and wrong-doers against the owner of the vessel. They were not put in charge of the vessel by him in the capacity of master. The vessel had no master. It cannot be claimed that a thief in possession of a vessel is the master of it. He may be in full physical, manual possession and control of it, and have power over it, until the law gets hold of him and deprives him of that power, but he is not the master of the vessel in the sense in which that title is applied to an officer of a vessel in the statutes of the United States. This case does not come within the letter or spirit of any law of the United States under which a forfeiture can be claimed, and I think, as counsel has contended here, that if congress had made a law that would apply to this case it would be unconstitutional as depriving a person of his property without compensation, and in a case in which no punishment or penalty could be rightfully inflicted upon him, he having violated no law. The decree will be in favor of the claimants. Counsel may prepare findings and a decree. The court will find the allegations of the libel to be true as far as they allege the bringing and attempting to land in the United States of Chinese persons, and all the affirmative allegations of the answer to be true.

THE EMMA KATE ROSS.[1]

GEIN *v.* THE EMMA KATE ROSS.

(District Court, E. D. New York. October 2, 1890.)

COLLISION—SAILING VESSEL AND TOW—CROSSING COURSES—FAULT.

The tug E. K. R., with two heavy mud-scows astern on a hawser, came down the North river, about 500 feet off the New York piers. A lighter, having her mainsail hoisted, but with the peak dropped and with her jib furled, came out from the piers in tow of a tug, ahead of the E. K. R., and crossing her course. The wind at the time was fresh from the south-west. When the lighter came ahead of the tow, she cast off her tug, the momentum carrying her past the course of the tow. She thereupon attempted to shape her course to Hoboken, but was carried by the wind against the foremost scow. *Held*, that the collision was the fault of the lighter.

In Admiralty. Suit for damages by collision.

Carpenter & Mosher, for libelant.

R. D. Benedict, for claimant.

BENEDICT, J. This is an action to recover for injuries to the lighter Union, caused by a collision between that lighter and a mud-scow, at the time in tow of the tug Emma Kate Ross. The tug was proceeding

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

down the North river, having in tow astern two mud-scows loaded. The lighter came out of the slip at pier 6 in tow of a tug, the wind blowing freshly from the south-west. When the lighter was about ahead of the tow, she cast off her tug, and was carried by her momentum across the course of the tow; but, while endeavoring to get upon her course, was struck by the leading scow in tow of the Ross. The faults charged upon the tug are—*First*, in taking the scows in tow astern on a hawser; *second* in taking the scows astern by a hawser so arranged as to render it impossible for the tug to control the course of the scow; *third*, in not keeping out of the way of the lighter, as required by law of a steam-vessel approaching a vessel under sail.

In regard to the first charge of negligence, I find that it is not negligence to tow mud-scows astern in the harbor of New York in ordinary wind and tide.

In regard to the second charge, the evidence shows that the scows were connected to the tug by a hawser attached to a bridle, and, further, that by using a bridle the course of scows towed astern can be controlled by the tug. I therefore hold it not to be negligence to tow mud-scows in this harbor by a hawser attached to a bridle under ordinary circumstances of wind and tide.

In support of the third charge, it is contended by the libelant that the proof shows that the collision was caused by the scow swinging out of the course of the tug and against the lighter, then outside of the tow. But the weight of the evidence is the other way. The lighter came out of the slip and under the bow of the tow, having her mainsail up, with the peak lowered, and no jib; the wind at the time blowing fresh from the south-west. When about abreast of the tow the steam-tug let go the lighter, and the lighter then, under the impulse given by the tug, passed outside of the course of the tow. The master of the lighter then put his helm up, and afterwards down, in an effort to get his lighter upon her course, but, owing to the condition of his sails, was unable to do so in time to avoid being carried by the wind down upon the scow, then moving slowly down the river in tow of the Ross. If it was not possible for the lighter, after having dropped her tug, to get under way without being driven by the wind upon the course of the tow, it was fault in the lighter to drop her tug when she did. If it was possible for the lighter to continue to move out from the tow it was fault not to do so. It is impossible to believe that the collision was caused by the heavy scow swinging out into the river and into the lighter, as claimed by the libelant. The libel must be dismissed.

AMERICAN FERTILIZING CO. *v.* BOARD OF AGRICULTURE OF NORTH CAROLINA *et al.*

(*Circuit Court, E. D. North Carolina.* August 14, 1890.)

1. CIRCUIT COURT—JURISDICTION—AMOUNT IN CONTROVERSY.
In a suit to enjoin the enforcement of a state tax, claimed to be unconstitutional, the subject of controversy is not limited to $500, the tax imposed for a single year; nor can it be determined, on a motion to dissolve the temporary injunction, that the damages will be less than $2,000, the sum required to give the court jurisdiction, where plaintiff asks to be relieved from threatened penalties and interference with its business, the damage to result from which it places at $10,000.

2. CONSTITUTIONAL LAW—TAXATION—DUTIES ON IMPORTS—INSPECTION LAWS.
Code N. C. § 2190, as amended by Act March 7, 1877, § 8, declares that no commercial fertilizers shall be sold or offered for sale until the manufacturer or importer obtain a license from the treasurer of the state, for which shall be paid a privilege tax of $500 per annum for each separate brand. Sections 22 and 23 appropriate the revenues arising from the tax to an industrial association and other purposes. *Held*, that the statute is void, in that it violates Const. U. S. art. 1, § 10, providing that "no state shall, without the consent of congress, lay any imposts or duties on imports, * * * except what may be absolutely necessary for executing its inspection laws," and is also an interference with interstate commerce.

3. SAME—PRIVILEGES OF CITIZENS.
The act is not unconstitutional as abridging the privileges and immunities of the citizens of other states.

In Equity.

Before BOND and SEYMOUR, JJ.

SEYMOUR, J. The plaintiff, a citizen and resident of Virginia, brings this suit against the board of agriculture of North Carolina, to perpetually enjoin the latter from enforcing against it the state tax on fertilizers. The act in litigation (Code, § 2190, amended and re-enacted in the statute of March 7, 1877) provides, in section 8 of the last-mentioned statute, as well as in the act which it amends, brought forward in the Code, that no commercial fertilizers shall be sold or offered for sale until the manufacturer or importer obtain a license from the treasurer of the state, for which shall be paid a privilege tax of $500 per annum for each separate brand. The plaintiff alleges that it is engaged in the manufacture and sale of commercial fertilizers; that it has a large and profitable business in North Carolina, amounting annually to over $25,000; that it has on hand in the state more than $2,000 worth of fertilizers; that defendants have, under the pretext that they are subject to forfeiture for non-payment of such tax, seized a car-load of its fertilizers, and that they threaten that they will seize all fertilizers which plaintiff has shipped, or shall ship, into the state; and will prosecute its agents for misdemeanor in selling its fertilizer without having obtained the license required by the statutes above cited. Plaintiff further avers that, unless defendants are restrained, its business will be entirely destroyed, and it will be damaged in a sum exceeding $2,000, and that its goods in excess of $2,000 will be seized by defendants under the provisions of such legislation. Defendants by their answer admit the seizure of the fertilizer, as alleged in the complaint, and aver that the cause of such seizure is the failure and refusal of plaintiff to pay a license tax of $500, as required by the laws of the state. They

also admit that, unless restrained by this court, they will continue to make seizures and institute prosecutions against plaintiff's agents, etc., and insist that the tax in question is valid, both as a tax on the trade of selling commercial fertilizers, and further as a police regulation of the state.

The case has been argued at the present term on a motion made by defendant upon the pleadings to dissolve the injunction heretofore granted by the circuit judge. It is claimed at the outset, that the court has no jurisdiction, on the ground that the amount in controversy is less than $2,000. We do not think the subject of the controversy limited to the sum of $500, the tax imposed. The tax is an annual one, and the value to plaintiff of the injunction cannot be measured by the tax of a single year. Moreover, plaintiff asks to be relieved from threatened penalties and from interference with its business, illegal if this tax upon its brand of fertilizers is unconstitutional, the damage to result from which it places at a large sum. The court cannot, at this stage of the case, determine that such damages will be less than the sum required to give it jurisdiction. *Railroad Co.* v. *Ward*, 2 Black, 485, seems to us in point. It was an action brought for the abatement of a bridge as a public nuisance. To the objection that the damages sustained by plaintiff were not sufficient to give the court jurisdiction, CATRON, J., says:

"The character of the nuisance and the sufficiency of the damage sustained is to be judged by the courts; but the want of a sufficient amount of damage having been sustained to give the federal court jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter in controversy, and the value of the object must govern."

In the southern district of New York, a suit brought to restrain the maintenance of an awning over a part of Great Jones street, having been removed to the circuit court, a motion to remand was made, on the ground that the matter in dispute did not exceed $500. The court in denying the motion said:

"The matter in dispute is the value of the right to maintain the awning, not the amount of damages done by it to plaintiff. This appears to be more than $500." *Whitman* v. *Hubbell*, 30 Fed. Rep. 81.

And in the same court, in an action for infringement of a trade-mark, WHEELER, J., says:

"There would be difficulty in maintaining the jurisdiction if the profits to be recovered were the measure of the orator's rights involved; but that is not so understood. An injunction may be of much greater value to the orator than any amount he may show himself entitled to, and it cannot be said now that such value may not exceed the limit required." *Symonds* v. *Greene*, 28 Fed. Rep. 834.

We are therefore of the opinion that the amount in controversy is not below that required to give jurisdiction.

The main question is whether or not the tax is unconstitutional. No doubt a state may tax any person for the privilege of doing any particular business therein, unless prevented by some section of the constitution of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429.

The contention of the plaintiff is that it cannot be taxed, under the provisions of the legislation above set forth, because (1) such taxation infringes upon the rights of citizens of other states, and therefore violates article 4, § 2, of the constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" and also article 14, § 1, of the amendments to the constitution, which provides, among other things, that "no state shall make any law which shall abridge the privileges or immunities of citizens of the United States." (2) Because such taxation is an impost on imports, and therefore violates article 1, § 10, of the constitution, which provides, among other things, that "no state shall, without the consent of the congress, lay any imposts or duties on imports * * * except what may be absolutely necessary for executing its inspection laws." (3) Because such taxation is an interference with interstate commerce, and therefore violates article 1, § 8, which provides that the congress shall have power "to regulate commerce * * * among the several states."

1. We do not find anything in the legislation in question which brings it within the inhibitions in either section 2, art. 4, of the constitution, or in the fourteenth amendment thereto. No privilege with regard to the sale of commercial fertilizers seems given by the act to any citizen of North Carolina which is denied to the plaintiff, and, unless this be attempted, it can hardly be said that it is deprived of any privilege or immunity which it is entitled to under the constitution, within the meaning of these constitutional provisions.

2. Although the statute in question does not in words impose a tax on fertilizers imported into the state, but one on the privilege of selling or offering them for sale only, it is not now admissible to argue that the latter is not equivalent to the former. That question was settled in *Brown* v. *Maryland*, 12 Wheat. 419. A statute of Maryland required all importers of foreign articles, or other persons selling the same by wholesale, to pay a license tax. The question was whether the imposition of such a tax was a violation of the two first-mentioned provisions of the constitution. MARSHALL, C. J., in delivering the opinion of the court, defined an impost as "a tax levied on articles brought into the country," and held that a tax on the sale of an article is a tax on the article itself, and that a tax on the occupation of the importer is a tax on importation. The tax under consideration is a tax on the privilege of selling; that is, a tax levied and collected in advance upon the occupation of selling commercial fertilizers. It is therefore a tax on the fertilizers. This case, however, differs from *Brown* v. *Maryland*, *supra*, for in that case the license was for selling foreign articles, and in this the articles sold are brought, not from without the United States, but from the sister state of Virginia. The question then arises whether or not the term "imports" in article 1, § 10, includes as well articles brought into one state from another as those imported from abroad. MARSHALL, C. J., in concluding the opinion in the last-cited case, holds that it does. He says, (*Brown* v. *Maryland*, 12 Wheat., at page 449:) "It may be proper to add that we suppose the principles laid down in this case to apply equally to

importations from another state." The contrary is expressly held by Mr. Justice MILLER, delivering the prevailing opinion in *Woodruff* v. *Parham*, 8 Wall. 123, and implied by TANEY, C. J., in *Peirce* v. *New Hampshire*, 5 How. 554. Both of these cases may be considered overruled in *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, (*The Original Package Case.*) Certainly the latter is. But whatever may be the result of the reasoning of the chief justice in *Leisy* v. *Hardin*, it is not expressly decided in that case that the term "import" applies to an article brought from one state into another. Were it not for the decision in *Woodruff* v. *Parham* we would not hesitate to say that it included, as Chief Justice MARSHALL evidently supposed that it did, goods brought from one state into another. Before the adoption of the constitution, and therefore at the time when it was framed, and its phraseology discussed, an article brought from Pennsylvania to North Carolina would have been said to be imported into North Carolina, and a tax on it would have been called an "import tax." It is difficult to say by what other name such a tax, if it could be laid, would be now styled. But, excepting in its relation to the power of congress to allow the levying by a state of a tax like the one under discussion, it is immaterial whether such a tax is an import tax or not; for, beyond doubt, if it be not a tax on imports it is a tax on interstate commerce.

3. It is therefore a violation of article 1, § 8, of the constitution. Precisely the same reasoning and the same authority as that used in the preceding paragraph prove that a tax on the privilege of selling or offering to sell fertilizers bearing a particular brand, and brought into North Carolina from another state, is a tax on commerce between the states. Being a tax on "commerce among the several states," the power to levy it must be denied to a state, on the reasoning of MARSHALL, C. J., in *McCulloch* v. *Maryland*, *supra*, which has ever since the rendition of that opinion been uniformly acquiesced in by the profession. It is there held that the power to tax involves the power to destroy, and therefore that its uncontrolled existence in the states is incompatible with the power of the federal government to regulate such commerce. It may perhaps be said that the argument does not apply to a case where the taxation makes no attempt to discriminate injuriously against the products of other states, and that such is the case with the statute *sub lite*. It is true that the North Carolina statute does tax all manufactured fertilizers offered for sale in the state, whether manufactured there or elsewhere; but, as is said by BRADLEY, J., in *Robbins* v. *Taxing-Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592: "It is immaterial that no discrimination is made; * * * interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce." The question of the equality of taxation is in terms excluded, if we consider the statute from the point of view of section 10, for that says that no tax on imports shall be levied. It seems equally immaterial with reference to section 8, for a tax must interfere with commerce if it in any degree has the effect of diminishing its volume; and that must necessarily be in a greater or less degree the result of any taxation on an article, whether

it be at discriminating or at an equal rate. In either case it diminishes sales, and therefore importations. The only conceivable case in which the amount of importations would not be reduced would arise were a state to tax its own productions more largely than imported goods. But even that would be only an apparent exception. The impost would still have the direct effect of checking importations, although the state tax on its own productions, having a still greater effect in reducing their consumption, might more than counteract the reduction of importations caused by the impost. Passing, however, from this view, drawn from the express words of the constitution, and returning to Judge MARSHALL'S celebrated argument that the power to tax necessarily includes the power to destroy, and is therefore inconsistent with the power of the United States to preserve commerce between the states, it may be remarked that, if the power were given to a state to tax all imports from other states without control, provided equal taxation were laid upon the same articles if produced or made in the state, the states would practically have the power to prohibit the introduction of any article not made in the state. North Carolina might tax the importation of manufactured cloths, and Massachusetts that of cotton or tobacco. If this tax can be sustained, it is certain that a license tax in these words would be constitutional: "No manufactured cotton shall be sold or offered for sale in this state until the manufacturer or person importing the same shall first obtain a license therefor," etc., "and pay a tax of five hundred dollars." A similar tax upon the different brands of tobacco might be levied in any state that does not manufacture tobacco. But it is needless to multiply illustrations which every one can supply for himself. It must be evident that a requirement of equality of taxation on the imported and home article would be no protection against such taxation as would seriously check, if it did not destroy, commerce between the states, and would impair, to the point almost of rendering its benefits nugatory, the domestic good results of the union of the states.

4. Defendants contend that this taxation can be sustained as a part of the police power of the state. Without attempting, what is perhaps impossible, to accurately define what does and what does not come under the term "police power," it is evident that the taxation in question does not come within the ordinary use of the phrase. "Unwholesome trades, operations offensive to the senses, the deposits of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law in the midst of dense masses of population." 2 Kent, Comm. 340; cited by MILLER, J., in the *Slaughter-House Cases*, 16 Wall. 62. This is called the "police power." If the legislation in question can properly be referred to that power, it will be because the right to pass inspection laws may be deemed to have its foundation in the police power of a state. Certainly if it be anything but what the act itself seems to contemplate, —a tax on an occupation or a privilege tax,—it is because it is used to secure an inspection of commercial fertilizers before they can be sold in North Carolina. Such a tax would be constitutional, only within

the limits of the constitution. It cannot be sustained when evidently in excess of what is required for such purpose, and when the proceeds are applied to other uses.

We think that in this case the court might judicially take notice of the evident fact that $500 on a brand of commercial fertilizers is a much larger sum than can be necessary for its inspection. But the court is relieved from all embarrassment in this respect by the fact that the act declares, by necessary implication, that the tax is not needed for inspection expenses. In section 22, $500 of the money received from the tax on fertilizers is appropriated to the North Carolina Industrial Association, and, in section 23, $41,000 is given to pay the expenses of the department of agriculture, including $20,000 for the completion of the oyster survey, and "all other revenues arising from the tax on fertilizers" are "appropriated to the establishment of an agricultural and mechanical college." The motion to dissolve the injunction is denied.

BOND, J., concurs.

BROWN *v.* MURRAY NELSON & CO. *et al.*

(Circuit Court, S. D. Iowa, W. D. October 20, 1890.)

1. REMOVAL OF CAUSES—APPLICATION—REMAND.
Where a proper bond and petition have been filed in the state court, the omission to ask that court to act on the petition is no ground for remanding the cause, especially where no term of the state court intervenes between the filing of the petition and the motion to remand, and the judge of that court has refused to consider the petition until the court is in session.

2. SAME—CITIZENSHIP—NOMINAL PARTIES.
Where the controversy is between the complainant and the removing defendant, who are citizens of different states, the fact that there are other defendants, citizens of complainant's state, does not prevent the case from being removable, where the interest of one of such co-defendants is identical with that of complainant, and the other co-defendants are merely nominal parties.

In Equity. On motion to remand.
Willard & Willard and *L. L. Delano*, for complainant.
Berryhill & Henry and *R. G. Phelps*, for defendants.

SHIRAS, J. From the record in this cause it appears that in November, 1889, Murray Nelson & Co., a corporation created under the laws of the state of Illinois, entered into a written contract with C. E. Myers & Co., citizens of the state of Iowa, doing business at Atlantic, Iowa, in regard to the purchasing, cribbing, shelling, and forwarding a large quantity of corn, the said Murray Nelson & Co. agreeing to advance the money needed to make the purchase of said corn, the quantity to be purchased not to exceed 100,000 bushels; that on the 12th day of May, 1890, said C. E. Myers & Co., in writing, assigned the said contract and all rights thereunder to Theodore H. Brown, a citizen of Iowa; that dis-

putes arose between said Murray Nelson & Co. and said Brown as to their rights under said contract; that the present bill in equity was brought by said Brown in the district court of Audubon county, Iowa, to settle the rights of the parties, and for an accounting, it being averred that said Murray Nelson & Co. and their agent W. L. May were about to remove from Iowa the balance of the corn not previously shipped to Chicago; that the issuance of an injunction pending suit was prayed for, and also the appointment of a receiver; that a preliminary writ of injunction was granted by one of the judges of the state court, and the application for the appointment of a receiver was set down for hearing after notice to the defendants, such hearing to be had at the court-house in Atlantic, August 25, 1890, with leave to both parties to submit evidence orally or by affidavits; that on the 23d day of August, 1890, there was filed in the office of the clerk of the district court of Audubon county in said cause a petition for the removal of said case to the United States court, with a bond in proper form; that on the 25th day of August, 1890, the petition for removal was submitted to the judge of said Audubon county court, at the time and place set down by him for hearing the application for the appointment of a receiver; that said judge held that he, as judge of said court, had no authority to receive or act upon said petition for removal, and ordered that said petition and bond be returned for presentation to the district court of Audubon county, Iowa; that thereupon said Murray Nelson & Co. procured a certified transcript of all papers and pleadings filed in said cause, and filed them in this court on the 22d day of September, 1890; that the term of court in Audubon county to which the notice served therein was returnable begins on the 14th day of October; that the amount involved in the controversy exceeds $2,000; and that on the 29th day of September, 1890, the complainant, Theodore H. Brown, filed in this court a motion to remand the case to the state court.

The first ground urged in support of the motion to remand is that the petition for removal has not been presented to the state court for its action thereon, which it is claimed is a prerequisite to the attaching of the jurisdiction of this court. Counsel cite the case of *Stone* v. *South Carolina*, 117 U. S. 430, 6 Sup. Ct. Rep. 799, as an authority for this position. That cause came before the supreme court on a writ of error to the supreme court of South Carolina, and presented the question whether the petition for removal filed in the state court showed upon its face that the right of removal existed. The supreme court of the United States held that—

"A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. *Yulee* v. *Vose*, 99 U. S. 539, 545; *Removal Cases*, 100 U. S. 457, 474. It is undoubtedly true, as was said in *Steam-Ship Co.* v. *Tugman*, 106 U. S. 118, 122, 1 Sup. Ct. Rep. 58, that upon the filing of the petition and bond, the suit being removable under the statute, the jurisdiction of the state court absolutely ceases, and that of the circuit court of the United States immediately attaches; but still, as the right of removal is statutory, before a party can avail himself of it, he must show

upon the record that his is a case which comes within the provision of the statute."

This opinion, read in connection with the authorities cited therein, declares the rule to be that, if the petition for removal, taken in connection with the record of which it becomes part, shows upon its face that the cause is one removable under the provisions of the statutes of the United States, then the filing of the petition and bond terminates the jurisdiction of the state court, and causes that of the United States court to attach to the cause. The state court has the right to decide for itself whether the record shows that its jurisdiction has been terminated, and the United States court, in like manner, has the right to decide for itself, when a transcript of the record is filed, whether the record shows that its jurisdiction has attached. Both courts in this matter proceed at their peril, but the rule given us by the supreme court of the United States is that if, upon the filing of a petition for removal and the requisite bond, the record of the case shows that it is a removable cause, then, upon the filing of the petition and bond, the jurisdiction of the state court ceases, and that of the United States court attaches to the case. It is not the presentation of the petition and bond to the court in open session that terminates the jurisdiction, but the filing the same, so that the same become part of the record of the particular suit. As a matter of correct practice, not, however, as affecting the jurisdiction, it is due to the state court that the party seeking the removal should in due season present the petition for removal to the state court, and invoke its consideration thereof, for it might be that the court might proceed in the cause without actual knowledge of the fact that its jurisdiction had been attacked. Under the provisions of the act of congress, it is made the duty of the party seeking the removal of a case to file the transcript at the next ensuing term of the circuit court. In this case the term of the United States court began at Council Bluffs on September 22d, which was before the opening of the term of the district court in Audubon county; and hence the party seeking the removal was required to file the transcript in this court by that day, which was done. It also appears that, upon the day set for the hearing of the application for the appointment of a receiver, the fact of the filing of the petition for removal and the accompanying bond was brought to the attention of the judge, who declined to consider it until the court was in session in Audubon county. Counsel certainly did in this respect all that could be required of them. When the term of this court opened, September 22d, the transcript was filed in this court, as required by the statute; and thereupon complainant, through his counsel, appeared in this court, and on the 29th of September moved to remand the case to the state court. When the motion to remand was filed, the session of court in Audubon county had not commenced, and no laches in any particular could be imputed to the party seeking the removal of the cause. If, therefore, the record shows upon its face that the cause is a removable one, then the motion to remand is not well taken.

As already stated, the complainant was when the suit was brought, and

the removal was petitioned for, a citizen of Iowa, and Murray Nelson & Co. was a corporation created under the laws of Illinois. C. E. Myers & Co. are named as defendants, but their interest is identical with that of complainant, the controversy in the case being between C. E. Myers & Co. and Theodore H. Brown, on the one hand, and Murray Nelson & Co., on the other, between whom the requisite diversity of citizenship is shown to exist. W. L. May is declared against merely as the agent of the corporation. No relief is asked against him, and it clearly appears that he is purely a nominal party; and the same is true of the remaining defendants, Bell, Dimmick, and Nutter. Their names appear in the caption of the bill, but they are not otherwise named or mentioned, and hence there is nothing appearing on the face of the record showing that they have any interest in the controversy. Being merely nominal parties, their presence does not affect the jurisdiction over the actual controversy involved. *Wood* v. *Davis*, 18 How. 467; *Bacon* v. *Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3. In the bill filed, it is averred, not only that Murray Nelson & Co. is an Illinois corporation, but also that it is a non-resident of Iowa, so that it appears upon the face of the record that the petitioning corporation is not only an Illinois corporation, but that it is also a non-resident of Iowa. The motion to remand is overruled.

UNITED STATES *v.* SIOUX CITY & ST. P. R. CO. *et al.*

(Circuit Court, N. D. Iowa, W. D. October Term, 1890.)

1. PUBLIC LANDS—RAILROAD AID GRANT.
   Act Cong. May 12, 1864, granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City to the Minnesota state line, and from a point on such road to South McGregor, every alternate section of land for 10 miles from such roads not otherwise disposed of, with indemnity for such disposed-of land. The former road was built, except a part where all the granted land had been previously sold. *Held*, that said road was only entitled to such part of the grant as was proportioned to the part of the road that was built.
2. SAME.
   Said road having been decreed to be entitled to only a moiety of the land included in the grant to both roads, it is entitled to indemnity for the moiety thus lost.

In Equity. Bill for adjustment of land grant.

W. H. H. Miller, Atty. Gen., *E. C. Hughes*, and *W. L. Joy*, for complainant.

J. H. & C. M. Swan, for defendants.

SHIRAS, J. The congress of the United States, by the act approved May 12, 1864, granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the state of Minnesota, to such point on said line as the state of Iowa might select, between the Big Sioux and the west fork of the Des Moines river, and also a line of railroad from South McGregor, in said state, running

westerly on or near the forty-third parallel of north latitude, to a point of intersection with the first-mentioned line in the county of O'Brien, every alternate section of land designated by odd numbers for 10 sections in width on each side of said roads, not sold, pre-empted, or otherwise disposed of by the United States, it being further provided that, for every section or part thereof sold or disposed of by the United States, within the 10-section limit, the secretary of the interior should select in lieu thereof, from the public lands of the United States nearest to the tiers of sections first described, and within 20 miles of the located line of railroad, and included in the alternate odd-numbered sections or parts thereof, such quantity as should be equal to the lands sold, reserved, or otherwise appropriated by the United States within the 10-section limit. The state of Iowa, by an act of its general assembly, accepted the grant thus made, and designated the Sioux City & St. Paul Railroad Company as the beneficiary of the grant, so far as the same provided for the building of a road from Sioux City to the Minnesota state line. That company accepted the grant, and on the 27th day of September, 1866, commenced the location of its line from Sioux City, completing the survey thereof to the Minnesota line by October 4, 1866; and on the 2d day of April, 1867, it caused to be filed in the office of the secretary of state of the state of Iowa a duly certified map of such location, and on the 10th day of July, 1867, this map, with the certificates of the governor and secretary of state of Iowa, was filed in the office of the secretary of the interior at Washington. On the 26th day of August, 1867, the commissioner of the general land-office of the United States transmitted to the local land-office at Sioux City a map showing the location of said line of railway, together with the 10 and 20 mile limits marked thereon, with an official letter withdrawing the lands numbered by odd sections from entry or sale, and increasing the price of the even-numbered sections to $2.50 per acre. In the year 1869 the railroad company made and filed in the land-office at Sioux City selections of all the lands undisposed of in the odd-numbered sections within the 10 and 20 mile limits, which selections amounted to 407,870 21-100 acres. In the year 1872 the company commenced the construction of the line of railway, beginning at the Minnesota state line, and progressing southwardly until the line reached the town of Le Mars, in Plymouth county. In the months of July and August, 1872, and November, 1873, the governor of Iowa filed with the secretary of the interior certificates showing the construction of 5 sections of 10 miles each of said railroad, and on the 16th day of October, 1872, and the 25th day of January, 1875, the secretary of the interior caused patents to issue to the state of Iowa for all the lands selected within the place and indemnity limits of said grant, covering 407,870 21-100 acres. The governor of Iowa, on behalf of the state, executed deeds to the railway company for 322,412 81-100 acres of these lands. In 1879, a suit in equity was brought in the United States circuit court for the district of Iowa, on behalf of the Chicago, Milwaukee & St. Paul Railway Company, as the successor of the McGregor & Western Railroad Company, which had become entitled to the lands granted for the build-

ing of the line from McGregor to the point of intersection with the Sioux City line, against the Sioux City & St. Paul Company, for the purpose of settling the rights of the respective companies to the lands embraced within the overlapping limits of the two grants, when the lines of railway approached each other. The supreme court of the United States held that the grant must be construed to be, within the overlapping limits, a grant in common, and that each company was entitled to one-half the lands; that the lands within the 10-mile limit of each road were to be equally divided, as well as the indemnity lands outside the 10 but within the 20 mile limits of both roads; but that neither company, in placing indemnity lands, could invade the 10-mile limit of the other company. *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 6 Sup. Ct. Rep, 790. Based upon this ruling, a decree in partition was entered in the case, which had the effect of conveying to the Chicago, Milwaukee & St. Paul Company 41,687 52-100 acres of the land which had been previously deeded by the state of Iowa to the Sioux City & St. Paul Company. Deducting these, there remains of the lands deeded to the defendant company 280,725 29-100 acres, which it has sold or disposed of, and the title to which is not questioned. Of the 407,870 21–100 acres of selected lands conveyed to the state of Iowa in trust under the provisions of said grant, there remain undisposed of 800 acres in Dickinson county, and 21,179 85-100 acres in O'Brien county, which the state of Iowa refuses to convey to the railway company, claiming that the same has not been earned by the defendant company. The time limited in the act of congress of May 12, 1864, within which the state of Iowa was to cause the building of the lines of railway named in the act, has long since passed by, and no further rights to the lands under that grant can be hereafter acquired by any action on part of the state or the railroad company. The bill in the present cause was filed under the provisions of the act of congress of March 3, 1887, providing for the adjustment of land grants in aid of the construction of railways, and the forfeiture of unearned lands; and the issues presented require a construction of the grant in question in order to determine the lands to which the defendant company has become entitled. Counsel for the respective parties have very fully and ably discussed the questions involved, and have submitted to the court well-digested briefs of the points and the authorities relied upon. I shall not attempt to touch upon all the points and authorities thus presented, but shall confine myself to a statement of the conclusions reached upon the few general points which, as I conceive it, must control the rights of the parties.

In construing grants of the nature of the one now in question, the object sought to be accomplished must be ever borne in mind, for this is what the subsidiary provisions of the law are intended to accomplish. As is said by the supreme court in *Railroad Co.* v. *Barney*, 113 U. S. 618, 5 Sup. Ct. Rep. 606, these land grants "are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used, if the grants were by instruments of private conveyance. To ascertain that intent, we must

look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." Can there be any doubt of the purpose which congress had in view when it passed the act making the grant in question? Was not such purpose to secure the construction of a line of railway from Sioux City to the Minnesota state line? This is the purpose declared upon the face of the act, as well as the one which all the other circumstances clearly indicate. To accomplish this purpose, congress was willing to grant all the public lands, not otherwise disposed of, found within the alternate sections designated by odd numbers within 10 miles of the located line of railway, with the right to select, within a limit of 20 miles from the odd-numbered sections, such quantity, if the same could be found not otherwise disposed of, as should equal the number of acres falling within the 10-mile limit excepted from the grant by reason of having been sold or otherwise disposed of by the United States. There is no guaranty by the United States that the quantity of land covered by the grant should equal any fixed number of acres, either for the construction of the entire road or any portion thereof. The extent of the grant and the limitations thereto are fixed by the terms of the act, but there is no attempt to state the number of acres that the grant would in fact cover, and the exceptions named in the act clearly show that it was expected that the company undertaking the construction of the line of proposed railway must be content with whatever quantity of land it was ultimately found was covered by the grant, and in fact conveyed by it. This quantity of lands, whatever the number of acres, the United States granted for the purpose of securing the building of a line of railway from Sioux City to the Minnesota state line, and the defendant company, when it accepted the grant, undertook to build that line, and not a part of it. To entitle the company to the entire quantity of lands covered by the grant, whether more or less, it was required to build the line of road named. Part performance on its part would not entitle it to demand entire performance on the part of the United States. The company, having failed to build the entire line, could not, equitably, demand payment for more than the number of miles actually constructed, and this much the United States is willing to concede the company may demand. The fact that, in the third paragraph of the act of congress, it is provided that, upon the completion of each section of 10 miles, the secretary of the interior should issue to the state of Iowa patents for 100 sections of land for the benefit of the company, cannot, when read in connection with the other sections of the act, be construed to mean that, by the building of 10 miles, the company absolutely earned the 100 sections. The work contracted to be done was an entirety, to-wit, the line from Sioux City to the southern boundary of Minnesota, and the compensation to be paid by the United States was the total number of acres of land covered by the grant, and the provisions of paragraph 3 only fix the time for partial payments to be made, and are not intended to change the clear meaning of the granting clause of the act. It must therefore be held that the company is entitled to such portion of the

lands actually covered by the grant as the number of miles of road actually constructed bears to the total length of the located line from Sioux City to the southern boundary of Minnesota. On behalf of the United States it is claimed that the company is limited in its selections for each 10-mile section of completed road to the lands found within the 10 and 20 section limits of each completed section. Whatever might be the limitation, when selecting the lands as each 10 miles was completed, I do not think any such restriction is applicable upon a final settlement of the rights of the parties. As I construe the grant, congress agreed to give, in consideration of the building the entire line of road, a quantity of land equal to the amount of the alternate sections within a limit of 10 sections on each side of the located line throughout its entire length, provided such quantity could be found within the 20-mile limit. The grant is not, so many acres for each mile, or each section of 10 miles, but so much for the entire line. If the contention of the United States in this particular is correct, it would follow that, if the company had built the line from Sioux City to Le Mars only, it could get nothing, as, in effect, there were no lands coterminous to that part of the line on which the grant could act. If the building of the line from Sioux City to Le Mars would not have earned any of the grant, for the reason stated, then the building thereof from Le Mars to the Minnesota line would earn all that the grant covers; and this is what is claimed by the company, and is resisted by the United States, when applied to the actual state of the case, which is, that the company, finding that the grant would not cover lands over the entire length of proposed road, built the road southwardly from the Minnesota line, going no further than the town of Le Mars. The conclusion reached on this point is that the right of selection extends over the entire length of the proposed road, and is not limited to the tiers of sections coterminous to the line of railway actually built.

This view practically disposes of the next point at issue between the parties, which is, whether the defendant company can make claim to indemnity for the moiety of lands which passed to the Chicago, Milwaukee & St. Paul Railway Company under the decision of the supreme court in the case already cited from 117 U. S. 406, 6 Sup. Ct. Rep. 790. On behalf of the United States it is argued that, as the two grants were made in one act, it must have been the intent to limit each company to a moiety thereof, and that by mere construction the grant should not be extended beyond the fair import of its language. The terms of the grant, however, are explicit, and embrace every alternate section along the entire length of the road within the 10-section limit, with the proviso that if, upon the definite location of the line, it was found that the United States had sold or permitted pre-emption or homestead rights to attach to any of these alternate sections, or that the same had been reserved by the United States for any purpose whatever, then indemnity lands should be selected in lieu thereof, within the 20-mile limit. Upon the location of defendant's line, it was found that a moiety of the alternate sections had been reserved by the United States for the purpose of aiding in the

construction of another line of railway, and, hence, to replace these lands, the defendant company could resort to the lands within the limits of the grant lying outside of those passing to the Chicago, Milwaukee & St. Paul Railway Company. If the grant to the McGregor line had been made by another act of congress, it could not be claimed that it did not reserve lands within the meaning of the exception found in the present act so as to entitle the defendant company to claim indemnity therefor, and the mere fact that the two grants are found in one act of congress, instead of in two, does not change the result in this particular. I hold, therefore, that the grant is not limited to one-half of the alternate sections found within the overlapping limits of the two grants, and that the defendant company is entitled to make claim for the proper portion of the lands that were reserved for the McGregor road, and which passed to the Chicago, Milwaukee & St. Paul Railway Company. As already stated, in the year 1867, the commissioner of the general land-office transmitted to the local land-office at Sioux City an official map showing the located line of the railway, and the 10 and 20 mile limits therefrom. In 1887, a succeeding commissioner of the general land-office prepared another map, which, to some extent, changes these limits, and the question is mooted which should be followed in adjusting the rights of the parties. It may be true, as claimed, that the later map is the more accurately drawn, but it not being claimed that the original map is in any way affected by fraud or serious mistake, I think it should govern in ascertaining the rights of the parties. It was made at the time it became necessary to define the limits in question. It presents or represents the view of the land department at that time, and must be held to have governed and controlled the local land-office and all third parties since its execution. It is impossible to now know how many titles and rights are based thereon, and it is always unwise to discredit, without good reason, documents which have been accepted and acted upon by the community at large. As an original proposition, under the express terms of the act, in selecting indemnity lands within the 20-mile limit, it was the duty of the secretary of the interior to make the selections from the tiers of sections nearest to the place limits; but if by any means other selections were in fact made and patented to the state, and by the state to the defendant company, that fact cannot be availed of by the defendant as a defense to the present bill for a proper and equitable adjustment of the rights of the parties. The defendant has no right to any of these lands, except as they may have been earned under the terms of the grant, and it cannot be heard to say that any of them were wrongly selected, so long as it claims them under the grant. The act of congress of March 3, 1887, on which this suit is based, makes it the duty of the department and of the courts, in dealing with this matter of the readjustment of these land grants, to carefully protect the rights and equities of actual settlers. Hence, the rule should be followed that in making such adjustment, so far as it may be possible to do so, actual settlers shall not be deprived of their farms or homes, even if, to do so, it may require the apportionment to the company of a section or other

quantity of land within the indemnity limits, which would not fall within the nearest tiers of sections. I have thus indicated the conclusions I have reached upon the general propositions discussed by counsel, but have not attempted to deal with the question of details. If, in the application of these rules to the special facts, counsel cannot agree as to the results, such differences must be hereafter presented; but I trust the foregoing opinion is sufficiently explicit to enable counsel to frame a proper decree thereunder.

KELLNER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. New Jersey. September 23, 1890.)

1. PLEADING—FAILURE TO REPLY—EFFECT.
   Where a complainant makes no reply to the pleas filed by defendant, but sets them down for argument, the truth of all the facts stated in them and well pleaded is admitted, and no objection can be made to their form or regularity.
2. SAME—PLEA—SUFFICIENCY.
   A bill to ascertain the surrender value of a policy of insurance upon the life of complainant alleged that the principles and methods of the apportionment made by defendant of its surplus funds failed to award to complainant's policy the amount equitably due to it. *Held*, that a plea alleging that complainant agreed to ratify any plans adopted by the company for the equitable distribution of its surplus and profits was not an answer, for, if the methods adopted resulted in an inequitable division, as alleged, it was not the method complainant agreed to ratify.
3. LIFE INSURANCE—CONDITIONS OF POLICY—PAYMENT OF PREMIUMS.
   Where a life insurance policy is conditioned that, if the premiums be not paid when due, the consideration of the contract shall be deemed to have failed, and the company shall be released from all liability, a failure to perform the condition operates as a formal release to the company of all its liability under the policy, and precludes the policy-holder from any relief in equity by a bill for accounting.
4. SAME—RESCISSION.
   A claim that the non-payment of the premiums was simply a rescission by the policy-holder of the contract, induced by the discovery of alleged frauds on the part of the company, cannot be sustained, where it appears that he has had the benefit of an insurance upon his life for 10 years at a rate of premium fixed upon the hypothesis that the premiums would be paid for a much longer period.

In Equity. Bill to ascertain value of life insurance policy.

B. A. Vail, for complainant.

J. B. Vrelenburgh and *Robt. Sewell*, for defendant.

GREEN, J. The bill of complaint in this cause has for its prime object the ascertainment of the value of a policy of insurance taken by the complainant upon his own life in the year 1878, and surrendered, as the bill alleges, to the defendant corporation in 1888. The bill states the making of the contract of insurance by the complainant and the defendant, whereby, in consideration of the payment of $96.95 to the defendant corporation, and of the further payment, to be made at the office of the company, of the same sum on the 7th day of January and July in each year during the continuance of the contract, the defendant agreed that it would pay to the complainant on the 7th day of January, 1903,

the sum of $5,000, and, in the event of the complainant's death before that date, it would pay the said sum to his legal representatives. The bill further alleges that the complainant was entirely ignorant of the business of life insurance and the manner in which it was conducted, and that, although he saw the annual reports which were issued by the defendant after the execution of the said contract, he did not understand them, but, having confidence in the integrity of the officers and managers of the company, he accepted the reports and statements as true. That in 1887, however, he caused all the annual statements made by the company to be examined by persons skilled in the business of life insurance, and expert in the examination and analysis of the accounts appertaining thereto, and that, from the reports made to him by these skilled accountants, he charges, upon information and belief, that all the said annual reports so made by the defendant were untrue, fictitious, and made with the intention to deceive and mislead him. The bill then specifies with some particularity the alleged untruthfulness of the reports which had been examined by the experts, as, for instance, in paragraph 16 *et seq.* it is stated that the—

"Sworn reports of the defendant corporation showed that it had received in premiums from its insured members, from 1859 to 1888, inclusive, upwards of $323,000,000, and upwards of $100,000,000 of interest upon invested assets. That from the 1st day of January, 1879, to the 1st day of January, 1889, the amount of said premium receipts, as reported by said defendant corporation, exceeded the sum of $68,000,000 and $54,000,000 of interest income."

That in respect to these items, the complainant—

"Charges the truth to be that the said sums of money so reported as premium receipts for the several years during the term from 1866 to 1888, inclusive, are falsely reported; the sums so reported as premium receipts during those years covering and embracing large sums of money which were received in the year prior to that of which the report was made, and being already in the hands of the said defendant corporation either as invested assets or as deposit in banks."

The complainant further charges the truth to be, in this respect—

"That the sums so falsely reported as premium receipts exceeded the sum of $143,000,000. That this sum, so falsely reported as premium income, was made up and consisted of dividends, declared and surrendered values, reported as premium receipts, when in fact and in truth a large part thereof had been appropriated to the payment of surrendered values and dividends to policyholders."

Various other allegations of the untruthfulness of the annual reports are made, chiefly consisting in charging or crediting one account with large sums of money which rightfully and properly should have been charged or credited to other accounts, and the bill then states—

"That the purpose and intention of the said defendant corporation, in thus fictitiously and falsely disposing of its premium income and amount of new business issued and amount of business canceled, was to make a false and deceptive showing of its business for the purpose of deceiving the complainant and other members of said corporation and the insuring public, and concealing the true state and condition of its affairs."

And, further—

"To create false and fictitious ratios of expense to actual premium income, such as would show to the complainant and the insuring public that its affairs were economically administered, when in truth and fact the expenses of the defendant corporation were of far greater proportion to its actual premium income than they should have been."

The bill then alleges that, upon being informed of the manner in which the defendant was conducting its business, the complainant discovered that the result was to defraud him and the other members out of the equitable share of the surplus and profits due to them under the provisions of the charter of the company. That thereupon the complainant demanded an accounting should be made upon his policy of insurance, and he be paid by the defendant the equitable cash surrender value thereof, which the defendant refused to do at that time, but in August, 1888, did offer the complainant $850 as the full value of his policy. That this sum the complainant refused, insisting that such value exceeded $3,000, and thereupon he filed his bill of complaint.

The prayer of the bill is for an account to be taken of all the business and transactions of the company from the 1st day of January, 1878, to and including the 21st day of December, 1888, and that the defendant be decreed to pay to the complainant the full, fair, and equitable surrender value of his policy, and for other relief. To this bill of complaint the defendant has, by leave of the court, interposed four special pleas, and, in pursuance of the requirements of the thirty-second rule in equity, has fortified the pleas with an answer denying explicitly the fraud specially charged in the bill; that the complainant was induced to enter into the contract of insurance by false and fictitious statements made by the defendant; and also denying that the complainant ever surrendered his contract or policy, or that the defendant ever accepted such surrender, or that it ever offered to pay the sum of $850, or any other sum, as the full and equitable value of the complainant's policy, or for any other object or purpose whatever. The pleas, stripped of their legal and formal verbiage, are practically as follows:

"(1) That in making application for the policy, the complainant, in writing, agreed that the contract about to be entered into between himself and the defendant was to be in all respects construed and interpreted under and by virtue of, and in accordance with, the law of New York, the place of the contract being expressly agreed to be the principal office of the company in the city of New York; that by the policy the conditions of the application became a part of the contract, and could not be waived except by formal release; that they were in fact never waived; that the contracts of the defendant company made with other policy-holders, in all respects similar to the one made with the complainant, have been construed by the highest court in the state of New York, and by that court it has been held that no relationship of trustee and *cestui que trust* exists between the parties by virtue of the contract; that the policy-holder has a full, complete, and adequate remedy at law for any breach of the contract made with him, and cannot claim relief in equity by a bill for an accounting. (2) That the contract in question was broken by the complainant, and, by its terms, forfeited by his repeated defaults in payment of premium due before the commencement of this suit, and thereby the de-

fendant was released from all liability under it. (3) That there is no provision in charter or in the contract of insurance to pay to a policy-holder any money upon the surrender of the policy, but such payment is forbidden. (4) The complainant has agreed to ratify and accept any plan adopted by the company for the equitable distribution of its surplus and profits."

The bill and pleas were set down for hearing under the thirty-third rule in equity. As the complainant has made no reply to the pleas, but set them down for argument, the truth of all facts stated in them and well pleaded is admitted. *Farley* v. *Kittson*, 120 U. S. 303, 7 Sup. Ct. Rep. 534. Nor can the complainant take any exception to the regularity or form of the pleas. If he desired to dispute either, he should have filed exceptions. Fost. Fed. Pr. § 203. *Suydam* v. *Johnson*, 16 N. J. Eq. 112.

The only question now to be considered relates solely to the sufficiency of the pleas, in point of law, as a bar to the complainant's action. If they or either present a valid defense, the bill of complaint must be dismissed. The last plea stated above is intended as an answer to the charge of the bill that the profits and surplus moneys of the company have been falsely, unfairly, and inequitably apportioned or divided by the company, to the loss of the complainant. It alleges, in substance, that the complainant agreed, in advance of such apportionment or distribution, to accept and ratify the principles and methods adopted by the company in such distribution, and in its determination of the amount equitably due or belonging to his policy. But the complainant charges that the principles and methods of the division or apportionment made by the company of its surplus funds fails in that very particular of awarding to his policy the amount equitably due to it. It is evident upon the mere statement of the charge that the plea is not an answer. Admitting that the complainant did in advance ratify the plan thereafter to be adopted by the company in distributing its surplus among policy-holders, which would give to his policy its equitable share, it is quite clear that he assented to nothing more. The plan which he ratified, if there could be, under these circumstances, such a precedent ratification of a method thereafter to be originated, was such as would give him his equitable share. The method of distribution and the share of surplus were inseparably connected, as cause and result. If the method resulted in an inequitable division, then it follows that the method adopted was not the method which the complainant agreed to ratify. The charge in the bill of complaint is that such was the result of the principles and methods adopted. Hence it is no answer to say that the complainant ratified some other principle or method of distribution. This plea is overruled.

The plea of the defendant, by it secondly pleaded, raises a very serious question. In effect, it avers that the complainant has no right of action against the defendant, because he voluntarily failed or refused to pay to the defendant the semi-annual premiums due, according to the terms of the contract of insurance, on the 8th day of January and 7th day of July, 1889, before the commencement of his suit; that this de-

fault worked not only a forfeiture of the contract of insurance, but as well defeated and made void all obligations of the defendant arising under that contract; and that the contract thereby became, by its very terms and the force of its conditions, null and absolutely void, and thereafter had no existence in fact. These facts are well pleaded, and are to be taken as true. It is difficult to see how the complainant, under these circumstances, has any standing in court. The business of life insurance is *sui generis*. It differs widely from fire insurance, and is controlled by principles essentially variant from those which limit the latter. Briefly stated, it may be said to rest upon the operation of two distinct, yet closely connected, factors, — the average expectation of life and the cumulative power of interest compounded. In other words, the two somewhat uncertain elements which life insurance seeks to reduce to the precision and certainty of a mathematical proposition are the average length of life accorded to a thoroughly well man, on the one hand, and the earning capacity, for a certain definite term of years, of a certain sum of money to be paid certainly on a fixed date during that life, on the other. It is by the skillful use of these two factors that life insurance corporations are enabled to fix and determine, as the very foundation of their business, the sum of money or premium which must be paid by the insured to them, as a just consideration for their contract of insurance; to enable them, in fact, to fulfill, honestly and promptly, their part of the contract. It is perfectly clear, therefore, that promptness of payment of such yearly premium, when fixed at the times designated for such payment, is necessary and absolutely essential to the honest conduct of life insurance. If there be uncertainty as to such payment of premium, all calculations based upon its prompt and certain receipt must be seriously disturbed, if not radically destroyed, resulting, finally and surely, in the disastrous collapse of the entire business scheme. And it is because of this that the courts, both United States and state, have, almost without exception, held that in a contract of life insurance the condition of payment of premium on a certain fixed date is of its very essence; and if the contract provides, as a penalty for the breach of such condition, that it shall thereupon become null and void, and all payments theretofore made shall be forfeited to the company, equity will not afford any relief. This principle is stated very strongly by Mr. Justice BRADLEY, in delivering the opinion of the court in *Insurance Co.* v. *Statham*, 93 U. S. 24. He says:

"It must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each

is interested in the engagements of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business. * * * Delinquency cannot be tolerated or redeemed except at the option of the company. * * * When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. * * * The case, therefore, is one in which time is material, and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the forfeiture. Courts cannot, with safety, vary the stipulation of the parties by introducing equities for the relief of the assured against their own negligence."

The same principle was asserted in *Klein* v. *Insurance Co.*, 104 U. S. 88. In this case it was held by the court that a condition in a policy of life insurance that if the stipulated premium shall not be paid on or before a certain day the policy shall cease and determine is of the very essence of the contract, and that a court of equity could not afford any relief against a forfeiture caused by a failure to pay the premium at the time fixed. Mr. Justice WOODS, in delivering the opinion of the court, says:

"A life insurance policy usually stipulates—*First*, for the payment of premiums; *second*, for their payment on a day certain; and, *third*, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit. Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons. * * * If the assured can neglect payment at maturity, and yet suffer no loss or forfeiture, premiums will not be punctually paid. To hold a company to its promise to pay the insurance notwithstanding the default of the assured in making punctual payment of the premiums is to destroy the very substance of the contract. This a court of equity cannot do."

The issue raised by the plea which is now being considered seems to bring this case directly within the rulings of the cases cited. The contract into which the complainant entered with the defendant, after providing for the payment of a certain fixed sum or premium upon a certain day named, contains this condition:

"If any premium, or installment of a premium, on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from all liability."

It is an admitted fact that, previous to the commencement of this suit for an accounting upon his policy, the complainant had voluntarily made default in the payment of premiums, which were due, respectively, on the 7th day of January and the 7th day of July, 1889. Clearly the complainant has failed to perform the condition by which his contract was to be kept alive and in force. That failure compassed the death of his policy of insurance, and as well operated as a formal release to the company of all liability that then existed or could arise under it. By his own act he destroyed the contract which he now seeks partly to enforce. How can a non-existent contract, if there can be such a thing,

have any value, pecuniary or otherwise? Or, if this contract can be said to have value, how can it be in any sense an obligation of the defendant, to whom the complainant has given a full release from all liability arising under or out of it? The only answer which is made on behalf of the complainant to the defendant in this behalf is that the complainant's failure to pay the premium when due was a simple rescission by him of the contract, induced by the discovery of the alleged frauds, set out in the bill of complaint, which rescission did not affect any right theretofore accrued to him under the policy. That fraud in the inception of a contract will justify and authorize a rescission is well settled. But it is equally well settled that a contract cannot be rescinded unless the parties thereto can be restored to the same condition in which they were when the contract was made. It is apparent from the nature of the contract into which these parties entered that this cannot be done. For a period of 10 years, or thereabouts, the life of the complainant has been insured for a large sum of money by the defendant. Such obligation of assurance has been a burden upon, and borne by, the defendant, for which it has received no adequate, or, at least, no fairly adjusted, compensation. The rate of annual payments by the complainant to the defendant was fixed and determined upon the hypothesis that the premiums would be paid, without interruption or failure, for a much longer term than 10 years. For an insurance secured by a contract which is to terminate in 10 years a much larger annual premium would be required and demanded than for one which is to terminate in 25 years, which was the life of the contract in question. Hence it is apparent that for a period of 10 years the complainant has had the benefit of an insurance upon his life at a rate of premium much lower than the risk fairly and honestly required, and which rate has been made too low by his own act of alleged rescission. In other words, if he has worked a rescission of the contract, in the legal acceptation of that term, instead, thereby, of restoring the defendant to the condition in which it was at the time the contract was entered into, he has compelled it to assume the burden of a contract from which before it was entirely free, for which it has received no adequate consideration, and which, by his act, has, in a most important particular, been rendered wholly variant from the contract into which the complainant and the defendant actually did enter.

The default of the complainant cannot operate as a legal rescission of the contract upon his part. Its legal effect was to cause a willful breach of a condition, thereby working a forfeiture of the contract by its very terms, and releasing the defendant from all liability under it. The plea, therefore, raises a complete bar to the action of the complainant, and upon it the defendant must have judgment. This conclusion renders it unnecessary to consider the questions raised by the other pleas.

UNITED STATES *v.* BUDD *et al.*

(*Circuit Court, W. D. Washington.* August 20, 1890.)

1. PUBLIC LANDS—CANCELLATION OF PATENT.
When the government of the United States applies for equitable relief, it must, like an individual suitor, do equity on its part. In a suit to cancel a patent for land on the ground of error in issuing it, when the patentee is not guilty of fraud, it is essential for the government to return the purchase money to the patentee.

2. SAME—SALE OF TIMBER-LAND.
Within the meaning of the act of June 3, 1878, providing for the sale of timber-lands in California and other Pacific coast states, lands which had been offered at public sale, but not sold by the United States, and which were thereafter withdrawn from sale because situated within the limits of the land grant to the Northern Pacific Railroad Company, belong to the class of unoffered lands, and may be lawfully sold as timber-lands under said act.

3. SAME.
The hilly, stony land, covered with fir and cedar forest trees, common in the western part of this state, are chiefly valuable for timber, and unfit for cultivation, within the meaning of said act, although the soil is not barren, and may be made to yield good crops after removal of the timber and stumps. The true interpretation of the act does not require the substitution of the word "solely" for the word "chiefly," nor do the words "unfit for cultivation" mean "not capable of being made fit for cultivation."

4. SAME—IMPROVEMENTS.
The word "improvements," as used in said act, means valuable improvements. An abandoned and dilapidated cabin and remnant of an abandoned fence, which are of no use, are not such improvements.

5. SAME—FRAUD.
The fact of a patentee of the United States having conveyed the land within one month after entering it in the land-office, and prior to the issuance of his patent to a vendee, who at about the time of said transaction also purchased other lands from a number of persons, who within a recent period entered the lands so conveyed by them, respectively, under the laws of the United States, is not a circumstance from which an inference, much less a conclusion, can be fairly drawn that there was an agreement between said patentee and his vendee, made prior to the entry, whereby the title to be acquired should inure to the latter; and, there being no evidence tending to connect said patentee with any conspiracy, no inference unfavorable to him can be drawn from evidence tending to prove that his vendee had received conveyances of other lands from other persons, made pursuant to agreements antedating entry of the lands.

6. SAME—RIGHTS OF PATENTEE.
A purchaser from the United States, under the act above referred to, is not required to retain the land. After perfecting his right to it in good faith, the *jus disponendi* immediately becomes vested in him, and, in a suit to cancel a patent on the ground of fraud, without evidence of fraud on the part of the patentee other than above indicated, the prayer of the bill will be denied.

(*Syllabus by the Court.*)

In Equity.

P. H. Winston, U. S. Atty., and *P. C. Sullivan*, Asst. U. S. Atty.

B. F. Dennison and *Raleigh Stott*, for defendants.

HANFORD, J. The defendant David E. Budd acquired title by a patent from the United States to a tract of land described as the S. E. ¼ of section 12, township 9 N., range 1 W., Willamette meridian, situated in Cowlitz county, in this state, and by direction of the attorney general this suit to cancel said patent was commenced in the district court of the second judicial district of Washington Territory, holding terms at Vancouver, in which court the issues were made up, a trial was had, and a decree for the defendant was rendered. The cause was then removed

by an appeal to the supreme court of the territory of Washington, and was pending in the last-mentioned court and undetermined at the time of the admission of the state of Washington into the Union, whereby it was transferred to this court. The testimony introduced upon the trial in the territorial district court was stenographically reported, and, together with all the exhibits and documentary evidence, has been duly certified, and is now on file in this court. It is assumed by the court, because conceded by all the parties, that the case is now properly before the court for trial *de novo* upon the testimony and proofs appearing in the record, precisely the same as it would have been in the supreme court of the territory if the existence of that court had continued long enough for a hearing to have been had and a decision of the case to have been rendered therein. The patent which the government is here asking the court to cancel was issued under the provisions of the act of June 3, 1878, providing for the sale of timber-lands in California, Nevada, Oregon, and Washington Territory. Supp. Rev. St. 328. The first three sections of this act contain the provisions which are of importance in this case. They are as follows:

"Section 1. That surveyed public lands of the United States within the states of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any person, or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber-lands: provided, that nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said states under any law of the United States donating lands for internal improvements, education, or other purposes: and provided, further, that none of the rights conferred by the act approved July 26, 1866, entitled (1) 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' shall be abrogated by this act. And all patents shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act. Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the general land-office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited, contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever,

by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself,—which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district wherein the land is situated. And if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void. Sec. 3. That, upon the filing of said statements, as provided in the second section of this act, the register of the land-office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time. And after the expiration of the said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, *First*, that said notice of the application, prepared by the register as aforesaid, was duly published in a newspaper, as herein required; *secondly*, that the land is of the character contemplated in this act, unoccupied, and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal. And, upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section (2) of the act approved May 10, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the general land-office of the papers and testimony in the case, a patent shall issue thereon: provided, that any person having a valid claim to any portion of the land may object in writing to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined, by the officers of the land-office, subject to appeal as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the commissioner of the general land-office."

An examination of this statute shows that it was framed with great care, and that congress intended by its own provisions, and the regulations which it authorizes the secretary of the interior to make, to insure such publicity of all proceedings, and such delays and opportunities for investigation and deliberation, as to render frauds and evasions of its provisions certain of exposure before the acquisition of title to any tract of land could be finally completed under it by the issuance of a patent. It was after the affidavit required by the second section of the act had been made and filed by the defendant Budd, and after he had given the notice, furnished the proofs, made the payments, and suffered the delays required by the act, that the officers of the government issued to him this patent as evidence of a complete and perfect title. This court has the right, and it is its duty, to undo what has been done by the executive branch of the government by decreeing a cancellation of this solemn instrument, subscribed, as it is, by the name of the president, if sufficient grounds for doing so are shown to exist; but only for good and sufficient reasons, distinctly alleged and clearly proven.

The alleged grounds for canceling this patent are as follows:

(1) The land had been, at a time prior to the date of the statute, offered for sale; therefore the patent was issued unlawfully, as this statute only authorizes the sale of land which had not been, prior to its passage, offered for sale. (2) The land is not of the description to which this act applies, because not chiefly valuable for timber or stone, and unfit for cultivation, but is valuable for agricultural purposes; and the defendant Budd, in making his proof in the land-office, procured the giving of false testimony as to the character of the land in this respect. (3) The land was not subject to sale under this statute, because at the time of Budd's application to enter it there were valuable improvements upon it, not made by him, and he was guilty of procuring false testimony in this particular. (4) The defendant Budd, before he applied to purchase the land, had made an agreement with his co-defendant, Montgomery, to transfer to the latter the title which he should obtain, and he did not apply to purchase the land for his own use; and the affidavit which he made to the effect that he had not made any agreement or contract whereby the title which he should obtain should inure, directly or indirectly, to any person or persons other than himself was in these particulars false and forsworn.

It is a conceded fact that the township containing the particular quarter section of land now in dispute was surveyed by the government in 1863, and all of said township not claimed by actual settlers and filed upon was thereafter offered at public sale, under the land laws of the United States, and remained as offered land, subject to private entry at the minimum price of $1.25 per acre, until the 13th day of August, 1870, at which time it was withdrawn from sale in consequence of being situated within the limits of the grant to the Northern Pacific Railroad Company. It is also a conceded fact that a small portion of this particular quarter section, to-wit, about 15 or 20 acres, is prairie, and all the balance of it is forest, being covered with fir, cedar, and hemlock timber, and an undergrowth of vine, maple, sallal bushes, and all the various shrubs and plants usually found in the forests of the western part of this state; and it is further conceded that, at a time prior to the application to purchase this land by the defendant Budd, it had been settled upon by a man named Doherty, who constructed a small cabin for his habitation, and made some attempt to cultivate the small prairie above referred to. And the record shows that it is conceded that Budd's application to enter this land was made on the 23d day of August, 1882, and he made his proofs and paid for the land, and a receiver's receipt was issued to him, on the 10th day of November, 1882; and that on the 8th day of December, 1882, he executed and delivered a deed of the land to the defendant Montgomery, and the patent conveying the title to Budd was issued on the 5th day of May, 1883.

I have now stated the premises from which the necessary conclusions of fact and law are to be reached which shall determine the rights of the parties here involved, and will now proceed to consider severally, and in the order above set forth, the several grounds upon which the court is asked to do equity, and, as a matter of justice, to cancel this patent. In considering the merits of the first of the several grounds for canceling the patent, it is important to keep in mind that this is not like a proceeding to rescind a contract. The government has not offered to return

the money it received for the land; and, while it seeks to be restored to its original title and possession, it does not pray to have the parties on both sides placed in the position which they occupied before its officers and agents granted Budd's application to enter the land under this statute, and accepted his money. The case is prosecuted to secure an absolute forfeiture of all the defendants' interests in the land, as well as the money paid for it, and proceeded under the theory that whatever is illegal and wrong in the transaction is chargeable solely to the defendants. Now, if all that is claimed by the government as constituting the first ground for canceling the patent, both as matter of fact and of law, were conceded, the court would be unable to find any such fraud intended, or misconduct on the part of the defendants, as would afford either legal or equitable cause for the confiscation of their property. At most it is only claimed that this particular land, by reason of having been once offered at public sale, is excluded from sale under the act of June 3, 1878. If this is so, the sale of it to Budd under that statute was an error, but only an error, and one for which the officers and agents of the government are chiefly responsible; for upon them is cast the duty of administering the law according to its provisions, and of holding all persons seeking to obtain title to lands from the government to a compliance with the laws and regulations prescribed for the determination of their rights. When the government of the United States seeks relief from a court of equity, it is as much bounden as any individual suitor by the rules of equity. It can obtain such relief only when entitled to it upon principles of equity and good conscience. *U. S.* v. *White*, 17 Fed. Rep. 561; *U. S.* v. *Tin Co.*, 23 Fed. Rep. 279, and the same case 125 U. S. 273, 8 Sup. Ct. Rep. 850. It cannot, to correct a mere error in a transaction not tainted with crime or fraud, perpetrate so grave a wrong on its part as to deprive its adversary of valuable property or a sum of money without any compensation or equivalent therefor. If this were a suit between two private individuals, the plaintiff would not be equitably entitled to a rescission of his contract and restoration of his title to the land without first on his part repaying the purchase money which he had received; and by the same rules of equity and justice the right of the government to recover this land, and also to hold the purchase money paid for it, must be denied, unless a forfeiture of the defendant's rights on the ground of fraud or willful misconduct can be shown.

In addition to the above considerations, I hold that there was in fact no such error committed in allowing Budd's application under this statute as counsel for the government have claimed. I think a reasonable construction of the statute would limit the application of the words, "and which have not been offered at public sale according to law," to lands which at the date of the act belonged to the class of unoffered lands, as contradistinguished from what, in the practice of the land department, is known as "offered" lands; that is, lands which are subject to private cash entry at the minimum price. By the insertion of this clause in the statute no more was intended than to avoid the absurdity of making a law providing for the sale of land at the price of $2.50 per acre, under

prescribed limitations and restrictions, which, under existing laws, were already subject to sale at one-half that price, without the limitations and restrictions. So viewing the statute, as this particular tract of land had been withdrawn from sale at a time prior to the date of the statute, its *status* was at the date of that act that of unoffered lands; and if otherwise of the character described in section 1 was subject to sale under this statute, and the sale of it to Budd was lawful.

Most of the testimony introduced on the part of the government was directed to support the second proposition,—that is, as to the character of the land, whether it is in fact unfit for cultivation, and chiefly valuable for timber; and the efforts of counsel in the argument were mainly directed towards this branch of the case. In the argument it has been contended that a proper interpretation of the statute would exclude from entry and sale, under its provisions, all lands capable of being improved or redeemed from their natural unfitness for cultivation, and rendered capable of yielding crops of vegetation, grain, and fruit, and which have any element of value other than timber or stone; in other words, the court is asked to judicially determine that congress, by the use of the words "valuable chiefly for timber, but unfit for cultivation," in the first section of the act, and the words "unfit for cultivation, and valuable chiefly for its timber or stone," in the second section, failed to express the meaning intended, and that the reading of the act to express its true intent and meaning requires the rejection of those words, and the substitution in their place of such words as the following: "Unfit and incapable of being made fit for cultivation, and of no value except for timber or stone." In support of this contention, the opinion of Mr. Secretary Teller, in the case of *Spithill* v. *Gowen*, 2 Dec. Dep. Int. 631, has been cited, in which he says:

"This act contemplates such timber-lands as are found in broken, rugged, or mountainous regions, where the soil, when the timber is cleared off, is unfit for cultivation, and not lands, though heavily timbered, where the soil is susceptible to cultivation."

The act in terms makes no reference to broken, rugged, or mountainous regions, and does not allude to the condition of the soil, after the removal of the timber; and I am not aware of any rule or reason requiring the court to so construe the statute as to enlarge the limitation which it imposes, or narrow its application so as to exclude all lands in the states and territory named, except the inaccessible portions in the broken and mountainous regions. For the production of valuable timber, strength and fertility of the soil, and conditions favorable for the growth of vegetation, are necessary, and there are no timber-lands in this state which will not, after the removal of the timber, yield crops of vegetation, grains, and fruit, and there are no broken, rugged, or mountainous regions unfit for cultivation where valuable timber can be found; and to give the statute the construction contended for makes it a self-contradiction, and impracticable, and thereby nullifies it. It is plain, also, upon the face of the statute that congress intended that it should be understood according to the ordinary meaning of the words and phrases used.

The introductory words in the first section are "that surveyed public lands of the United States * * * may be sold. * * *" This language of the statute itself carries a direct contradiction of the assertion made in the opinion of Mr. Secretary Teller, above cited, that the act contemplates such timber-lands as are found in broken, rugged, or mountainous regions. The act was made to go into immediate effect upon its passage, and by its terms it embraces and authorizes the sale of surveyed lands, which are not to be found in broken, rugged, or mountainous regions; for it is a matter of history in this country that settlements and improvements usually precede the surveys, and it is a matter of continual complaint that the government fails to extend its surveys as rapidly as the agricultural, lumbering, and mining industrial enterprises of the country demand, and it is a matter of common knowledge that the remote and more inaccessible regions, where the land is unfit for cultivation, have not been surveyed, and no provision for the survey thereof appears to have been contemplated. To fairly interpret this statute, the general descriptive features of the country to which it applies must be taken into account. In each of the states named there is a diversity of climate, timber, soils, and natural formations. This is especially true of Washington, which may be taken as representative of all, for the purpose of a more minute and particular description. Within this state are mountains, plains, hills, valleys, rivers, lakes, seas, forests, prairies, and mines of coal, iron, and almost every kind of minerals. It is divided by the Cascade range of mountains, running north and south across its entire breadth. East of the mountains the country is generally timberless, and the land is good, and easily brought under cultivation. However, it is not all of this description. There are in this part of the state small areas of timber of good quality, and the land is of inferior quality for agricultural purposes, though not barren. These timbered tracts answer the description in the statute of lands, unfit for cultivation, and chiefly valuable for timber, and they are within the limits of the public surveys, made and being made as rapidly as appropriations can be obtained for the purpose. All of the state west of the mountains is a timbered region, though there are a few small prairies. The river bottoms and valley lands, having a rich alluvial soil, is considered good farming land, although in its natural state it is covered by a dense growth of alder, ash, cottonwood, and maple timber, which is useful and valuable for fuel and many other purposes. The stumps and roots of this timber soon decay after the trees are cut down, and in two or three years' time they can be easily and cheaply removed and the land then yields bountiful crops of vegetables, grass, hops, grain, and fruits. Fortunes have been made out of the produce of comparatively small farms of this quality of land by men who, without capital, took the land in the rough, and by their own hands improved and cultivated it. This class of land, although valuable for timber, is not chiefly so, and is not unfit for cultivation, because it can be profitably cleared, improved, and cultivated. The most valuable timber, however, grows upon hilly and stony land. Fir and cedar stumps and roots will re-

main many years without decaying, and cannot be got rid of without much labor or great expense; and the soil of such timber-lands is not so rich, and will not yield so abundantly, as that which I have previously described, yet will, when cultivated, produce the same kind of crops. After removal of the valuable timber, and while the stumps remain, it is readily convertible into pastures, but is unfit for cultivation, because it cannot be at once made tillable without an expense greater than its value for agricultural purposes. Such land is chiefly valuable for its timber, and vast areas of it are to be found within the limits of the surveys. It is the character of land contemplated by this statute, and is as much subject to sale under its provision, if situated in near proximity to navigable water, or a farming community, or a city, or a railroad, as if it were in some remote, broken, rugged, and mountainous region. To a person acquainted with this country, this class of land is as readily distinguished from the alder bottom and valley lands, which are considered valuable for cultivation, as a forest is distinguished from a prairie.

The evidence before me leaves no uncertainty or doubt as to which class the tract conveyed by the patent to Budd belongs. On the part of the government, eight witnesses have testified, proving that the land can be cultivated after the removal of the timber and stumps; that it is similar to other lands in the immediate vicinity, occupied by settlers, who each cultivate small tracts thereof; that in their opinion the land is valuable for agricultural purposes; and that the land is covered with a crust of leaf mould, which is an excellent fertilizer. And to confirm this testimony samples of the soil and specimens of the grain and grass grown by the settlers have been introduced. These witnesses show by their evidence that the tract, except about 15 acres, is timbered, and show nothing as to the value of the timber, except that there has not been any market or demand for it. This evidence is insufficient to warrant the cancellation of a patent. But the defendants have not been content to accept a Scotch verdict. They have met the issue with evidence of the most conclusive character. Thirteen witnesses were called, who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall, and straight and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre,—and this testimony and estimate is not controverted. The field-notes made by the government surveyor at the time of surveying the land, more than 25 years ago, describe the land as being stony and second rate, and the timber as fir, cedar, and hemlock, and the most convincing testimony of all is a series of 12 photographs, taken near the centers of each legal subdivision of the tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees, standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no man would be willing to subjugate this piece of forest for the mere sake of cultivating it.

But few words are needed to dispose of the third proposition. The evidence shows that there were no valuable improvements on the land at the time Mr. Budd purchased it. Mr. Doherty, who at one time settled upon and attempted to improve the land, soon became discouraged and abandoned it; his cabin became dilapidated and worthless, and all his other improvements, except the remnants of a fence, disappeared long prior to Mr. Budd's entry.

The fourth reason alleged for conceling this patent also vanishes upon an examination of the evidence, for there is nothing to support the charge made in the bill, and explicitly denied in the answer, that prior to his application to purchase this land Budd entered into an agreement with Montgomery to acquire the title for him. If such an agreement was made, the evidence certainly fails to show how, when, or where it was done. There is no direct evidence of such an agreement, and the circumstances shown lead only to a suspicion, not to a reasonable inference, much less to a conclusion. These circumstances, briefly narrated, are as follows: (1) Mr. Budd gave a deed of the land to Montgomery within one month from the time of making final proof in the land-office and receiving the receiver's receipt. (2) About the time of this transaction Montgomery purchased a large number of other tracts of land in the vicinity of this one, from persons who entered it as timber-land, and he was known to be in the market as a buyer of timber-lands in that locality. (3) A man named White spent a considerable time previous to these purchases made by Montgomery in exploring the lands, and represented himself at the time as being in Montgomery's employ, and he acted as a witness for nearly all of the parties who made entries of timber-lands, and afterwards sold them to Montgomery, and he was also a witness for the defendant Budd in making his final proof as to this tract. These are the only circumstances shown by legal evidence within my opinion tending to prove the grave charge made against the defendant Budd of having falsely sworn, in his application to purchase this land, that he did not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself, when in fact he had previously contracted with Montgomery for a consideration to acquire the title for Montgomery's benefit, and that the deed executed subsequent to the final step in perfecting his right to the land was in fact given pursuant to an agreement made anterior to the initiation of said proceedings.

Other testimony was introduced upon the trial, which was objected to as incompetent and irrelevant, to the effect that Montgomery had at some time prior to Budd's entry of the land visited that part of the country, and while there had advised one settler in the neighborhood to take a timber claim, assuring him that the claim would be readily salable, and that he could make a bonus of at least $100 by the transaction; and that Mr. White, above referred to, had promised another man a bonus of

$100, if he would secure a timber claim, and sell it to Montgomery, and that this party acted upon the suggestion, and did enter 160 acres of timber-land, and, after making his final proof, deeded it to Montgomery, and received therefor $100 from Montgomery, by a check, which was afterwards cashed at the bank, which sum so paid was in addition to the amount necessary to pay for the land in the land-office, the land-office fees, and all expenses of acquiring the title, which Montgomery also paid. This evidence is immaterial, but I do not wish to rest my decision upon any mere rule of evidence or practice. I prefer to receive the evidence, and consider it for what it is worth, which is necessarily very little in this case. It was offered by the government upon the theory that it connected Montgomery with other transactions which were in fact fraudulent and against the government, and similar in kind to what is charged against him in this case; and it is assumed that he may be found guilty of the specific offense here charged upon evidence not proving, or tending to prove, the particular fact alleged, but going to prove the commission of other offenses of a similar kind. But, even if all this be true, this evidence proves nothing, and does not in any degree tend towards proving anything material as against the defendant Budd. There is no evidence connecting him with any conspiracy, so I do not see how it is possible to draw from the circumstances shown by this testimony any inference that Mr. Budd was guilty of any such fraudulent conduct as that of Mr. Searle, the self-impeached witness, who testified that he took a timber claim for Montgomery at White's suggestion for a bonus of $100.

Now, the material question involved is not whether Montgomery was contriving to acquire title to a large tract of land by evasion of the law, but it is whether the entryman—that is, the defendant Budd—was guilty of evading the law, or of perpetrating a fraud upon the United States, and whether he swore falsely in the affidavit which he filed upon applying to enter this land; for, if he acted in good faith up to the time of the issuance of the receiver's receipt, his right to the land then became perfect, and from that time the *jus disponendi* was in him, and, as against him, it cannot be contended that evidence of the misconduct of other persons, not shown to have to have been acting in concert with him, is sufficient to justify any inference whatever. This statute does not, by its terms, assume to obligate a person who acquires a title to land under it to keep the land, or to control his use or right to dispose of it for any period of time after he shall have complied with its provisions in perfecting his right to it. It only requires good faith on the part of the purchaser, and it is intended to prevent the acquisition of land from the United States at a wholesale rate by individuals or corporations, by using individual persons, who do not acquire it of their personal volition, but simply as mediums for the transmission of titles from the government to land-grabbers; and to effect this object the law goes no further than to prohibit entries by persons who have, prior to the filing of their applications, bound themselves by contracts.

Upon a careful examination of all the testimony, and in the light of

all the facts shown by the record, I conclude that there is an entire absence of testimony of the commission of any fraud or evasion of the laws of the United States, or of any such wrong on the part of the defendants as to justify the court in granting the relief prayed for in this bill. Let there be a decree in favor of the defendants.

WALSH *v.* WOLF *et al.*

(*Circuit Court, D. Minnesota.* October 25, 1890.)

PLEADING—COMPLAINT—DESCRIPTION OF PLACE.

In an action for personal injuries received by a child while playing with a detonating cap used to explode dynamite, an allegation in the complaint that defendant deposited the caps on the premises of plaintiff's father, at a designated number and street, sufficiently describes the place, without stating specifically on what part of the premises the caps were deposited.

At Law. Motion for new trial.

Erwin & Wellington, for plaintiff.

Davis, Kellogg & Severance, for defendant.

NELSON, J. I find nothing in this case that would justify me in granting the motion for a new trial. Defendants' negligence was found by the jury to be the proximate cause of the injury complained of. The defendants could not have been misled by the allegation in the complaint. It was not necessary to aver any more specifically the place on the premises of plaintiff's father where the fulminating caps were placed. Witnesses were introduced by defendants, and a map to show that the water-pipes were not piled up or located on the alleged premises. There was conflict of evidence, and the jury found against the defendants upon the weight of plaintiff's testimony. The case was fairly tried, and the law correctly given. The tenth request was properly modified. The newly-discovered evidence is cumulative, and not sufficient to warrant a new trial. It is true, as counsel states, that new trials are granted in the discretion of the court, but such discretion must be a legal one; and, when no satisfactory legal reason can be urged in favor of the motion for a new trial, it must be overruled. Such is my duty on this application.

Motion denied.

KOHN *et al.* v. MELCHER.

(Circuit Court, S. D. Iowa, W. D. October 7, 1890.)

1. CONTRACTS—VALIDITY—PUBLIC POLICY—INTOXICATING LIQUOR.
Where liquor is sold to a pharmacist for the express purpose of enabling him to retail it as a beverage, in violation of law, the price of such liquor cannot be recovered by suit, even though the sale itself was not illegal.
2. INTOXICATING LIQUOR—CONSTRUCTION OF STATUTE.
Code Iowa, § 1550, which provides that payments made for intoxicating liquor sold in violation of the prohibitory law shall be deemed to have been made upon a promise of repayment, does not apply to payments made by a registered pharmacist for liquor intended to be sold by him contrary to law, and which he purchases in the original packages from a resident of another state.

At Law. Action on notes and counter-claim.

Wright, Baldwin & Haldane, for plaintiffs.

Lehmann & Park, Rockafellow & Scott, and *Willard & Fletcher*, for defendant.

SHIRAS, J. In this cause the parties waived a jury, and submitted the case to the court. The evidence shows the following facts:

(1) The firm of Kohn & Adler, plaintiffs herein, are now, and for years past have been, engaged in the business of selling spirituous liquors at wholesale; the headquarters thereof being established at Rock Island, Ill., of which state the plaintiffs are now, and have been for years, citizens.

(2) The defendant, during the period of time involved in this case, has been a resident of Atlantic, Cass county, Iowa, engaged in the drug business, holding a permit from the county authorities to sell spirituous liquors for medicinal, culinary, and sacramental purposes.

(3) That the defendant, under cover of his permit to sell for legal purposes, has been engaged in the business of selling intoxicating liquors as a beverage, in quantities to suit purchasers, or, in other words, has been practically running a saloon in connection with his business as a druggist; the liquors sold being drunk on defendant's premises, or carried away, at the option of the purchasers.

(4) Since June 25, 1884, plaintiffs have sold and delivered to defendants spirituous liquors to the amount of $3,840.80, upon which defendant has paid the sum of $2,959.70, leaving a balance due on December 1, 1885, of $887.10, which is partly evidenced by three promissory notes,—two bearing date September 15, 1885, for $124.25 each, and the third bearing date September 20, 1885, for $124.20,—executed by defendant, and payable to order of plaintiffs.

(5) The liquors thus sold were contracted for and delivered as follows: Every few weeks Edward Kohn, one of the plaintiffs, would visit defendant's place of business at Atlantic, Iowa, and defendant would then and there contract with him for the purchase of such liquors as he then needed. The liquors so purchased would from time to time be forwarded from Rock Island, Ill., to Atlantic, Iowa, by rail, being delivered to the railway company at Rock Island, Ill.

(6) The payments made upon the account were usually made at Atlantic, Iowa, to Edward Kohn in person, although in some instances the sums paid were remitted by letter to plaintiff at Rock Island, Ill.

(7) Edward Kohn, and, through him, his said firm, plaintiffs herein, knew that defendant was engaged in selling the liquors furnished him in the manner already stated.

(8) The defendant, in making the monthly reports to the county auditor of

the sales, and profit thereon derived from the sales, of spirituous liquors, under the requirements of the state statute, falsely stated the amounts thereof, and the profit derived therefrom, and intentionally concealed the fact that he was engaged in selling spirituous liquors as a beverage, and not solely for the four legal purposes contemplated by the provisions of the statute of Iowa.

(9) In order to aid the defendant in concealing the fact that he was, in violation of the laws of Iowa, running an establishment wherein intoxicating liquors could be purchased and used as a beverage, it was agreed between the plaintiffs, represented by Edward Kohn, and the defendant, at Atlantic, Iowa, that two invoices of the liquors sold to defendant by plaintiffs should be made and furnished by the latter, one of which should show the actual price agreed to be paid for the liquors, and the other a higher fictitious price; the latter invoice to be shown in case a question should arise between the county authorities and the defendant as to the amount of profit realized by defendant in selling under his permit as a druggist. It was likewise agreed that a portion of the liquors sold should be shipped to Atlantic, to a fictitious consignee, so as to aid in concealing the amount of liquors actually received by defendant. It was likewise agreed that a portion of the liquors should be inclosed in boxes and barrels, in such a manner as to conceal the nature of the contents thereof; the marks placed thereon indicating that the contents were hardware, crockery, or goods other than liquors. In pursuance of the agreements thus made, the plaintiffs did, from time to time, furnish to defendant the false invoices agreed upon, and did ship a portion of the goods sold to defendant under a fictitious name, as consigneee, and did pack portions of the liquors and so mark them as to conceal the real nature of their contents.

(10) The liquors sold to defendant by plaintiffs, when received at defendant's place of business at Atlantic, Iowa, were not sold by him in the original packages, but the packages were opened, and the contents retailed in small quantities, which facts were known to the plaintiffs.

(11) Plaintiffs brought this suit to the March term, 1886, of this court, to recover the amount due upon the three promissory notes hereinbefore described, and a balance of an open account; the total sum claimed to be due being $887.10, with interest.

(12) The defendant, by answer, pleads the illegality of the sales under the prohibitory liquor law of the state of Iowa, and by a counter-claim seeks to recover judgment in the sum of $6,396.09 against plaintiffs for moneys alleged to have been paid to plaintiffs for liquors sold by plaintiffs in violation of the statute of Iowa, and under the circumstances recited in the foregoing findings of fact; the illegal agreements set forth in the ninth finding being expressly declared upon in said counter-claim.

In support of the right of recovery on part of plaintiffs, it is argued that the case of *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, establishes the right of plaintiffs to make the sales of liquors to the defendant; that in making such sales they were acting under the protection of the commercial clause of the constitution of the United States; and that the prohibitory liquor law of Iowa cannot be invoked to defeat their right of recovery. If the facts of the case presented no other question than that of a citizen of Illinois importing liquors into Iowa, and selling the same in the original packages, then the doctrine announced in *Leisy* v. *Hardin* would apply.

There is, however, another question which fairly arises on the undisputed facts of the case. For years past, it has been the established policy of the state of Iowa to forbid the sale of intoxicating liquors for

use as a beverage. Provision has been made for the sale of such liquors for certain named uses, and to cover that end the statute provides for licensing parties to make sales of liquors for lawful purposes. It has also been the settled policy of the state for years past to regulate the business of pharmacists, so far as the same includes the compounding and selling of medicines, poisons, and intoxicating liquors. In 1882 the legislature passed an act providing for the examination of parties desiring to carry on such business, for the issuing of certificates to those found competent, defining the duties of such pharmacists, and expressly forbidding such registered pharmacists from selling intoxicating liquors as a beverage. To authorize pharmacists to sell liquors for mechanical and other legal purposes, they are required to procure a license for that purpose, under the provisions of the statute regulating the sale of liquors. As a means looking to the prevention of the abuse of the license to sell liquors for legal purposes, the statute requires the party holding the license to make stated reports to the county auditor of the quantity of liquors sold by him, and the price thereof; and the statute regulating pharmacists makes it a penal offense for one engaged in such business to sell liquors for use as a beverage. It appears from the evidence in this case that the defendant, who was a registered pharmacist, constantly and intentionally violated the provisions of the statute in question, and, under the guise of carrying on the business of a registered pharmacist, he engaged in the business of running a saloon, selling intoxicating liquors by the drink or other quantity to suit purchasers. The plaintiffs well knew the provisions of the laws of Iowa above referred to, well knew that the defendant was violating the same, well knew that the liquors sold to defendant were to be used by defendant in the violation of the laws of the state, well knew that defendant, to carry on said business, was compelled to perjure himself in making oath to the monthly statements furnished the auditor, and with this knowledge the plaintiffs in Iowa contracted, from time to time, to sell the liquors in question to defendant, and agreed to aid him in such wrong-doing by furnishing double invoices, one of which, by falsely stating the price of the liquors, would sustain the perjured statements made by defendant to the auditor; and further agreed to ship part of the liquors to a fictitious consignee, and to so pack other portions of the liquors as to conceal their real nature,—all of which agreements were carried out by plaintiffs. By aiding the defendant in thus violating the laws of Iowa, the sales made by plaintiffs would be increased; because the larger the business of defendant in this particular, the greater need of purchasing from plaintiffs. To recover the balance due from defendant, and resulting from transactions of the nature indicated, the plaintiffs now ask the aid of the court.

It is refused. One who has actively participated in a transaction which involves a violation of the statutes of the state, or the commission of acts contrary to well-recognized public policy or to the criminal laws of the state, or which are injurious to the public morals, cannot successfully invoke the aid of the judicial tribunals to enable him to secure the results of his wrong-doing.

In *Hanauer* v. *Doane*, 12 Wall. 342, it was held that an action would not lie for the price of goods sold with knowledge that they were in fact purchased for the Confederate states government, and in the opinion is cited approvingly the language of Chief Justice EYRE in *Lightfoot* v. *Tenant*, 1 Bos. & P. 551, that "no man ought to furnish another with the means of trangressing the law, knowing that he intended to make that use of them;" and, in summing up the conclusions reached upon a consideration of the authorities, it is said:

"The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

In *Trist* v. *Child*, 21 Wall. 441, a contract for the performance of lobby services in aid of a bill providing for payment of a claim against the government was held void, it being said that—

"In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord MANSFIELD said: 'Many contracts which are not against morality are still void as being against the maxims of sound policy.' It is a rule of the common law, of universal application, that where a contract, express or implied, is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."

In *Meguire* v. *Corwine*, 101 U. S. 108, it is said:

"Frauds of the class to which the one disclosed belongs are an unmixed evil. Whether forbidden by a statute, or condemned by public policy, the result is the same. No legal right can spring from such a source."

In *Teal* v. *Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420, it was held that a contract between the mortgagor and mortgagee in Oregon, to the effect that upon default in payment the possession of the premises should be surrendered to the mortgagee, was contrary to the settled statutory policy of that state, which secured to the mortgagor the possession of the property until after foreclosure and sale; and, "although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

In *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, it is said:

"The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and, 'as there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal,' (*Bank* v. *Owens*, 2 Pet. 527,) it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced."

The statute of Iowa expressly forbids a registered pharmacist from selling intoxicating liquors as a beverage, and makes a violation of the statutory prohibition an offense punishable by a fine. The plaintiffs and defendant combined together to evade this statute, resorting to fraud and perjury to accomplish that purpose, and the selling the liquors, furnishing false invoices, forwarding the same to a fictitious consignee, and

in concealed packages, were all parts of the illegal transaction of which plaintiffs are now seeking to recover the fruits. The entire transaction between the parties, in all its steps, is tainted with fraud and perjury, and was intended to aid defendant in violating the settled policy and statute of the state, in forbidding the sale of intoxicating liquors as a beverage, and the maintenance of a saloon under the guise of a registered pharmacy; and no right of action can be based upon such a transaction.

Upon the matters declared upon in plaintiffs' petition, for the reasons stated, no recovery can be had, and the like result follows as to the counter-claim filed by defendant. Section 1550 of the Code of Iowa provides, in substance, that all payments made for intoxicating liquors sold in violation of the prohibitory law are deemed to be without consideration, and to have been made and received as upon a promise to repay the same on demand. If the sale made by plaintiffs had been held void by reason of the express provisions of the prohibitory statute, then it might well be that payments made therefor could be recovered back. Section 1550 of the Code refers only to the provisions of chapter 6, tit. 11, thereof, known as the "Prohibitory Liquor Law," and does not include the statute regulating pharmacists.

If the defense to plaintiffs' action was based solely on the fact that they had imported into Iowa, and sold to defendant in original packages, intoxicating liquors, then, under the doctrine announced in *Leisy* v. *Hardin*, the court would have been compelled to hold that to importations of that character the statute of Iowa was not applicable; and, as in such event the plaintiffs would have had the right to sell the liquors, money paid therefor could not be recovered back.

The ground, however, upon which the plaintiffs' right of action for the liquors sold is defeated is that the plaintiffs sold the liquors to the defendant as a registered pharmacist, well knowing that the statute of Iowa regulating pharmacists forbade such pharmacist from selling intoxicating liquors as a beverage; and, in order to aid defendant in evading the statute, they forwarded the liquors in concealed packages, to a fictitious consignee, and furnished false invoices as a protection to defendant in making the false statement sworn to by him, thus actively aiding defendant in the commission of perjury, as well as in other violations of law.

The claim of plaintiffs is defeated, therefore, upon the ground of public policy, and not upon the provisions of the statute as such. This same principle defeats the right of recovery upon the counter-claim interposed by defendant. In pleading the counter-claim, the defendant recites the frauds, perjuries, and violations of law and good morals in which he and plaintiffs participated, and thus shows that, according to the ordinary rule, he has forfeited all right to invoke judicial aid to recover back the sums paid by him in furtherance of the illegal business he was engaged in. Section 1550 of the Code, as already said, enacts that money paid for intoxicating liquors sold in violation of chapter 6, tit. 11, of the Code, may be recovered back; but it does not enact that money paid in the course of a transaction violating the provisions of the

pharmacy statute, or involving the commission of repeated perjuries, can be recovered back by one of the wrong-doers. If the right to recover back the sums paid by defendant was based solely upon the provisions of section 1550 of the Code of Iowa, it would be questionable whether this court would be justified in entertaining the counter-claim. This section is a part of the chapter of the Code dealing with the subject of sales of intoxicating liquors, and in the enactment of the chapter the legislature was exercising the police power of the state. While the section authorizes the recovery back of money paid for intoxicating liquors sold contrary to the provisions of the statute, and thus enables the vendee to maintain an action therefor, civil in form, yet it is entirely clear that the section was not enacted for the protection of the vendee. He is in all cases a participant in the violation of the statute, and no ground exists for legislating for his benefit in the particular named. The right to recover back moneys paid for intoxicating liquors illegally sold was evidently conferred upon the vendee as a means of deterring parties from selling liquors contrary to the statute, and as a punishment in case the sales were in fact made. It is one of the provisions of the statute, adopted for the purpose of preventing violations of the statute, or, in other words, it is an aid to the enforcement of one of the police statutes of the state, and the question is whether, under the decision of the supreme court in *Wisconsin* v. *Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. Rep. 1370, this court ought to undertake the enforcement thereof. In the view taken of the facts, it is not necessary to decide this question, as, irrespective thereof, good ground exists for holding that defendant cannot recover upon his counter-claim.

The conclusion reached is that plaintiffs cannot maintain their action for the reasons stated, and judgment thereon must be in favor of defendant at cost of plaintiffs, and that the defendant cannot maintain his counter-claim, and judgment thereon must be in favor of plaintiffs, at cost of defendant.

SOUTHERLAND *v.* NORTHERN PAC. R. Co.

(Circuit Court, D. Minnesota. October 13, 1890.)

MASTER AND SERVANT—NEGLIGENCE.

In an action against a railroad company for personal injuries, the evidence showed that plaintiff was employed by defendant to make up trains in its yard; that, while coupling cars in the yard at night, his foot caught in a pile of ashes left on the track, causing him to fall and be run over; and that it was the duty of the section foreman to keep the track clear. There was evidence that ashes were not usually dumped in the yard. *Held*, that the evidence justified a verdict for plaintiff.

At Law. On motion for new trial.

McDonald & Barnard, for plaintiff.

John C. Bullitt, Jr., for defendant.

NELSON, J. This suit is brought to recover damages for injuries received by the plaintiff while working for the defendant as a switchman on a track called the "house track," in the yard at Missoula, Mont. He had charge of the yard crew on the night when injured in making up trains and taking out empty cars. In coupling cars, he caught his foot in a pile of ashes on the track between the rails, which threw him down, and the trucks of one of the cars ran over him. The pile of ashes was about four feet long, and six or seven inches high, between the rails, and showed the appearance of having been pushed down by the brake-beams or sand-boards of cars running over it. The duty of the section foreman was to keep this track clear, and remove ashes if dropped upon it. It was submitted to the jury to determine from the evidence whether the heap of ashes was of an immense size so as to form an obstruction and interfere with the plaintiff in the discharge of his duty. The evidence was conflicting about the custom of dumping ashes in the yard, but there was evidence tending to show that, at the time plaintiff worked in this yard, and previous thereto, ashes were usually dumped at or near a coal-shed, and not in the yard. The gist of the action is that the defendant was negligent in permitting its road-bed, which the plaintiff was compelled to go upon in the discharge of his duty, to become obstructed, and thus increasing, unnecessarily, the danger incident to his employment. It is urged by defendant that the injury was occasioned either by the plaintiff's own negligence or by the negligence of a fellow-servant in the same common employment, viz., the negligence of the fireman in dumping ashes on the track, or the negligence of some person whose duty it was to keep the track clear of obstruction. It cannot be assumed from the evidence that the situation which caused the plaintiff to catch his foot was apparent and obvious, and the question of plaintiff's knowledge of the condition of the track at the place of injury by the exercise of ordinary care was properly submitted to the jury. The court would not have been justified in holding that the defendant was not liable for the negligence of the person upon whom the duty was imposed of clearing the tracks in the yard, if such negligence caused the injury; nor could this court properly say to the jury that the custom of dumping ashes on the track was known to the plaintiff, and, if it was an unsafe and careless custom, it was a risk assumed by him. The case of *Filbert* v. *Canal Co.*, 23 N. E. Rep. 1104, (N. Y. Ct App.,) relied upon by defendant's counsel, was decided on the authority of many New York cases, which the learned judge who wrote the opinion states "are ample authority for the opinion reached." I agree with the text-writers on Negligence, Shearman & Redfield, (see note to section 234,) that in some, if not all, of the cited cases, the rule seems to have been erroneously applied to work of superintendence. Motion for new trial denied.

BALKHAM *et al. v.* WOODSTOCK IRON CO. *et al.*

(Circuit Court, N. D. Alabama, S. D. 1890.)

1. ADVERSE POSSESSION—COLOR OF TITLE.
Land belonging to the estate of a testator was sold by the administrator by order of court in 1866, the widow becoming the purchaser, and thereafter holding the land under such sale until she sold the same to other parties. *Held*, that though the order of sale may have been void, the deed in pursuance thereof, for which the widow paid a valuable consideration, is sufficient color of title to make her possession, and that of those claiming under her, adverse to the heirs.
2. LIMITATIONS—ACTION FOR LAND.
Where the heirs bring suit to recover such land in 1889, their recovery, under the laws of Alabama, is barred by the lapse of more than 20 years from the date of the sale by the administrator.

At Law.

In accordance with the instruction of the court, the jury returned a verdict for defendant.

James H. Savage, *Kelley & Smith*, and *Smith & Lowe*, for plaintiffs.

Knox & Bowie, *Caldwell & Johnson*, *D. C. Blackwell*, and *Brothers, Willett & Willett*, for defendants.

BRUCE, J. This suit is in ejectment. There is an agreement in writing as to the facts in the case. The plaintiffs are the only heirs at law of one Samuel P. Hudson, who died intestate on the —— day of August, 1863. He was at the time of his death seised and possessed of the land in controversy, together with other adjoining lands, and left surviving him a widow, Keziah A. Hudson, who died June 26, 1879. Prior to 1866, one J. F. Grant was the regularly appointed administrator of the estate of Samuel P. Hudson, and took possession of the estate as such administrator, including the land in question. On the 20th day of March, 1866, James F. Grant, as administrator, under the order of the probate court of Calhoun county, Ala., sold the land in controversy, subject to the widow's right of dower, and at such sale Keziah A. Hudson, widow of Samuel P. Hudson, became the purchaser of the land in suit for the sum of $450, which amount she paid to the administrator in cash, and he executed a deed of conveyance to her of the property. That she, Keziah A. Hudson, was in possession of the land, at the time, and continued to hold possession of the same until the 28th of October, 1869, when she conveyed it to Sherman and Boynton, by deed in the usual form, and surrendered possession to the grantees Sherman and Boynton, who afterwards conveyed to Hill Jeffers, who in turn, in 1874, conveyed to the Woodstock Iron Company, defendant in this suit, who afterwards sold and conveyed the land to the Anniston Land & Improvement Company, who in turn sold and conveyed it to the Anniston City Land Company. All these conveyances were in the usual form of deeds of warranty in fee-simple, and were duly recorded. James F. Grant, the administrator, died in the year 1878, and Alexander Woods, who was probate judge during the administration of the estate of Hudson, de-

ceased, died in the year 1878. This suit was commenced June 8, 1889, and is the second suit for the property between the same parties. The plaintiffs contend that they have the right to recover the land in suit upon the facts stated; that they had no right or capacity to sue until the termination of the life-estate of Keziah A. Hudson, who died June 26, 1879, and the suit was brought within the 10 years under the statute of limitation of Alabama, which would not operate a bar until June 26, 1889. It is not claimed by the defendants that the plaintiffs are barred by the statute of limitation of 10 years, but it is claimed by the defendants that the plaintiffs are barred by the lapse of more than 20 years from the date of the administrator's sale of the land in question to Keziah A. Hudson, under whom they claim by a continuous, open, and unchallenged actual possession of the lands under claim of title from March, 1866. There are other questions in the case, but it will be necessary to refer to them only so far as they are connected with the question of the effect of the lapse of more than 20 years from the date of the administrator's sale to the commencement of the suit, coupled with possession under claim of title on the part of defendants, and those under whom they claim, which is the decisive question in the case.

The contention of the plaintiffs is that the sale by the administrator of the lands in question under the proceedings of the probate court, and the deed of conveyance by the administrator to Keziah A. Hudson, are void, and cannot operate to divest their title to the land as the heirs of Samuel P. Hudson.

Two objections to the probate court proceedings are mainly relied upon: *First*, that the order of sale which was granted by the probate court was not supported by testimony taken by deposition as in chancery cases, as provided by the statute of Alabama in such cases; and, *second*, that there was no order authorizing the administrator to make the conveyance of the property which he did make to the purchaser, Keziah A. Hudson. It is claimed by the defendants that in a collateral attack of this kind the probate court proceedings are not assailable; but, without discussing these questions, even if the contention of the plaintiffs can be maintained, still the proceedings in the probate court are competent to show the character of the possession of Keziah A. Hudson, of the land in question, from the time of her purchase at the sale by the administrator. In the agreed statement of facts in the case it is said "that Keziah A. Hudson held possession of the land in controversy from the date of said deed by said administrator claiming to hold same under said purchase, and conveyance of said lands by said administrator, and in her own right, until she sold the same to Sherman and Boynton," etc. She was the life-tenant, but she was more than that, and held possession under the deed of the administrator to the property, for which she had paid the consideration of $450. Under such a state of facts, the deed of the administrator to her was at least color of title, and, however vulnerable the probate court proceedings may have been, she was in possession, with an equitable right to the property, and that possession, and the possession of those claiming

under her, remains unchallenged until the commencement of the litigation on the part of the heirs of Hudson, which is more than 20 years. The plaintiffs contend, however, that this possession thus maintained cannot be held to have been adverse to them, except from the date of the death of Keziah A. Hudson, the life-tenant, which occurred June, 1879; and a line of authorities are cited to the proposition that the possession of the life-tenant is not adverse to the remainder-man; that it is, in fact, the same possession, and that the right of entry of the remainder-man does not accrue until the death of the life-tenant; citing *Pickett* v. *Pope*, 74 Ala. 122, and many Alabama and other authorities. Concede the rule, as stated, to its full extent, that the statute of limitations of 10 years can operate no bar until the 10 years from the date of the death of the life-tenant has expired, still, does it follow that the 20-year rule could only begin to run from the date of the death of the life-tenant? We have just seen that Keziah A. Hudson was more than a life-tenant, and we are not dealing with a case in which the life-tenant had simply and only a life-estate and right to the property, and undertook by deed in fee-simple to convey the full title to the property. I do not say that even in this case the statute of limitations of 10 years could begin to run before the death of the life-tenant. Still, does it follow that in a case like this the 20-year rule of prescription does not begin to operate until the death of the life-tenant? The plaintiffs contend that, in cases where the statute of limitations of 10 years could not begin to run by reason of the fact that the right of entry had not accrued to the heirs, in like manner the 20-year rule could not begin to operate. If that view of the subject be correct, it would be equivalent to two statutes of limitation,—one 10 and the other 20 years,—and whatever would defeat the 10-year statute would also defeat the 20-year statute; so that there could be no operation to the 20-year rule at all, for in every case in which the 20-year rule could operate a bar the 10-year limitation would already have perfected the bar. The statute of limitation of 10 years, and what may be called the "20-year rule of repose," are different in their nature and operation. The statute of limitation is avoided by disability, such as infancy and coverture; but the 20-year rule may be and is applied even where disabilities exist.

The case of *Harrison* v. *Heflin*, 54 Ala. 563, was a case of the purchase of slaves from an administrator at private sale, forbidden by the statute, and where, after the lapse of 20 years, at the suit of an administrator *de bonis non*, the court say:

"Until his appointment there was no party capable of suing, and the possession of the defendant was not protected by the statute of limitations. It was therefore insisted the presumption could not be drawn. The court, regarding the presumption as more general in its operation than the statute of limitations, held the want of a proper party to sue would not overturn it."

In the same opinion the case of *McCartney* v. *Bone*, 40 Ala. 533, is cited, where it is held that infancy and coverture would not avail to rebut the presumption. In *Bozeman* v. *Bozeman*, 82 Ala. 389, 2 South. Rep. 732, the court say:

"The rule is one of presumption, based on the broad doctrine of prescription, and is not to be rebutted. It has in view the peace and security of society, and is applicable, as often held, to all human transactions which are open to judicial investigation. The doctrine is broader and more comprehensive than a mere statute of limitations, although based upon analogous principles."

These cases were not suits in ejectment, like the one at bar, but they show the difference between the application of the statute of limitations and the 20-year rule of repose.

It is argued that in cases of this kind the life-estate might continue during the whole period of 20 years, and that in such case at no time could the heir bring his suit, and therefore could no laches be imputed to him. The answer to that proposition is found in the case of *Iron Co.* v. *Fullenwider*, 87 Ala. 587, 6 South. Rep. 197, where the supreme court of Alabama say:.

"The plaintiffs in the present case, as reversioners, had no right, as we have said, to sue at law, but they had a right to go into a court of equity to remove the cloud from their title created by the probate court proceedings."

Plaintiffs' counsel strenuously attack this proposition as unsound in point of law, and an elaborate brief on that subject is presented, citing Alabama and other authorities. Without discussing or passing upon this question I prefer to rest my opinion upon a different ground, already indicated, in part, at least, by what has been said. It is said that all statutes of limitations are based upon the theory of laches, and no laches can be imputed to one while he has no remedy or right of action. And this proposition, as applicable to statutes of limitations, is conceded. But is it equally applicable to the 20-year rule of repose in Alabama? We have already said that Keziah A. Hudson was not only the life-tenant, but she was more than that, she was the purchaser at the administrator's sale, paid the purchase price, and in the agreed statement of facts it is said that she held possession of the land in controversy, * * * claiming to hold the same under said purchase, and conveyance of said lands by said administrator, and in her own right. It is said that Keziah A. Hudson took nothing by the said proceeding in the probate court. But she at least parted with her money, the purchase price of the property, and it is certainly true that she had a right to the property, or to have her money refunded; and to say that her possession will be limited under such circumstances to her right as a life-tenant, and will be conclusively presumed to be friendly to the title and right of the heirs, is a proposition which cannot be maintained. If her possession was not strictly and technically adverse to the heirs, it was at least adversary in its character, and had in it no element of admission of the title of the heirs. It is said that Keziah A. Hudson had the right to resort to a court of equity to compel the heirs to elect a ratification or rescission of the contract of the purchase of the property. There is in this suggestion a concession that laches are chargeable to one or the other of the parties to this suit, and the idea must be to shift the burden, and charge the defendants with the duty of becoming actors as

to the land in controversy. It cannot be maintained, however, that one who holds lands under a bad or defective legal title, but who has an equitable right to the property, must, under the penalty of the imputation of laches, go into a court of equity to perfect his title. In the case of *Ruckman* v. *Cory*, 129 U. S. 387, 9 Sup. Ct. Rep. 316, the court say:

"'Laches,' the supreme court of Illinois has well said, 'cannot be imputed to one in the peaceable possession of land, for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.'" Citing authorities.

This case and others might be cited to show the force and effect which courts are disposed to give the fact of open, notorious, adverse possession of property, (real estate,) maintained for so long a period of time under color and claim of right. It may be said, and is said in substance, that the logic of this proposition is that, even in a case like the one supposed, when the life-tenant should hold the entire period of 20 years, that the possessor of the property would have a good title against the heir. But whether the courts would go to this extent we need not say here, for this is not a case like the one supposed. The administrator's sale under which defendants claim title was made March, 1866; and 20 years would carry the time to March, 1886. The life-tenant died in June, 1879; so that from that time to the time the 20 years expired, a period of about 7 years, there was nothing to prevent these plaintiffs from bringing their suit. And it would seem the clear result from the authorities that in such a case laches will be presumed as a conclusion of law against them, and in favor of the actual possessors of the property. There is in this case the lapse of a period of near 24 years, during all of which time the defendants and those under whom they claim have maintained actual possession of the land in question under claim of title entirely inconsistent with the claim of these plaintiffs to the property. And it would seem to be the clear result of the rulings of the supreme court of Alabama, in numerous cases covering the entire period of its history as a state, that in such a case the court will presume almost anything in favor of defendant's title; that it will presume regularity in the probate court proceedings under which title is claimed; that it will supply missing links in the defendant's paper title, and will allow nothing to overturn the presumption in its favor, except evidence in the nature of admissions of plaintiff's title, which is not claimed here. The following authorities, with many others which might be noted, are in support of the proposition above stated: *McArthur* v. *Carrie*, 32 Ala. 76; *Matthews* v. *McDade*, 72 Ala. 377; *Kelly* v. *Hancock*, 75 Ala. 229; *Gosson* v. *Ladd*, 77 Ala. 223; *Iron Co.* v. *Fullenwider*, 87 Ala. 584, 6 South. Rep. 197. The Alabama cases seem to have established the 20-year rule of repose as applicable to cases like the one at bar in such a way as that it has become a rule of property in this state; and that being so, the federal courts sitting in this state are bound to follow it, under the principles settled by the supreme court of the United States in many cases, among which may be cited, *Burgess* v.

Seligman, 107 U. S. 21, 2 Sup. Ct. Rep. 10. The cases cited and relied on by the plaintiffs' attorneys are mainly cases from other states, and, however pursuasive they may be in such states, they cannot be held to be controlling here, and they are, some of them at least, distinguishable from the case at bar in this: that the life-tenant had no other or greater interest or claim to the property than the bare life-estate, and undertook by the terms of his conveyance to convey an absolute title in fee to the property. That is not this case, unless it can be maintained, as argued, that Keziah A. Hudson took nothing by the purchase at the administrator's sale,—a proposition which we have clearly considered. If the rule of which we are speaking was less firmly settled by the decision of the court of last resort in this state, and the door was wide open, inviting entrance upon the investigation of the question as it has been decided in the federal courts, still it is believed that the plaintiffs here would meet with no great encouragement. The supreme court of the United States has in many reported cases, though perhaps none like the case at bar, given little favor to stale demands, or to parties chargeable with laches in the assertion of their rights. The jury is instructed that, if they believe the evidence, they will find for the defendant.

In re SPICKLER.

(*Circuit Court, S. D. Iowa, C. D.* October 25, 1890.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DELEGATION OF POWER TO REGULATE.
   Act Cong. 1890, known as the "Wilson Bill," which declares that intoxicating liquors shall, on arrival in a state, be subject to the operation of the police powers of the state, simply defines the time when imported intoxicating liquors shall become subject to state control, and is therefore not unconstitutional as being a delegation to the states of the power to regulate interstate commerce.
2. INTOXICATING LIQUORS—SALE IN ORIGINAL PACKAGES AFTER PASSAGE OF WILSON BILL.
   Leisy v. *Hardin*, 10 Sup. Ct. Rep. 681, did not declare the prohibitory liquor law of Iowa (Code, § 1523 *et seq.*) void under all circumstances, but only that imported liquors remaining unsold in the original packages in the hands of the importer are not subject to the jurisdiction of the state by reason of the commerce clause of the federal constitution. Therefore, on the passage by congress of the Wilson bill, which subjects to state police laws all imported liquors as soon as they pass within the boundaries of the state, it became unlawful to sell such liquors in Iowa without a re-enactment of the prohibitory liquor law.
3. HABEAS CORPUS—WHEN ISSUES—DEBATABLE FEDERAL QUESTION.
   Where it is a debatable question whether a state court deprived a person of his liberty contrary to the provisions of the federal constitution, and the point presented by such action of the state court has not been finally decided by the supreme court of the United States, the federal circuit court will not release the prisoner on writ of *habeas corpus*, but will leave him to present the federal question to the supreme court by writ of error.

Habeas Corpus.

F. A. Charles, for petitioner.

SHIRAS, J. A petition having been duly filed in this court by E. E. Spickler, averring that he was unjustly and illegally restrained and deprived of his liberty by the sheriff of Carroll county, Iowa, a writ of *habeas corpus* was issued in his behalf, and, in obedience to the mandate thereof, the sheriff of Carroll county brings the petitioner before this court, and returns, as the cause of his detention, that he, the said Spickler, was, by the district court of Carroll county, adjudged guilty of a contempt of court in violating an injunction issued by that court restraining him from selling intoxicating liquors contrary to the provisions of the prohibitory law of the state, and for such contempt he was fined and imprisoned. Evidence on behalf of petitioner has been introduced, showing that the liquor sold was in the original packages in which it was imported from Nebraska; the defendant doing business at Coon Rapids, Carroll county, Iowa, as agent for parties residing in Omaha,—in other words, the petitioner runs a saloon at Coon Rapids, in which, as agent for parties in Nebraska, he sells intoxicating liquors in the same packages in which the same are put up in Omaha. The sales, for the making of which he was fined and imprisoned, were made in September of this year, and after the adoption of the act of congress known as the "Wilson Bill." The contention of petitioner is that the prohibitory law of Iowa, as applied to imported liquors remaining in the original packages, had been declared unconstitutional and void by the supreme court of the United States in the case of *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, before the passage of the act of congress just cited; and that the passage of that act did not have the effect of re-enacting that statute, and that the state law is in fact no law, and can have no force or effect unless re-enacted by the legislature of Iowa. In my judgment this is a misconception of the construction to be given to the ruling of the supreme court in *Leisy* v. *Hardin*. It cannot be questioned that the state of Iowa, in the exercise of its police power, had the right to enact a statute prohibiting the sale within its borders of liquors to be used as a beverage. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Foster* v. *Kansas*, 112 U. S. 201, 5 Sup. Ct. Rep. 8; *Mugler* v. *Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. The gist of the Iowa statute is contained in the opening sentence of the first section of the chapter of the Code dealing with this subject, being section 1523 of the Code, and it reads as follows: "No person shall manufacture, or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided." The following portions of the chapter provide the means for enforcing this enactment, for punishing violators of the law, and for the sale of liquors for certain specified purposes. I know of no decision of the supreme court of the United States which holds that the enactment above cited was beyond the power of the state to enact, or that it was void by reason of any contravening provision of the federal constitution.

In *Bowman* v. *Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, the question was presented whether section 1553, of the Code of Iowa, which in terms forbade any common carrier from knowingly bringing within the

state any intoxicating liquors without having first received a certificate from the county auditor that the same were imported to be sold for a legal purpose, was sustainable as an exercise of the police powers of the state; and it was held that the effect of the section was to interfere with the freedom of interstate commerce, and it was therefore void. In *Leisy* v. *Hardin* the facts were that Leisy & Co. were shown to be engaged in the manufacture of beer in the state of Illinois; that they imported a quantity thereof into the state of Iowa for the purpose of selling the same in the original packages; that while in their possession unsold it was seized under the order of the state court, in a proceeding brought to enforce the state law; that Leisy & Co. thereupon replevied the beer; and thus the question was presented whether the beer was or not, in its then condition, liable to seizure and confiscation under the prohibitory law of the state. This question was carried to the supreme court, and it was by that court held that the beer was not liable to seizure under the statute of Iowa; that the protection of the clause of the federal constitution giving congress power to regulate foreign and interstate commerce was thrown around the importation until the importer should have sold the same in the original packages, and thereby caused the importation to become a part of the common mass of the property within the state; and that when this was done, then, and not till then, would the property become liable to be dealt with under the provisions of the state statute. If the facts of that case had been that the seizure had not been made until after a sale of the packages by the importer, is it not clear that the supreme court would have held that the same were then subject to the operation of the state law? The three points decided in that case are: (1) That the commercial clause of the federal constitution prevents the states from forbidding the importation of any article commonly recognized as property, and not harmful or dangerous in the condition in which it is imported. (2) That the right of importation thus secured protects the property from the operation of state laws until the importer has caused the same to become intermingled with the common mass of the property in the state, which ordinarily is effected by a sale in the original packages. (3) That it is for the congress of the United States to determine whether such imported property should or should not be rendered subject to the police laws of the state at and from any time prior to a sale by the importer in the original packages.

In the *Bowman Case* the supreme court was called upon to decide the validity of a particular section of the statute, and, for the reasons stated, held it void.

In the *Leisy Case* there was not presented for consideration the validity of one or more sections of the statute. The real point for decision was whether the statute, as a whole,—that is, the prohibitory principle,—could be made applicable to beer or other liquors imported from another state; and it was held that—

"Under our decision in *Bowman* v. *Railway Co.*, *supra*, they had the right to import this beer into the state; and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled

in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. * * * The legislation in question is, to the extent indicated, repugnant to the third clause of section 8 of article 1 of the constitution of the United States, and therefore the judgment of the supreme court of Iowa is reversed," etc.

The decision in the *Leisy Case* therefore does not declare any section or particular portion of the Iowa statute to be wholly void, nor does it declare the whole statute to be void under all circumstances. What it did declare was, that the effort to make the prohibitory purpose of the statute applicable to imported liquors remaining in the original packages unsold in the hands of the importer was repugnant to the commercial clause of the constitution, and this for the reason that, until such importations had become intermingled with the common mass of property in the state, such liquors were not subject to the jurisdiction of the state. Neither in terms nor by fair inference, does this decision declare that the Iowa statute, in whole or in part, is void or unconstitutional, as applied to liquors subject to the jurisdiction of the state. In the *Bowman* and the *Leisy Cases* alike, the power of the state to regulate or forbid the sale of intoxicating liquors within its jurisdiction is fully recognized, and the effect of these decisions is simply to define the limitations of that jurisdiction. The language of the state statute is general in its terms, but the legislature in enacting it must be presumed to have intended it to apply to persons and property within the jurisdiction of the state. It is doubtless true that it was the belief of the legislature that the statute would be applicable to all liquors within the boundaries of the state, but that belief grew out of a mistake as to the time when imported property passes under the jurisdiction of the state in the exercise of its police and taxing power. It was not the intent of the legislature to pass an act to affect liquors before the same came under the jurisdiction of the state, but to control all within the jurisdiction of the state. When the conclusion reached in the *Leisy Case* was announced, the extent of the jurisdiction of the state was made plain, and thus it was found that the statute of Iowa was limited in its operation and control to an extent greater than was anticipated by the legislature. The ascertainment of the fact that broad and general terms used in a statute are subject to the limitation contained in a constitutional provision in the state or federal constitution does not show that the statute is void, but only demonstrates that, in the construction of the language found therein, regard must be had to the constitutional limitation. It is a fundamental rule that legislative acts shall not be declared void by the courts, if by any reasonable construction thereof such result can be avoided. If, by limitation upon its general terms, the same can be fairly construed and so applied as to bring the statute within the constitution, and thus save it from being in conflict therewith, such limited construction should be adopted. It is entirely clear that the purpose sought to be achieved in the adoption of the prohibitory law of the state, and the amendments thereto, was the regu-

lation of the traffic in intoxicating liquors, and to prohibit the sale thereof in the state for use as a beverage. There was no purpose on part of the state to undertake the regulation of foreign or interstate commerce as such. It has been determined, however, that, in the adoption of the amendments to the statute, the legislature has, in effect, attempted to make the prohibitory law applicable, not only to property within the jurisdiction of the state, but also to importations before the same became subject to state jurisdiction. To this extent the law is void, and has been so held; but this does not mean that, as applied to property within the jurisdiction of the state, the statute is void in whole or in part. The true conclusion is that the statute of Iowa remains in full force as to all property within the jurisdiction of the state. This construction gives full force to the statute as applied to property within the jurisdiction of the state, and at the same time gives to the importer the full benefit of the protection afforded him by the commercial clause of the federal constitution. If the sales made by the petitioner had been made before the adoption of the act of congress known as the "Wilson Bill," it might well be claimed that the provisions of the state statute could not be made applicable thereto, and that the petitioner would, of right, be entitled to his discharge. In fact, however, the sales were made after the Wilson bill had become a law, and it is necessary to consider the effect thereof on the rights of the petitioner.

It is said that this act of congress is itself void, for the reason that it assumes to confer upon the states the power to regulate interstate commerce. Such is not the purpose or effect of the act. It does not declare that the states shall, in general or in any particular, have the power to regulate interstate commerce. It confers no power upon the states to legislate upon that subject. The act declares that intoxicating liquors shall, upon arrival in the state or territory, be subject to the operation of the police powers of the state. In the exercise of the constitutional power to regulate foreign and interstate commerce, congress has declared when such imported property shall become subject to the state laws. The states are not authorized to declare when such importations shall become subject to state control, nor can the states in any manner change or affect the enactment made by congress upon that subject. Congress can at any time abrogate or change the enactment in question, and it is clearly a constitutional exercise of the power conferred on congress. It is apparent to every one that at some time, or upon the happening of some event, imported property loses that character, and becomes subject to the laws of the state; and it is for congress, which possesses the power to regulate commerce, to define the time or event which shall have the effect of subjecting importations to state control, and this is what is done by the Wilson bill in regard to intoxicating liquors.

It is also earnestly contended that, granting the validity of the Wilson bill, the statute of Iowa cannot be held to be in force, because it has not been re-enacted since the decision of the supreme court in *Leisy* v. *Hardin*.

The thought is that the statute was then declared wholly void, and that the act of congress does not impart life and validity to it. If it be

true that the statute was declared wholly void, then it follows that congress cannot give it life. No one claims that congress can adopt a prohibitory liquor law for the state of Iowa. The error lies in the assumption that the statute of Iowa has been declared wholly void.

I have attempted to maintain, in this opinion, the proposition that, after the decision in the *Leisy Case*, the statute of Iowa remained in full force in relation to all liquors within the police jurisdiction of the state. The language of the statute is broad and comprehensive, but is nevertheless subject to the limitation imposed upon the police power of the state by the provisions of the federal constitution, and must always so remain. All the state can ever do in this particular is to declare the will of the state in regard to the sale of intoxicating liquors when the same come within the jurisdiction of the state. That it has already done in the statute now in force. The state, under the Wilson bill, does not possess the power to declare when imported liquors shall be freed from the protection of the commercial clause of the federal constitution, and pass under the operation of the police powers of the state. Congress cannot confer that power upon the state. It is for congress to determine that question. It is for the state to say what the police regulations of the state shall be as to liquors within the jurisdiction of the state, and for congress to define when or how imported liquors shall become subject to state control. Whether the legislation of the state antedates the action of congress is wholly immaterial. Congress determines when imported property shall become subject to the state laws, and can at any time change the enactment. The states regulate the sale of property within their jurisdiction, and can at any time modify or change these police regulations. It cannot be true, because congress to-day passes an act declaring that importations shall become subject to state police or revenue laws so soon as they pass the boundaries of the state, that the state must, in order to make such laws applicable thereto, at once re-enact such laws. That could only be required upon the theory that the action of congress was permissive in its effect, and was intended to enable the state to determine when it would subject imported liquors to state control; but it is clear that such was not the purpose of the Wilson bill. That bill, upon its adoption, made subject to state police laws all imported liquors as soon as they should pass within the boundaries of the state. It is not declared that such liquors shall be subject to the police laws hereafter to be passed, but the declaration is that such liquors shall "be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers," etc. It seems to me that this enactment is so plain that it needs no construction other than to read it as it is written, and it must therefore be the fact that, upon the adoption of the Wilson bill, imported liquors, upon their arrival in Iowa, became subject to the then existing police laws of the state, just the same as though such liquors had been manufactured in Iowa. Thus we are brought back to the question whether, when the petitioner sold the liquors which it is admitted he did sell, there was then in force in Iowa a law which made it illegal to sell liquors produced in Iowa for use

as a beverage. There is such a law upon the statute books of the state. If that law was in force as to domestic liquors, it was in force as to imported liquors. There is no middle ground in this matter. Unless it be held that the decision of the supreme court in *Leisy* v. *Hardin* is to the effect that the prohibitory law of Iowa is wholly void, and cannot be enforced as against domestic liquors, then it must be held that, after the adoption of the Wilson bill, imported liquors became subject to its provisions. After the enactment of the Wilson bill, the matter of sale in original packages ceased to be of any moment. When the imported liquors pass the boundary of the state, they then become subject to the law of the state, without regard to the character of the packages in which they are contained.

It is urged in argument that it is necessary to have legislative action on part of the state in order to render illegal the sale of imported liquors, because it was held in the *Leisy Case* that the importer had a right to sell the same in the original packages, and that, as there has been no change in or addition to the statute of Iowa since the date of that decision, such right must still continue. If the statute of Iowa in terms excepted from its operation imported liquors, as it once did, there would be force in the argument; but such is not now the fact. The language in the statute is as broad and comprehensive as it is possible to make it. It cannot be questioned that, in the adoption of section 1523 of the Code, it was the intent of the legislature to absolutely forbid the manufacture or sale of any intoxicating liquors for use as a beverage. This section was intended to, and does apply to all liquors, regardless of the question whether the same are domestic or imported; and the supreme court of the United States has, in several cases, upheld the validity of the law as applied to liquors within the jurisdiction of the state, but further held that it did not become applicable to imported liquors until the same had been, by the importer, sold, and thus made part of the common mass of the property subject to state control; and thus the statute was limited in this particular. These same decisions, however, also expressly declare that it is not within the power of the state to declare by legislation when imported property becomes subject to state control, nor to subject imported property to the operation of the state revenue and police statutes until it had ceased to be an importation. The state possesses no more power in this regard to-day, than it did when these rulings were made. If the legislature should now convene and undertake to deal with the subject, what could it enact that is not now in force upon the statute book of the state? Could it legally adopt an act declaring that the sale of imported liquors by the importer thereof in the original packages is forbidden? When the state attempted to so enact, the supreme court held that the federal constitution forbade the exercise of such a power on part of the state, and what has since changed the force of this constitutional restriction? That which prevented the state from legislating on this question before the passage of the Wilson bill is in equal force now. All that the state can do is to declare that, within the jurisdiction of the state, no liquors, imported or domestic, shall be sold or used as a

beverage; and it is for congress to declare when imported liquors shall become subject to the jurisdiction of the state in this particular. Under the division of powers created by our dual system of government, it is necessary, in order to control the sale of imported liquors, that there should be legislation on part of both the state and federal governments. It is the province of the former to regulate or forbid the sale of all liquors within the jurisdiction of the state, and of the latter to determine the point of time when imported liquors become subject to the jurisdiction of the state. The state has long since declared its purpose touching liquors within its jurisdiction, and no additional legislation or re-enactment is needed to make plain the law of the state in that particular.

If the legislature, as suggested, should now undertake to legislate on this subject, with a view to preventing the sale of imported liquors as a beverage while in the hands of the importer, all it could do would be to declare that no liquors could be legally sold for use as a beverage by any one within the jurisdiction of the state; and that is the exact purport of the statute now in force, and which is as broad as it is within the power of the state to make it. The case is simply this: The petitioner is a resident of Iowa, and therefore subject to the police laws of the state. Those laws declare it to be a penal offense to sell intoxicating liquors for use as a beverage. In September last, and after the adoption of the Wilson bill, the petitioner sold intoxicating liquors for use as a beverage, and for so doing, in violation of an injunction issued from the district court of Carroll county, he was brought before that court and fined and imprisoned. He now asks the court, by use of a writ of *habeas corpus*, to free him from imprisonment, on the ground that the liquors he sold were imported from Nebraska, and sold in the original packages. The answer is that since the passage of the Wilson bill imported liquors, upon their arrival in Iowa, become subject to the prohibitory law of Iowa, the same as though they had been produced in Iowa. The district court of Carroll county, as it had a right to do, upon a petition duly presented to it, enjoined the petitioner from selling intoxicating liquors in violation of the statute of Iowa. Disregarding such injunction, the petitioner made sales of liquors for use as a beverage, and thereupon was cited before the district court to answer for contempt of court in violating the injunction, and, failing to excuse himself, was fined and imprisoned.

I entirely concur with the state court in holding that, as the sales of the imported liquors were made after the enactment of the Wilson bill, the provisions of the Iowa statute are applicable thereto, and that in making such sales the petitioner violated the statute of Iowa. Furthermore, if I entertained doubt upon the principal question, or was in my own mind satisfied that the state court had erred in its construction of the law, I should not feel justified in releasing the petitioner from the effect of the judgment of that court. The way is open to the petitioner to present the question to the supreme court of the United States by a writ of error to the state court. He has thus a means of correcting any error committed to his prejudice in the state court, by a direct appeal to

the tribunal which we all recognize as the paramount and final arbiter of all questions arising under the federal constitution and laws. I do not question the existence of the power in the United States circuit courts to grant writs of *habeas corpus* when it is alleged that a person is deprived of his liberty by state action, contrary to the provisions of the federal constitution; but it is a power to be sparingly exercised. When it appears that the petitioner is held under the judgment of a state court of competent jurisdiction, before this court should grant him a discharge, it should be made to appear that the illegality of his detention is beyond fair question; and in all cases wherein the pivotal point has not been finally decided by the supreme court, but still remains a debatable question, the circuit court should not discharge the petitioner, for this would be simply converting the writ of *habeas corpus* into a writ of error, by means of which this court would be asked to review the judgment of the state court upon a debatable question of law arising under the federal constitution, but which it was the duty of that court to investigate and decide. In such cases, the federal question can be readily presented to the supreme court, and, as there exists this plain and proper remedy, it should be followed. When the question has been finally settled by the supreme court, if the state courts should refuse to follow the construction given by the supreme court to the federal constitution, and, disregarding such construction, should sentence a person to imprisonment, then the duty of the circuit court to grant relief by means of a writ of *habeas corpus* would be plain; but, until that improbable contingency arises, the writ should not be executed in cases like that now before the court.

For the reasons stated, the writ is discharged, and the petitioner is continued in custody of the sheriff.

Ex parte ULRICH.

(*Circuit Court, W. D. Missouri, W. D.* September 30, 1890.)

1. HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS.
The district court of the United States has no jurisdiction by writ of *habeas corpus* to declare a judgment of a state criminal court a nullity, and discharge the petitioner from imprisonment imposed by it, where such court had plenary jurisdiction over the person, the place, the offense, and the cause, and everything connected with it.

2. SAME—REMEDY BY APPEAL.
In such a case, it is the right and duty of the state courts to decide questions arising under the constitution and laws of the United States, and, if it errs in its rulings to the prejudice of the defendant, his remedy is by appeal to the supreme court of the state; and, if that court denies him any right, privilege, or immunity which he claims under the constitution of the United States, he can have his writ of error to the supreme court of the United States.

Habeas Corpus. On appeal from the district court. For former report, see 42 Fed. Rep. 587.

On the 13th day of June, 1890, there was presented to the district court of this district the petition of Oscar Ulrich, praying for a writ of *habeas corpus*. The petitioner alleged, in substance, that at the January term, 1890, of the criminal court of Jackson county, Mo., the petitioner was indicted by the grand jury for the crime of bigamy. That his trial on said indictment for said alleged offense was set down for the 21st of April, 1890, on which day the cause was called for trial and a jury duly impaneled and sworn and the trial proceeded with, by the examination of witnesses for the state, until noon of the following day, when the judge of the court, without the consent of the defendant, adjourned the cause until 9:30 o'clock the next morning, and caused the petitioner to be committed to jail for safe-keeping. That after the noon adjournment of the petitioner's case on the 22d, the judge of the court before whom the petitioner was being tried permitted a special judge, who had been previously appointed to try another criminal case pending in the court, to impanel another jury, and proceed with the trial of said second cause, and to continue the trial thereof from day to day until the evening of the 25th of April, when it was concluded. On the morning of the 23d of April, the prosecuting attorney announced that the jury and witnesses in the petitioner's case would be excused until 2 o'clock P. M. of that day, at which hour the regular judge came upon the bench, and announced that the jury and witnesses in the case would be dismissed until the next day at 1:30 P. M. That the next day the judge did not appear until 3:30 P. M., and that he then announced the petitioner's case would not be called until 1:30 P. M. the following day. That at 2:30 o'clock P. M. the following day the judge announced that the case would not be called until the next morning at 10 o'clock. That the next morning, which was Saturday, April 26th, the judge came on the bench, and announced he was feeling ill and not able to go on with the court, and thereupon discharged the jury impaneled to try the petitioner, and set the case down for trial the 26th of May, 1890. That the several adjournments of his trial from the 22d to the 26th of April were made and ordered in his absence, and without his knowledge or consent, and against the protest of his counsel, and that the jury were discharged against his protest. That on the 26th day of May, the day to which his case had been adjourned, it was again called for trial, whereupon the "petitioner filed his motion for a discharge and a plea in bar of all further proceedings, based upon and by reason of the facts hereinbefore set out," which motion and plea the judge overruled, and, against the petitioner's protests and objections, ordered another jury to be impaneled, and again placed the petitioner on trial for said alleged offense, and, as a result thereof, the petitioner was convicted, a new trial denied him, and he was sentenced to two years' imprisonment in the penitentiary. The petitioner thereupon presented to the district court his petition for a writ of *habeas corpus*, alleging his imprisonment was in violation of the fifth and fourteenth amendments to the constitution of the United States, and praying to be discharged therefrom for that rea-

son. The marshal of Jackson county, who had the petitioner in his custody, and upon whom the writ of *habeas corpus* was served, made return to the writ, showing that the petitioner had been regularly indicted by the grand jury of the criminal court for Jackson county for the crime of bigamy committed in said county, and that he had been duly tried on said indictment for said offense, and found guilty by the verdict of the jury, and sentenced for said offense by the court to two years' imprisonment in the penitentiary of the state of Missouri, and that the respondent had the defendant in his custody to convey him to the penitentiary in execution of that sentence. Upon hearing the case, the district court discharged the petitioner, from which judgment the respondent appealed to this court. The opinion of the district court discharging the petitioner is reported, (*Ex parte Ulrich*,) 42 Fed. Rep. 587.

A. R. Strother, for the State.

Crittenden, Stiles & Gilkeson, for appellee.

CALDWELL, J. Assuming the truth of the allegations in the petition, the first question to be determined is whether the district court had jurisdiction, by a writ of *habeas corpus*, to declare the judgment of the state court a nullity, and discharge the petitioner from the imprisonment imposed by it. The district courts of the United States do not possess any supervisory or appellate jurisdiction over the criminal courts of a state. Nor can the writ of *habeas corpus* be made to perform the office of a writ of error or appeal. Errors in law, however numerous and gross, committed by the trial court in a cause within its jurisdiction, can only be reviewed by appeal or writ of error in the court exercising supervisory or appellate jurisdiction over the trial court in the particular case. It is only where the trial court is without jurisdiction of the person or the cause, and a party is subjected to illegal imprisonment in consequence, that the writ of *habeas corpus* may be invoked, and the party discharged from the illegal imprisonment. *Ex parte Watkins*, 3 Pet. 193, 7 Pet. 568; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371, 1 Sup. Ct. Rep. 381; *Ex parte Carll*, 106 U. S. 521, 1 Sup. Ct. Rep. 535; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. Rep. 96; *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. Rep. 542; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780; *In re Lane*, 135 U. S. 443, 10 Sup. Ct. Rep. 760; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. Rep. 487; *Hans Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672; *In re Coy*, 127 U. S. 731, page 756, 8 Sup. Ct. Rep. 1263.

In the case at bar, the criminal court of Jackson county had plenary jurisdiction of the person, the place, the offense, and the cause, and everything connected with it. The petitioner was indicted for violating a criminal statute of the state. The statute defining and punishing the offense was a valid law. The indictment sufficiently charged the offense,

and the court trying the petitioner had jurisdiction of his person, and exclusive original jurisdiction to try him on the indictment for the offense therein charged. Having such plenary jurisdiction, it was the right and duty of the state court to decide every question that arose in the case, from the beginning to the end of it. Possessed of unquestioned jurisdiction of the case, the court had the same jurisdiction and right to decide questions arising under the constitution and laws of the United States that it had to decide questions arising under the constitution and laws of the state. The state court is under the same high obligations to support, construe, and give effect to the constitution of the United States that this court is, and an erroneous interpretation of the constitution of the United States no more affects the jurisdiction of the court than an erroneous ruling on any other question of law arising in the case. Whether the first jury was discharged without sufficient legal excuse was a mixed question of law and fact, to be determined by the court, or by the court and a jury, if the facts were disputed. It is undeniable that the court had jurisdiction to determine that issue. It was the only court that had jurisdiction to determine it in the first instance; and, if it be conceded that the court decided the question erroneously, its jurisdiction over the cause was not thereby lost or in any degree impaired, and its judgment was not void, and is not open to collateral attack. If the state court erred in its rulings on this or any other question, to the prejudice of the petitioner, he has his remedy to correct the error. He can appeal to the supreme court of the state, and, if that court denies him any right, privilege, or immunity which he claims under the constitution of the United States, he can have his writ of error to the supreme court of the United States. This is the regular legal and orderly mode of reviewing and revising the judgments of courts in criminal, as well as in civil, cases. The cases in which a United States court has jurisdiction, by a writ of *habeas corpus*, to discharge a party imprisoned under the process or judgment of a state court rest on special grounds, which have no existence in this case. Among the cases in which such jurisdiction is exercised are cases where the state court is proceeding against an officer of the United States, for an act done in pursuance of his official duty, under the constitution of the United States or an act of congress, (*In re Neagle*, 135 U. S. 1, 10 Sup. Ct. Rep. 658, and 39 Fed. Rep. 833;) and cases where the state court, assuming to act by authority of a state statute which is in conflict with the constitution of the United States, and void for that reason, imprisons a citizen for exercising a right guarantied to him by the constitution of the United States, (*In re Barber*, 39 Fed. Rep. 641, and 136 U. S. 313, 10 Sup. Ct. Rep. 862; *Ex parte Kieffer*, 40 Fed. Rep. 399; *In re Beine*, 42 Fed. Rep. 545.) But any extended or critical analysis and classification of the cases in which this jurisdiction exists is rendered unnecessary, in this case, by the decision of the supreme court of the United States in *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. Rep. 542. In principle that case is on all fours with the petitioner's, and is decisive of it. The essential point is the same in both

cases. In that case, as in this, a jury was impaneled and sworn to try the prisoner, and the jury was afterwards discharged by the court, against the prisoner's protest, before the cause was tried and submitted to them. The prisoner, against his protest, was again put upon his trial and convicted, and sentenced to imprisonment for five years. He thereupon made an application to the supreme court for a writ of *habeas corpus* to release him from that imprisonment, on the ground that he had been twice put in jeopardy for the same offense, in violation of the fifth amendment to the constitution of the United States. That amendment applied to his case, because he was tried in a federal court of the District of Columbia; but it has no application to the petitioner's case. The supreme court refused to grant the writ. Mr. Justice MILLER, who delivered the unanimous opinion of the court, said:

"But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass, so far as it was purely a question of law, and on which the jury, under the instructions of the court, must pass, if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal,—a much stronger case than this,—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense; and, if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly, in these cases, the court not only had jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial, it is error which may be corrected by the usual modes of correcting such errors; but that the court had jurisdiction to decide upon the matter raised by the plea, both as matter of law and of fact, cannot be doubted. This article 5 of the amendments, and articles 6 and 7, contain other provisions concerning trials in the courts of the United States, designed as safeguards to the rights of parties. Do all of these go to the jurisdiction of the courts? And are all judgments void where they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation?"

To the same effect is *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780, where it is held that the fact that an alien sat on the grand jury that found the indictment, and that the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor, did not render the judgment void, and did not, therefore, give the court authority or jurisdiction to discharge the petitioner on a writ of *habeas corpus*. The criminal court of Jackson county having plenary jurisdiction of the petitioner's case, neither the district court nor this court has any jurisdiction to inquire into the regularity of the proceedings in that court.

Upon that subject, as well as the question whether the fourteenth amendment is to be construed as a prohibition on the states and the state courts from placing a person on trial twice for the same offense,[1] the court expresses no opinion.

The judgment of the district court is reversed, and the petitioner is remanded to the custody of the state authorities, in execution of the sentence of the state court. There is nothing in the record to show what order, if any, the district court made under section 3 of rule 34 of the supreme court, regulating appeals in *habeas corpus* cases; but there seems to be no reason to apprehend that the petitioner will not be forthcoming to answer the judgment of the state court.

[1]NOTE. It has been held in England, upon great consideration, by the unanimous judgment of all the judges, affirmed on error in the exchequer chamber, that at common law a court may, in its discretion, discharge a jury in a criminal case before verdict, and that that discretion is not reviewable on error; and that a defendant cannot avail himself of an abuse of this discretion to defeat a conviction on a second trial. Winsor v. Queen, L. R. 1 Q. B. 289, 390. Upon the question of the construction of the fourteenth amendment on the point suggested, but not decided, in the principal case, see Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, and particularly what is said on pages 534 and 535. And in Re Kemmler, 136 U. S. 448, 10 Sup. Ct. Rep. 930, where the views of Mr. Justice MATTHEWS, expressed on pages 534 and 535 of Hurtado's Case, are reaffirmed by Chief Justice FULLER. And see Strauder v. West Virginia, 100 U. S. 303.

BLUMENTHAL *v.* BURRELL *et al.*

(Circuit Court, N. D. New York. October 10, 1890.)

1. PATENTS FOR INVENTIONS—NEW MANUFACTURE.
Patent No. 344,433, granted to Moritz Blumenthal, June 29, 1886, is for new manufactures,—the two chemical products, chymosin and pepsin, uncombined with each other and practically free from foreign substances. Chymosin and pepsin are ferments, the former a curdling agent, the latter a digestive agent, found in the rennets of calves and hogs, which had, on account of their curdling properties, been used in the form of a liquid in the manufacture of cheese, but the liquid contained objectionable matter, and its curdling powers varied according to the predominance of chymosin in the stomachs treated. At the time of the patent chymosin had not been produced in a pure state. *Held*, that the chymosin described in the patent was a new and patentable product.

2. SAME.
The article actually produced being merely the extract in a powder form, differing from previous extracts only in containing more of the curdling principle, and less of the useless or deleterious matter, is not a patentable product, though it contain but an insignificant proportion of pepsin and other foreign matter.

In Equity. On bill for injunction.

Briesen, Steele & Knauth, (*A. v. Briesen*, of counsel,) for complainant.

E. S. Jenney, for defendants.

WALLACE, J. The patent in suit (No. 344,433) granted to Moritz Blumenthal, of Prussia, June 29, 1886, is for new manufactures,—the two chemical products, chymosin and pepsin, uncombined with each other, and practically free from foreign substances. The first claim is for chymosin "uncombined with pepsin," as described; the second is for pepsin "uncombined with chymosin," as described; and the third is for "chymosin or pepsin uncombined with each other, in combination with an indifferent preservative," as described. Chymosin and pepsin are ferments found in the rennets or stomachs of calves and hogs, the former predominating in calf rennet and the latter in hog rennet; but they are unlike in their properties, chymosin being a coagulating agent, and pepsin a digestive agent. On account of its coagulating properties calf rennet has long been in extensive use for curdling milk by cheese makers in the form of a liquid obtained by cutting up the stomachs and macerating them in a salt solution containing from 5 to 10 per cent. of salt. Such a liquid contains the collected gastric juices of the stomach, including, besides chymosin and pepsin, more or less of the objectionable mucous and albuminous matters of these juices; and its curdling power varies according to the predominance of chymosin in the stomachs treated. The patentee states in his specification that before his invention neither chymosin nor pepsin had ever been obtained in an absolutely pure state, and that each, as theretofore obtained, contained a compound of both, besides mucous, albuminous, and other impurities, which impart an offensive smell and taste to the products. The questions in the case are whether the chymosin of the claim was at the time of the alleged invention a new product in a patentable sense, and whether the defendants have infringed the claims. The pepsin claim is not in controversy;

but the complainant insists that the rennet powder made by Chris. Hansen, of Copenhagen, and sold in this country compressed in the form of tablets by the defendants, is the chymosin of the first and third claims of the patent. Inasmuch as the claims are for the product, irrespective of the processes by which it may be made, it is unnecessary to consider whether, in view of the prior state of the art, Dr. Blumenthal's process for treating rennet to produce his extract was a new discovery. If the product was new it is immaterial whether the process was new or old. As described in the specification, the product of the first claim is a constituent of rennet which separates itself out of a rennet solution from the pepsin and other rennet matters of the solution in the form of white flocculent substance, and is collected on a filter and dried. It is an amorphous, white, gelatinous substance, insipid and odorless, greatly resembling in appearance hydrate of alumina. It may be kept for years without deterioration, and is not injured by temperatures reaching as high as 35° centigrade. The product of the second claim is the chymosin of the first claim mixed with a neutral preservative, such as an alkali soluble in water or sugar. By the terms of each claim the product is uncombined with pepsin. According to the testimony in the record Dr. Blumenthal conceived the idea that the curdling ferment of rennet could be obtained isolated from all other rennet constituents, and in a dry state; and in the years 1880 to 1882 he made experiments with a view of obtaining such a product. The patent in suit, and another (No. 338,471) which was granted March 22, 1886, for the processes of making chymosin and pepsin, are the outcome of these experiments. At that time, besides the rennet prepared in the way which has been mentioned, liquid extracts of rennet, prepared by adding boracic acid to the ordinary solution, to preserve it, had been introduced to some extent among dairymen, and so had powdered rennet made by drying and pulverizing the rennets; but both the liquid and powdered rennet were prepared by processes which did not contemplate the separation of the chymosin from the pepsin, and mucous and albuminous matters. Like the ordinary liquid of rennet, they were the extracts of the collected gastric juices. Their coagulating value was variable, depending upon the comparative coagulating and foreign constituents of the renneis used, and the liquid extracts, by reason of their chemical ingredients, sometimes imparted noxious flavors to the cheese. According to Dr. Blumenthal, before his chymosin was made, no pure coagulating ferment for commercial purposes had ever been made. He testifies, and so do his expert witnesses, that he was the first to make a product isolated from foreign ingredients having the curdling principle alone, in a dry state. In the language of Dr. Bischoff, while pepsin had been separated in an approximately pure form, "chymosin was not known as an isolated substance, especially not in the form of a dry powder, and as a commercial article."

The only evidence offered by the defendants to controvert the testimony of Dr. Blumenthal and the other expert witnesses for the complainant, or to show that the product described and claimed in the patent was not a

new article, consists of various publications relating to the subject of rennet and its extracts. Of those the only ones of the slighest value as anticipating references are those which describe Deschamps' process, Hammarsten's process, Scheffer's process, and Soxhlet's process. Deschamps, in treating of "laab" prepared from calf's stomach, speaks of it as containing "a peculiar matter, which the author calls 'chymosin,'" and gives a process by which a precipitate is obtained, insoluble in water unless the water is acidulated, which "curdles milk, though not with the power of the original laab." Hammarsten describes the curdling ferment by the term "lab," and points out that it is very difficult to get a liquid free from pepsin containing lab, while, on the contrary, it is tolerably easy to get a liquid free from lab, but rich in pepsin; and gives a process of obtaining a liquid free from pepsin in which "a not inconsiderable amount of the lab" remains. Scheffer describes a process for treating hog rennet to obtain pepsin, and does not offer a hint about the production of chymosin. Soxhlet gives a process for obtaining from a rennet extract a precipitate which consists not of pure ferment, but mainly of mucous, which carries with it the bulk of the ferment, and which "may be utilized to prepare very concentrated rennet extracts for experimental purposes." All these references may be disposed of by the observation that so far as can be collected from them the attempt to extract the pure curdling principle of rennet had not passed the region of laboratory experiment, and the thought of extracting it in the form of a dry ferment capable of commerical use had not originated. It is obvious that such a product as the patent describes will contain a known and uniform amount of the active curdling principle, free from all the useless or noxious constituents of rennet. As distinguished from the old rennet extracts, whether liquid or powdered, containing more or less of pepsin and other constituents, such a product would be not merely descriptively new but substantially new.

The evidence for the complainant to support the charge of infringement consists of a comparison by chemical analysis of the Hansen rennet powder sold by the defendants with the article known as "Dr. Blumenthal's Rennetine." The analysis of the Blumenthal rennetine does not show that it is chymosin uncombined with pepsin, or that it has any of the novel characteristics of the chymosin of the patent. The evidence indicates that it is a rennet powder containing but an insignificant proportion of pepsin to chymosin, and but little mucous and albuminous matter. Possibly and probably it is a purer and better rennet extract than had been made for commercial use before the alleged invention of Dr. Blumenthal. But, if the product produced by his process is nothing more than an old extract of rennet in the form of a powder, differing from those previously known only in having more of the curdling principle and less of the useless or deleterious matter, it is not the subject of a valid patent. A patent for a product destitute of properties or characteristics by which it can be identified and distinguished from an old product, and which rests merely upon the difference in the degree of excellence between the two, and not in kind, cannot be sustained.

Smith v. *Nichols*, 21 Wall. 112; *Wood Paper Patent*, 23 Wall. 566; *Wooster* v. *Calhoun*, 11 Blatchf. 215; *Excelsior Needle Co.* v. *Union Needle Co.*, 23 Blatchf. 147, 152, 32 Fed. Rep. 221; *Hatch* v. *Moffitt*, 15 Fed. Rep. 252.

The testimony of complainant's expert denotes that Hansen's rennet powder is richer in pepsin, and contains more of the mucous and albuminous matters, than Blumenthal's rennetine. According to the testimony introduced by the defendants the Hansen product is made by treating calves' rennets according to the process practiced by Scheffer in treating hogs' stomachs to obtain pepsin, described in the publication which has been referred to. Their theory is that, when his process is employed in the treatment of hogs' stomachs, a product is obtained which is strong in pepsin, and weak in chymosin, and when that process is employed to treat calves' stomachs, the product is an extract strong in chymosin and weak in pepsin. In any view of the case the charge of infringement is not established. The bill is therefore dismissed.

LEE *v.* UPSON & HART CO. *et al.*

(Circuit Court, D. Connecticut. October 4, 1890.)

PATENTS FOR INVENTIONS—ANTICIPATION—EVIDENCE.

The invention described in letters patent No. 365,819, issued July 5, 1887, to Horatio Jordan, for improvement in the art of welding the ends of metal tubes, and consisting in but-welding the ends of tubular metallic blanks, like those theretofore used, is near the dividing line between the work of an inventor and of a mechanic; and the evidence of cutlery manufacturers that they had but-welded such blanks before the patentee's invention being a natural and probable occurrence, is sufficient to satisfy the court of the fact of anticipation.

In Equity.

Bill by William W. Lee against the Upson & Hart Company and others, to restrain the defendants from infringing letters patent No. 365,819, issued July 5, 1887, to Horatio Jordan, for improvement in the art of welding the ends of metal tubes. For former opinion, see 42 Fed. Rep. 530.

Edward S. Beach, for complainant.

John P. Bartlett, for defendants.

SHIPMAN, J. This is a petition of the plaintiff for a rehearing of the above-entitled cause. The bill was dismissed, upon the ground that the invention described in the patent in suit, known as the "Jordan Patent," had been anticipated. 42 Fed. Rep. 530. The plaintiff asks for a rehearing on account of the insufficiency of the defendants' testimony upon this point. The case showed that the Jeralds and Lawton blank for a hollow knife-handle, which preceded Jordan's, was a tubular metallic blank, having at one end projecting lips which were bent inwardly, edge

to edge, and which were to be brazed together; that these lips were very like those of the Jordan blank, were bent towards each other in the same way, but were nearer together than in that blank; that a Jeralds and Lawton blank was capable of being but-welded by the use of the appropriate dies, and that a skillful forger of metals could have but-welded such a blank, before the date of the Jordan invention, if he had been told to do it. The Jordan improvement, so far as it was disclosed in the patent, consisted in but-welding, instead of brazing, the oval ends of a Jeralds and Lawton blank. Soldering, brazing, and lap-welding the end seams, and but-welding the side seams, of a hollow handle blank, had been well known before the date of either patent. The Jordan patent disclosed nothing in regard to the shape of the dies. That was a mechanical detail, to be adjusted by practice. The patentability of the invention seems to rest upon inadequate foundations, and, accordingly, I doubted whether it was patentable, but, from the history of the art, was led to the conclusion that the idea of but-welding the ends of a Jeralds and Lawton blank was the fruit of an inventive mind. It is still plain that the alleged invention is very near to the dividing line between the work of an inventive, and that of a merely mechanical, mind. This being the character of the invention, the Messrs. Hart testified that they practiced the same art in 1881, and that story is a natural and probable one. They were the sons of a manufacturer of iron and steel edged tools, worked in their father's shop, had long been familiar with welding and brazing, were familiar, before 1881, with hollow handles in which a seam was formed by brazing or soldering, began to be manufacturers of table cutlery in 1878, were inventors, and, as appears from a patent to H. C. Hart, were certainly familiar, in 1883, with a hollow handle, the lips of which were bent together for brazing. That the idea of but-welding the inclined lips of the end of a hollow handle should occur to them, and that they should carry the idea into effect, was most natural. It was not a mystery to them. If the improvement had been a complex mechanism, if the essence of the invention had been the nice adjustment of parts to produce a result, or if the thing to be done required genius of a superior order, the testimony would have been insufficient; but it requires much less testimony to satisfy a court that the Messrs. Hart, who had brazed, and welded, and but-welded, for years, conceived and carried out the idea of but-welding instead of brazing the inclined end lips of a blank, than it would to satisfy a court that they had made a new, complicated machine. In such a case as this, the severe scrutiny which is given to the alleged anticipation of the Morse telegraph, the Bell telephone, or the Howe sewing-machine is not called for, because reasonable doubts do not exist. The argument of the plaintiff forgets that it requires less testimony to establish a fact which was very likely to have occurred, than to establish an improbable theory. The application is denied.

AM ENDE *v.* SEABURY *et al.*

(Circuit Court, S. D. New York. August 5, 1890.)

1. PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT.
One who manufactures and sells a patented article is not relieved from the liability to account to the patentee therefor by the fact that he might have sold the ingredients of which the article is composed at the same or even a larger profit.
2. SAME—CORPORATIONS.
In accounting for the profits made by a corporation in the manufacture and sale of a patented article no allowance should be made for the services of the president of the corporation where it is not shown that he received a salary.
3. SAME—LOSS OF PROFITS.
Where the reduction in the price of a patented article by an infringer compels the patentee to reduce his price also, the loss caused by such enforced reduction is a proper item of damages in a suit for infringement.
4. SAME—PROFITS—INTEREST.
In estimating the profits of a business, interest on the capital invested should not be considered.

In Equity. Bill for infringement and accounting. On exceptions to master's report.

Antonio Knauth, for complainant.

N. T. M. Melliss, for defendant.

WALLACE, J. None of the exceptions filed by the defendant to the master's report are well taken.

1. The corporation defendant manufactured and sold the borated cotton of the complainant's patent, and it was properly held liable for the profits derived from the manufacture and sale of that article, notwithstanding it might have made and sold the cotton, boracic acid, and glycerine, which are the ingredients of borated cotton, if it had chosen to do so, and at the same or even a larger profit. Instead of selling these ingredients, however, the defendant preferred to convert them into the new chemical composition invented by the complainant, and whatever profit it derived accrued by reason of appropriating the patented invention.

2. The master properly refused to allow the defendant, as an element of the "factory cost" of the borated cotton, interest on the capital of the corporation invested in its business. As the supreme court say in disallowing a similar item in *Rubber Co.* v. *Goodyear*, 9 Wall. 804, in ascertaining profits: "The calculation is to be made as a manufacturer calculates the profits of his business." In calculating profits, manufacturers customarily treat as items of expense interest paid out on money borrowed for the use of the business, as well as rent paid for the use of property in the business; but it is not customary to charge against profit interest upon the capital embarked by the owners in the enterprise, or rent for the use of property owned by them. There is nothing inconsistent with this conclusion in the opinion in *Manufacturing Co.* v. *Cowing*, 105 U. S. 257, because, for all that appears, in that case the "use of tools, machinery, and power," for which it was said an allowance should be made to the defendant, may have been a hired use.

3. The master properly disallowed the item of $15,000 per annum for salary of the president of the defendant as an element of cost, because it was not shown that the president was a salaried officer. The defendant introduced evidence to show what compensation would be reasonable for such services as were performed by the president of the defendant, but for all that appears he was serving without compensation. If he had been paid any salary the fact could and would have been shown.

4. The master properly found that the percentage for selling expenses which should be added to the factory cost of all the goods sold by the defendant, exclusive of the goods known as "Benson's Plasters," was 29 per cent. The fair interpretation of the very confusing statement of the cashier of the defendant is that instead of 50 per cent. the amount to be added was 76,837/132,473 of 50 per cent.

5. The testimony showed that the defendant was the only competitor of the complainant in the market in selling the borated cotton of the patent, and that in consequence of the reduction of price made by the defendant the complainant was compelled to reduce his price in order to retain his customers. The loss entailed upon him by reason of this enforced reduction of price was a proper item of damages, and was properly allowed by the master.

WEBSTER LOOM CO. *v.* HIGGINS *et al.*

(Circuit Court, S. D. New York. September 1, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—MEASURE OF DAMAGES.
Where the infringers of a patented loom for weaving carpets could, according to the patentee's own evidence, have attained the same results if, instead of using the infringing looms, they had used twice that number of non-infringing looms, the patentee's measure of damages is the difference between the cost of weaving the carpets on the non-infringing looms and the cost of weaving them on the infringing looms, and not the net profits which the infringers received per yard on the increased amount of carpets manufactured by means of the infringing looms. Disapproving *Webster* v. *Carpet Co.*, 2 Ban. & A., 67.

2. SAME—ACTION FOR INFRINGEMENT—MASTER'S REPORT.
Where the master, to whom was referred the ascertainment of the damages sustained by complainant in consequence of defendants' infringement of its patented loom, has not specifically found as to the alleged superiority of a non-infringing loom over the one infringed, the court will not assume that he intended to so find from indefinite answers to defendants' requests on that subject, but will recommit the case to him, so that he may clearly state his own conclusions from the evidence.

3. SAME—NEWLY-DISCOVERED EVIDENCE.
Where defendants introduced evidence of the alleged superiority of the non-infringing loom at the close of a long hearing before the master, complainant, who was then unable to obtain rebutting evidence, and who did not then have a full opportunity to present that branch of its case, will be permitted to do so on the recommitment of the case to the master, though complainant does not unquestionably bring itself within the rules which ordinarily govern the reopening of a hearing to admit newly-discovered testimony.

In Equity. On exceptions to master's report. For former report, see 39 Fed. Rep. 462.

Edward N. Dickerson, *Esek Cowen*, and *Edward Stephens*, for complainant.

Livingston Gifford and *Walter K. Griffin*, for defendants.

Before SHIPMAN and WALLACE, JJ.

WALLACE, J. I have sat with Judge SHIPMAN upon the reargument of the exceptions to the master's report in order that a ruling of mine, made upon the application of the defendants for instructions to the master, might be reconsidered; and the other questions which have been reargued will be disposed of by Judge SHIPMAN without my participation. At the threshold of the accounting the defendants applied for instructions to the master, which would, if allowed, preclude the complainant from investigating the cost of carpet material to the defendants at any stage of manufacture before it was ready for the loom. These instructions could not have been given without disregarding the decision of Judge NIXON in *Webster* v. *Carpet Co.*, 2 Ban. & A., 67. He had decided that an infringer of the patent was liable for the net profits realized upon the number of yards of carpet made by the use of the invention in excess of the quantity that could have been made by using non-infringing looms. That decision was accepted as the correct rule of recovery upon the application for instructions, without any independent consideration of the nature of the patent or the character of the infringement. Notwithstanding the excellent authority of the opinion of Judge NIXON in support of the ruling, I am satisfied that my ruling was radically erroneous.

The invention which the defendants have appropriated is specified in the fifth claim of the patent, and is for an improvement in the wire-motion devices of looms for weaving pile fabrics. The improvement enables the loom to be driven more rapidly, and thereby the weaver can make more yards of carpet in the same period of time than he could make upon a loom without it. The defendants were manufacturers of carpets on a large scale, having the requisite capital and general facilities for carrying on an extensive business. They bought the material, chiefly wool, of which carpeting is made, in the raw state, and, after subjecting it in the various departments of their factory to the operations of washing, sorting, combing, carding, spinning, dyeing, etc., in order to prepare it for the loom, at the last stage of the production of carpets wove it upon looms, some of which contained the patented invention. When the material was prepared for the loom, it was in that condition a marketable commodity, and presumably could have been sold in the market at a profit above cost, which would have yielded the defendants a partial return, at least, for the use of their capital, and for their experience and judgment in purchasing and treating it. During the period of infringement there were other looms, open to public use, having devices for effecting the result accomplished by the patented devices, and by which the same result of increased rapidity in weaving was actually accomplished with a greater or less degree of success. The defendants employed many non-infringing looms in their factory, together with 61

infringing looms. They wove 8,277,012 yards of carpeting on the infringing looms, which quantity, according to the theory of the complainant, was 4,145,872 yards more than they could have woven on the same number of non-infringing looms. Consequently it appears, in the aspect of the proofs most favorable to the complainant, that the defendants could have made all the carpeting they did make if, instead of using the 61 infringing looms, they had used twice that number of non-infringing looms. Upon such a state of facts it is entirely clear that the defendants are not accountable for any part of their profit upon the material when it was ready for the loom, included in its market value at that time, or for any part of the seller's profit on the increased production.

In settling an account between a patentee and an infringer, the liability of the latter for profits is measured by the advantage which he has gained by the use of the patented invention. It is often difficult to ascertain with even approximate accuracy what the value of this advantage is in a particular case; and the rule established by the adjudications, which imposes upon the patentee the burden of ascertaining and separating this value from the profits which the infringer might have made without appropriating the invention, but did not make, nor attempt to make, frequently strips the patent of all value. Nevertheless the rule obtains, and must be applied as best it may be to cases as they arise by the light of the illustrations afforded by the reported cases. The adjudications declare that the advantage gained by the infringer who makes and vends a patented article is measured by the value which the invention contributes to the market value of the article; and he is held accountable to that extent, unless his net profit in making and selling the article is less than the value of the invention. If the invention invests the article with its whole value as a marketable commodity, his entire gains are attributed to the invention. If it contributes only a subsidiary value, this value, segregated from the independent market value of the article, is the advantage for which he is accountable; and it is incumbent upon the patentee to show affirmatively what this advantage is worth by reliable evidence, however difficult it may be to do so. In *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, the patented article was a wood pavement, and did not differ from other wood pavements, open to public use, except in the mode of arranging and combining the materials of which it was composed; but the infringer was held liable for the whole difference between the cost of materials and labor and the price received for the pavement when laid, upon the theory that the whole value of the pavement was contributed by the invention. The court said:

"The parts were so correlated to each other, from bottom to top, that it required them all, put together as he put them, to make the complete whole, and produce the desired result. * * * Thus combined and arranged, they made a new thing, like a new chemical compound. It was this thing, and not another, that the people wanted and required."

On the other hand, in *Dobson* v. *Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945, the patent was for a design for carpets, and the court below had allowed as profits the difference between the cost to the infringer

and the selling price. But the supreme court considered it a matter of common knowledge that, as between carpets of different designs, one patented and another not, the one with the patented design might or might not command in the market a higher price than the other, and reversed the decree below; applying the doctrine that the entire profit from the manufacture and sales of a patented article is not chargeable to the infringer "unless it appears by reliable evidence that its entire value as a marketable article is properly and legally attributable to the patented feature." The court held in that case that the owner of the patent could not recover anything as infringer's profits, because the value of the advantage attributable exclusively to the design was not shown. In the more recent case of *Callaghan* v. *Myers*, 128 U. S. 617, 666, 9 Sup. Ct. Rep. 177, the infringer of a copyright had published and sold books in which copyrighted matter was incorporated with matter which he had a right to use, and the court held that, the lawful matter in the infringing book being useless without the unlawful, and it being impossible to separate the profit on the latter from that on the former, and the volume being sold as a whole, the defendant was responsible for the consequences, and liable for the entire profit. In the recent case of *Am Ende* v. *Seabury*, *ante*, 672, (decided in this court,) the infringing corporation was held liable to the owner of a patent for a chemical preparation (borated cotton) to the extent of the whole profit made on the sale of the article. It was insisted that the ingredients of the compound could have been sold at a profit, and that it was incumbent upon the patentee to prove what part of the whole profit arose exclusively from selling them as borated cotton; but the court held that, the defendant having converted them into the new chemical composition, and having sold them as such, whatever profit accrued was attributable to the patented invention.

The embarrassment so often found in ascertaining the value of the advantage derived by an infringer when the infringement is the selling of a patented article seldom occurs in cases where the infringement consists in using a patented process or machine by which a thing old in itself may be made more economically than it could be without employing the invention. In these cases the advantage attributable to the invention is the gain in economy of manufacture; and it matters not whether the general business of manufacturing and selling the product has proved profitable to the infringer or not, he is responsible to the patentee to the extent that he has saved himself from loss by using the patented invention. *Mowry* v. *Whitney*, 14 Wall. 620; *Cawood Patent*, 94 U. S. 710; *Black* v. *Thorne*, 111 U. S. 123, 4 Sup. Ct. Rep. 326; *Thomson* v. *Wooster*, 114 U. S. 104, 5 Sup. Ct. Rep. 788; *Conover* v. *Mers*, 11 Blatchf. 197, affirmed, 125 U. S. 144, note, 8 Sup. Ct. Rep. 898, note; *Tilghman* v. *Proctor*, 125 U. S. 136, 8 Sup. Ct. Rep. 894. In such infringements it is immaterial what profits the infringer has made in his business, or from his manner of conducting it; but the expense of using the process or machine over that of using one open to the public is to be ascertained by the manner in which he has conducted his business, and not by the

manner in which he might have conducted it. The advantage derived by the farmer who has raised a crop of grain and threshed it with a patented machine which threshed more in a given time than any other machine could have threshed is not, according to the rule of the adjudged cases, the profit made on the sale of the excess, including the contribution made by the use of his land, and by his labor in plowing, planting, reaping, and harvesting; no more is it, in the present case, the profits made by the defendants upon the manufacture and sale of their increased production of carpets.

Assuming that the defendants were by the use of the patented wire-motion enabled to weave more yards of carpet than they could under similar conditions and circumstances with non-infringing looms, the inquiry in the case is how much more it would have cost them to employ enough non-infringing looms to do the work done by the patented looms. It is not necessary to consider at this time what factors enter into this inquiry. It suffices for present purposes to indicate what is the ultimate inquiry to be solved upon the accounting.

SHIPMAN, J. There are two motions in regard to the above-entitled cause. They were made in consequence of the opinion of the court, which recommitted the report to the master. 39 Fed. Rep. 462. One is by the plaintiff, that it may be permitted to present to the master new evidence in regard to the Johnson loom. The second is by the defendant, asking for a reargument of the question arising upon the exceptions to the master's report. So much of the defendant's motion as relates to the exception to the master's conclusion in regard to the rule for the computation of profits in case an advantage was found by the use of the patented device described in the fifth claim of the patent was heard before Judge WALLACE and myself. Judge WALLACE's opinion, in which I concur, is to the effect that the rule which the master adopted was the proper one, and consequently the exceptions which relate to that part of the report are overruled, and his conclusion that there was a failure to establish a legal basis for the computation of profits is sustained.

The question then arises as to the propriety of recommitting the report, either for the purpose of taking additional evidence in regard to the Johnson loom or for new findings of fact. The master said in his report:

"In view of the expense in time and money already consumed in this case, I deem it proper to report further respecting the factor of superiority, [of complainant's invention,] so that in case the conclusions of law may be overruled on exceptions, the necessity of sending the case back for further report may possibly be avoided."

This course was eminently proper. The accounting before him commenced in the latter part of 1882 or in 1883. The defendants' testimony in regard to the Johnson motion was taken in May, 1887, and their testimony was closed July 21, 1887. The master's draft report was dated July 27, 1888. The hearing was a long and very expensive one, the testimony is voluminous, and the questions of fact require

much study. The case will probably go to the supreme court, and, if the conclusion of law in regard to the rule for computation of profits should not be sustained, it would be very desirable to have the findings of the master and of this court upon the volume of testimony in such condition that the supreme court can also review the questions of fact, and, if practicable, bring this expensive litigation to a close. To this end it is important that the report should be recommitted for the purpose specified in my former opinion.

The next question is in regard to the admission of new testimony by the complainant in respect to the Johnson device. The defendants' testimony in regard to this loom was taken near the close of the exhaustive hearing before the master. The complainant's counsel were not at the time able to find and obtain rebutting testimony, for the reason stated in the affidavit of Mr. Stephens, and also, in my opinion, did not give to this part of the defendant's testimony the importance which it subsequently assumed. It is now able to find and to produce testimony which it deems important. While it does not bring itself, without question, within the rules which ordinarily govern the reopening of a hearing to admit newly-discovered evidence, the complainant has not yet presented that part of its case, and has not had a full opportunity to do so, and it would be, in my opinion, inequitable to say that it never shall present it. The motion of the plaintiff is granted.

The remaining question arises upon the application of the defendants for a reargument of the exceptions to the master's report, in order to show that the facts in regard to the Johnson motion, which the court desires to have found, were found by the master. After a draft report had been submitted, and exceptions thereto had been filed, which were considered and overruled, the master signed and filed the draft as his final report. He also says in his report:

"Written requests, somewhat voluminous, to find facts and conclusions upon matters not included in such report, having been presented, such requests are filed herewith, with my action indicated thereon."

The defendant filed 92 requests to find upon matters of fact, and 14 requests to find conclusions of law. To the requests upon matters of fact the master appended the words "I so find," or "I do not so find," or "Substantially correct." These findings were treated by the parties as, and I have assumed them to be, *addenda* to the master's report, but I have not attributed to the statements contained therein the same importance which unquestionably belongs to the main report. The ninth request is to find that the following number of yards of carpet were woven at defendants' mill during the years 1874 to 1881, inclusive, the average amount woven per loom per day being stated as reduced *pro rata* to the number of wires to the inch of carpet to an arithmetically equivalent number of yards of nine-wire carpet, the yards so reduced being termed "9-wire level, * * * on 54 Gilbert & Taft looms, including the Sterling loom, and three sample looms, Nos. 54, 55, and 56, with the Davis and Duckworth wire motion devices, * * * average per day 53.37 yards." The master says: "I so find." Similar

requests were made in regard to each set or class which made up the 61 infringing looms. The daily average of the 61 looms is found to be 52.90 yards. The fifty-ninth request is that—

"The Johnson loom, with the said motion, for the seven years—May 1, 1874, to April 30, 1881—wove from 1,288,623 yards to 1,842,314 yards per year of 10-wire tapestry, 216 sets of worsted ends, and averaged a daily production in gross per year of from 44.65 to 50.55 yards per loom of said carpet. A small immaterial amount in fact of shoe carpet was woven in the earlier years irregularly on a few looms. The gross daily average or loom for said seven years was 48.531 yards of 10-wire carpet, equal to 53.935 yards of 9-wire level."

The master said, "Substantially correct." In reply to subsequent requests the master found facts which, it is claimed, gave the Johnson loom additional allowances in its favor; so that if an estimate of these allowances was made it would be found that the Johnson loom, with its motion, could weave 8.16 per cent. more per day than the 61 infringing looms did, upon an average, weave. If this evidence enables the master to find, as his conclusion from it and the other testimony, that the Johnson motion was equal or superior to the motion which, for convenience sake, I call the "Webster motion," he can easily state such conclusion. He did not state it in his answers to the eighty-second and eighty-eighth requests, although he had an opportunity to do so, and the omission seemed to me of importance. The general conclusion which the defendants asked the master to find in regard to the superiority of the motions, seven of which they claimed to be free and open to the public at the date of the Webster patent, were, with the answers thereto, as follows:

"(81) Complainant has not shown any gain or profit or advantage to defendants by the use of the Davis or Duckworth motions, as compared with the use under similar circumstances of the following motions: (*a*) The Bigelow. (*b*) The Collier Bandy, (1862.) (*c*) The Collier Overhead or Upright. (*d*) The Johnson. (*e*) The Weild Trough. (*f*) The Weild Cylindrical. (*g*) The Moxon. (*h*) The Magnetic. I so find. J. A. S.

"(82) Defendants have shown that said motions *a*, *b*, *c*, *d*, *e*, *f*, *g*, and *h* of request No. 81 are equal or superior to the Davis or Duckworth motions, and of equal or superior advantage or usefulness in carpet manufacture. I do not so find. J. A. S."

"(87) Complainant has not shown any increase in the average amount of carpet woven per loom in the same time, due to the use of the Webster combination of the 5th claim, as compared with said wire motions *a*, *b*, *c*, *d*, *e*, *f*, *g*, and *h* of request No. 81. I so find. J. A. S.

"(88) Defendants have shown that said motions *a*, *b*, *c*, *d*, *e*, *f*, *g*, and *h* of request No. 81, upon looms old and well known in the art prior to the date of the Webster patent, and of the period of infringement herein, are capable of running at as great and greater loom speed than the Davis or Duckworth motions were run at, and of weaving more carpet per day per loom. I do not so find. J. A. S."

The answers throw no light upon the subject to which the questions relate. Requests 82 and 88 were probably construed by the master to call for a finding of the inferiority of the Davis or Duckworth motions to each one of the specified motions, and his negative answer is there-

fore consistent with a belief that the Davis or Duckworth motions had been proved to be inferior to one or more of the specified motions. It is nevertheless true that the master could, if he had chosen, have made a specific finding under question 82 in regard to the Johnson or any other motion. In response to the plaintiff's requests, he had already indicated his opinion in regard to the state of the evidence upon the productive capacity of the Moxon and Magnetic looms. I think that he did not intend to state his conclusions in regard to the Johnson motion, although he may think that its superiority is proved, and therefore I prefer that he should state his own conclusions from his patient study and accurate knowledge of the evidence, rather than that they should be spelled out from the answers to the defendants' requests.

SCRIBNER *et al. v.* HENRY G. ALLEN CO.

BLACK *et al. v.* HENRY G. ALLEN CO.

(*Circuit Court, S. D. New York.* September 30, 1890.)

COPYRIGHT—FILING COPIES OF BOOK—INFRINGEMENT—PLEADING.

Rev. St. U. S. § 4956, allowing a person seeking a copyright to deliver at the office of the librarian of congress the copy of the title of the book and the two copies of the book which the statute requires to be deposited, and also permitting the deposit of such copies in the mail, addressed to such librarian, does not prevent both the delivery and mailing of the copies; and, where a complaint for infringement avers that both these acts were done, complainant will not be required to elect which averment he will undertake to prove at the trial, and to abandon the other. Distinguishing *Falk* v. *Howell*, 37 Fed. Rep. 202.

In Equity. On bill for injunction.

Motion to compel complainants to amend bill. For former report, see 42 Fed. Rep. 618.

Rowland Cox, for complainants.

James A. Whitney, for defendant.

LACOMBE, Circuit Judge. An essential feature of the copyright system is the deposit in the proper government office of a printed copy of the title, and also of two copies of the book or other article for which copyright is sought. It is made the duty of the person seeking a copyright to see to it that such deposits are made. The statute allows him to "deliver [such title and copies] at the office of the librarian of congress." It also allows him "to deposit [such title and copies] in the mail, addressed to the librarian of congress." One or other of these must be done, but there is nothing in the statute to prevent the author or proprietor from doing both. Section 4956. The bill of complainants alleges that in this case both were done. Defendant insists that this assertion is so "improbable" and "incredible" that it may be assumed to be false. Such a proposition is clearly unsound. One, who was anxious to be in a position to prove, at any time, compliance with the

statute might very well employ one person to deposit two copies in Washington, and another to mail two copies in New York, thus securing two independent witnesses to the fact of such compliance. It must be assumed, then, that both steps were taken in this case. The defendant's motion now is that—

"Complainants be directed to so amend their bill of complaint that it shall clearly and distinctly appear whether complainants allege that the title of the alleged copyright work was delivered to a postmaster, to be mailed to the librarian of congress, or whether complainants allege that such title was delivered at the office of the librarian of congress, and that all reference to the act which is not so alleged as the basis of complainants' copyright be stricken from the said bill of complaint; and that the court order and direct in like manner concerning the allegations regarding the delivery to a postmaster for mailing, or, as the case may be, the delivery at the office of the librarian of congress, of the two copies," etc.

Inasmuch as it now clearly and distinctly appears on the face of the complaint that both acts were done, and that neither was not done, the particular relief prayed for must be denied. The motion, however, may be treated as practically one to require the complainants to elect which averment they will undertake to prove on the trial, and to compel them to abandon the other. This should not be required of them. They have done what the statute allows them to do, and aver that they have done so. To deprive them at this stage of the right to make proof thereof on the trial would be unfair. If they should now elect to prove the mailing, their witness to that fact might die before the trial, and they might thus fail to establish their case, although still able, if their pleading permitted it, to make proof of the deposit. And the converse is equally true. The distinction between this case and *Falk* v. *Howell*, 37 Fed. Rep. 202, cited on the argument, is that in the latter case the complaint in substance averred that one act was done and one was not done, and at the same time failed to indicate which was the one that was done, and on the doing of which alone the complainant relied. It was therefore ambiguous, and tendered no issue. The bill now before the court is unambiguous, and distinctly and plainly tenders two issues. The motion is denied. Five days after order granted defendant to plead, answer, or demur.

THE CALEDONIA.

(*Circuit Court, D. Massachusetts.* October 1, 1890.)

1. SHIPPING—BILL OF LADING.
   Where a bill of lading is given by the ship-owner and accepted by the shipper without objection, a prior agreement for the carriage is not a final and definite statement of all the terms of the agreement between the parties, and the bill of lading is the real contract by which the mutual obligations of the parties is to be governed.
2. SAME—WARRANTY OF SEAWORTHINESS.
   Unless otherwise expressly stipulated, there is an absolute warranty on the part of the ship-owner that the ship is or shall be seaworthy at the time of beginning her voyage, and such warranty is not affected by an exception of damages from

"steam-boilers, and machinery or defects therein," inserted in the bill of lading in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage.

3. SAME—DELAY IN DELIVERY—DAMAGES.

Where a ship-owner receives cattle for carriage with knowledge that they are to be sold at the first possible market day after arrival, and there is a delay in their arrival owing to the unseaworthiness of the vessel, he is liable to the shipper for the fall in the market value of the cattle.

In Admiralty. On appeal from district court.

Russell & Putnam, for appellants.

Henry M. Rogers and *Warren K. Blodgett*, for appellee.

Before GRAY, Justice, and COLT, J.

FINDINGS OF FACT.

This was a libel in admiralty, in a cause of contract, civil and maritime, by a shipper of cattle against the steam-ship Caledonia, to recover damages caused by the breaking of her shaft. The Caledonia was one of the Anchor Line of transatlantic steam-ships, owned and employed by the claimants, Henderson Bros., as common carriers. The plaintiff was a dealer in and exporter of cattle. The terms of the contract between the parties were as expressed in the following memorandum of agreement, made before the shipment of the cattle, and in the following bill of lading, signed at the time of shipment, and afterwards accepted by the libelant.

"MEMORANDUM OF AGREEMENT.

"Concluded at New York, the twenty-fifth day of May, 1885, between Messrs. Henderson Brothers, 7 Bowling Green, New York, agents of the steamer Caledonia, hereinafter described as the party of the first part, and Mr. M. Goldsmith, of New York, hereinafter described as the shipper of the second part. The agents of the steamer agree to let to said shipper suitable space, as undernoted, for the transportation of live cattle, that is to say, on the steam-ship Caledonia, for about two hundred and seventy-five to three hundred head of cattle on and under decks. Steamer expected to sail from Boston for London about eleventh of June. The agents agree to fit the stalls in the style customary at the port of Boston, to the satisfaction of inspectors of Boston insurance companies, and the shipper, who will assume all responsibility for same, and for various appliances of ventilation after shipment of the cattle; and the steamer Caledonia undertakes to supply sufficient good condensed water for the use of the animals during the voyage. All water casks, buckets, hose, and similar appliances must be put on board by shipper of the cattle. A reasonable supply of fodder for the animals will be carried by the steam-ship Caledonia, free of freight; but freight, if demanded, shall be payable on any unusual excess of fodder landed at port of destination. Hay and straw to be in compressed bales. The steamer Caledonia will also furnish free steerage passage for attendants (not exceeding one man to every thirty cattle) over and return, providing them with the necessary utensils for the voyage. The agents of the steamer agree to notify the said shipper, at least six days in advance, of the intended departure of the steam-ship, and, twelve hours prior to sailing, of the day and hour. In event of shipper failing to deliver the cattle to steam-ship within twenty-four hours after expiry of due notice, as aforementioned, steamer is to have liberty to sail, and freight is to be paid in full by the party of the second part. The steamer Caledonia agrees to deliver the cattle at Deptford, and the shipper agrees to bear tonnage, dock,

or shed dues when incurred. The cattle are to be delivered and received from steam-ship's decks immediately on arrival at the port of destination. The shipper agrees to ship all the cattle the steam-ship can carry, as above mentioned, paying freight on same at the rate of forty-five shillings British sterling per bullock for all cattle shipped. The shipper agrees to prepay freight on the above-mentioned shipments in current funds, at first-class bankers, selling rate for sight exchange, on the number of cattle shipped at Boston, vessel lost or not lost, and irrespective of the number landed at the port of destination; and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage. The shipper agrees to deliver the cattle on the date and hour ordered by the agents of the steamer, or pay demurrage of the steam-ship for all or any detention incurred by his failure to do so. In case of non-arrival of vessel in time to sail from Boston on or before 18th June, shipper has option of cancellation. Any dispute arising on this contract to be settled by arbitration in the usual way in Boston. HENDERSON BROTHERS."

"CATTLE BILL OF LADING.

"Shipped alive, by M. Goldsmith, and at shipper's risk, in and upon the steam-ship called the 'Caledonia,' now lying in the port of Boston, and bound for London, two hundred and seventy-four head live cattle, to be delivered from the ship's deck at the aforesaid port of London; the act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, steam-boilers and machinery, or defects therein, transshipment, escape, accidents, suffocation, mortality, disease, or deterioration in value, negligence, default, or error in judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steam-ship or of the owners or their agents, excepted; with liberty to sail with or without pilots, to tow and assist vessels in all situations, to call at any port or ports to receive fuel, load or discharge cargo, or for any other purpose, and, in the event of the steam-ship's putting back to Boston or into any other port, or being prevented from any cause from proceeding in the ordinary course of her voyage, to transship by any other steamer unto order, or to his or their assigns. Freight for the said stock to be paid without any allowance of credit or discount, at the rate of £2-5-0 sterling for each animal shipped on deck, and £2-5-0 sterling for each animal shipped under deck, whether delivered or not, vessel lost or not lost, cattle jettisoned in all or in part, or otherwise lost, with average accustomed. In the event of the loss of the vessel, of her not arriving at the said port, or of the consignee neglecting to pay the freight upon the arrival of the vessel, or neglecting to pay the charges and expenses herein mentioned, the shipper, in consideration of the waiving of the payment of the freight in advance, hereby binds and obligates himself to pay the freight above expressed, and such charges and expenses, upon demand. It is also stipulated and agreed by the shipper, as a condition of the shipment, that he will take charge of the stock during the voyage, the vessel furnishing water only; that he has examined the condition of the steamer, the construction of the stalls, and the means of ventilation, and approved of the same, and that no claim shall be made for any loss or damage resulting therefrom; that any mortality, sickness, or deterioration in the condition of the stock shall be presumed to arise from the condition of the animals when shipped, or from natural causes. Consignees to enter the property at the custom-house within twenty-four hours after the ship is reported there, and to remove the same immediately upon being landed, otherwise the property may be discharged by the agents of the ship at the expense and risk of the shipper or consignee of cargo. Porterage of the delivery of the cargo to be done by agents of the ship, at the expense and risk of the receivers. Lighterage, ton-

nage, and shed dues payable by the receivers. This bill of lading, duly indorsed, to be given up to the ship agents in exchange for delivery order. In witness whereof, the master, purser, or agents of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void. In accepting this bill of lading, the shipper, as owner, or agent of the owner, of the property shipped, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed.

"*Dated in Boston, Mass., 15th June,* 1885.

"J. MILLER STEWART, for the Agents."

On Monday, June 15, 1885, the libelant shipped on board the Caledonia at Boston, to be delivered at Deptford, 274 head of cattle in good order and condition, and put on board fodder sufficient for a voyage of 15 days, a day or two more than the usual length of voyage, being all the fodder that by the usage of the business he was bound to provide. On the morning of June 24th, the ninth day out from Boston, in smooth weather, the propeller shaft of the Caledonia broke straight across in the stem tube. There had been no heavy weather on this voyage, and the propeller did not strike against any rock or derelict or other object. The cause of the breaking of the shaft was its having been weakened by meeting with extraordinarily heavy seas on previous voyages. At the time of leaving Boston on June 15th, the shaft was in fact unfit for the voyage, and by reason of its unfitness the vessel was unseaworthy. No defect in the shaft was visible, or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined. No negligence on the part of the owners of the steam-ship was proved. By reason of the breaking of the shaft the voyage lasted 25 days, and the cattle were put on short allowance of food, and, in consequence thereof, were landed at Deptford in the afternoon of Monday, July 20th, in an emaciated condition. The market days in London were Mondays and Thursdays. By the usual course of the business of shipping live cattle from Boston to Deptford for the London market, and in accordance with the knowledge and contemplation of both parties at the time of the execution of the memorandum of agreement and the bill of lading, the cattle were not to be sold before arrival, and were sold at the first market after their arrival. The amount of the damages suffered by the libelant was as stated in the following agreement, signed and filed by the counsel of the parties:

"It is hereby agreed that the whole amount of damages suffered by the libellant (exclusive of interest) arose from two sources of loss: shrinkage in the weight of cattle from the protracted voyage, and fall in the market value of the cattle during the delay in arrival; and that these two causes together made the loss seven thousand eight hundred and fifty dollars, and that one half thereof, to wit, three thousand nine hundred and twenty-five dollars, was and is to be attributed to each cause."

CONCLUSIONS OF LAW.

There was a warranty that the vessel was seaworthy at the time of sailing from Boston. This warranty was not affected by the exceptions in the bill of lading. The breach of the warranty was the cause of all the damage claimed. The libelant is entitled to recover $7,850 and interest.

GRAY, Justice. A contract for the carriage of goods by sea may doubtless exist without a bill of lading; and, when the parties have made such a contract, the ship-owner cannot, without the shipper's consent, vary its terms by inserting new provisions in a bill of lading, and the shipper may decline to assent to the modifications, and insist upon his right to have the goods carried under the original contract. *Jones* v. *Hough*, 5 Exch. Div. 115; *Crooks* v. *Allan*, 5 Q. B. Div. 38, 40, 41; Lord BRAMWELL, in *Sewell* v. *Burdick*, L. R. 10 App. Cas. 74, 105. But the bill of lading is often given by the ship-owner and accepted by the shipper as expressing the terms of the agreement between them, and when this is the case both parties are bound by its provisions. *Glyn* v. *Dock Co.*, L. R. 7 App. Cas. 591, 596; *Chartered M. Bank of India* v. *Netherlands, etc., Co.*, 10 Q. B. Div. 521, 528; *The Delaware*, 14 Wall. 579. In the case at bar the original contract, although containing no mention of a bill of lading, was evidently a preliminary memorandum only, and not a final and definite statement of all the terms of the agreement between the parties. For instance, it did not even except perils of the sea, yet it is incredible that either party contemplated or intended that the carrier should be liable for such perils. And the shipper not only, without objection, accepted and forwarded to the consignees their bill of lading, but in the usual course of business between the parties, both before and after this shipment, he accepted similar bills of lading under like circumstances. It is a necessary conclusion of fact, as well as of law, that the bill of lading was understood and intended to be, and was, evidence of the real contract by which the mutual obligations of the parties were to be governed. The shipper is therefore bound by the exceptions in the bill of lading, as far as those exceptions are valid in law. So far as they undertake to exempt the carriers from responsibility for the negligence of their servants, they are inoperative and void. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469. But in this case, as no negligence is proved, that part of the exception is immaterial.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship-owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence. *Work* v. *Leathers*, 97 U. S. 379; *Cohn* v. *Davidson*, 2 Q. B. Div. 455; *The Glenfruin*, 10 Prob. Div. 103. In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left port, and that unseaworthiness was the cause of the damage to the libelant's cattle. The exception of "steam-boilers and machinery, or defects therein," inserted in an instrument framed by the ship-owners, and in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage, must, by elementary rules of construction, and according to the great weight of au-

thority, be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time of leaving port upon her voyage. *Kopitoff* v. *Wilson*, 1 Q. B. Div. 377; *Steel* v. *Steam-Ship Co.*, L. R. 3 App. Cas. 72; *The Glenfruin*, 10 Prob. Div. 103; *Tattersall* v. *Steam-Ship Co.*, 12 Q. B. Div. 297; *The Rover*, 33 Fed. Rep. 515. The opinion in *The Miranda*, L. R. 3 Adm. & Ecc. 561, so far as it tends to a different conclusion, is contrary to the later cases; and in *The Laertes*, 12 Prob. Div. 187, the bills of lading expressly restricted the warranty of seaworthiness to cases in which there had been a want of ordinary and reasonable care.

It has been held by the highest courts of Michigan, Massachusetts, and New York, upon reasons which appear to us conclusive, and which it is unnecessary to restate, that a common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterwards, and when their market value is less, is responsible to the owner of the goods for such difference in value. *Sisson* v. *Railroad Co.*, 14 Mich. 489; *Cutting* v. *Railway Co.*, 13 Allen, 381; *Ward* v. *Railroad Co.*, 47 N. Y. 29. The same general rule has been often recognized as applying to carriers by sea in this circuit as well as in the second circuit. *Oakes* v. *Richardson*, 2 Low. 173, 178; *Page* v. *Munro*, Holmes, 232; *Rowe* v. *The City of Dublin*, 1 Ben. 46; *The Success*, 7 Blatchf. 551; *The Giulio*, 34 Fed. Rep. 909. But this case does not require us to go so far, because it clearly appears that these parties, at the time of contracting together, knew and contemplated that the cattle were not to be sold before arrival, and were to be sold at the first possible market day after arrival; and, under such circumstances, there can be no doubt whatever that the carrier is liable to the shipper for the fall in the market value of his goods. *Telegraph Co.* v. *Hall*, 124 U. S. 444, 456, 8 Sup. Ct. Rep. 577; *The Parana*, 2 Prob. Div. 118, 121, 123. Decree affirmed, with interest and costs.

The Columbus.[1]

Smith *v.* The Columbus.

(*District Court, E. D. New York.* October 6, 1890.)

1. Seaman's Wages—Agreement not to Sue until Specified Time.
The agreement of a seaman not to bring suit for his wages, if discharged, until a certain time after such discharge, is valid where the vessel on which he is employed is a harbor vessel, unable to leave the port, and where there is no voyage or limitation of the time of service.

2. Same—Written Agreement—Premature Suit.
When a seaman, by written instrument, agreed that if discharged the wages due him should be payable on the next regular pay-day of his employer, and on being discharged commenced suit for his wages without waiting for such pay-day, the suit was premature.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Suit for seaman's wages.

Anson Beebe Stewart, for libelant.

Goodrich, Deady & Goodrich, for claimant.

BENEDICT, J. This action is brought to recover wages for services rendered by the libelant as engineer on the dredge Columbus, a dredge employed in dredging in the port of New York. The libelant was employed in August by a verbal agreement. On August 27th he entered into a written agreement. On the 10th day of September he was discharged for drunkenness, and at once commenced this suit to recover wages for the time of his employment to the time of his discharge. The defense is that the suit is premature. Upon the case coming on for trial, the validity of the clause in the written agreement upon which the defense is based was disputed by the libelant, and it was agreed that this point should be disposed of preliminarily in order to avoid trouble and expense. The written contract relied on by the claimant is as follows:

"This agreement between the North American Dredging and Improvement Company of New York and Frederick Smith witnesseth: That said Frederick Smith agrees to work for said company in the capacity of 2nd engineer on the dredge Columbus, at the rate of $60.00 monthly wages, to be paid on the Saturday following the 15th of each month, for all work done in the preceding month. It is further agreed by said Frederick Smith that in case he voluntarily leaves the employ of the company, or is discharged for drunkenness, refusing to obey orders, or neglect of duty, that his wages then accrued shall be due and payable on the next ensuing regular monthly pay-day of the company. The said company reserves the right to discharge the said Frederick Smith whenever the exigencies of its business seem to them that his services are no longer required or desirable, in which case they agree to pay him in full on presentation of time-check at its office.

"THE NORTH AMERICAN DREDGING & IMPROVEMENT COMPANY.
"By B. C. HOWELL, Prst.
"FREDERICK SMITH.
"*Dated August 27th*, 1890.
"Witnessed by C. L. MCMILAN."

If the provision of this agreement in regard to the day of payment is valid, the suit is premature as to the wages earned after the signing of the written agreement, because they were not payable until the 26th day of September, whereas the libel was filed on the 12th of September.

On the part of the libelant it is insisted that the stipulation in the contract referred to is unconscionable and void, and should not be enforced in a court of admiralty. I am unable to discover any just ground for declaring the provision in question in a contract of this character to be void. If this were a contract for the services of a seaman on board a vessel liable to leave the port, and where delay from the time of discharge until the Saturday following the 15th of the month might in some cases deprive the seaman of an opportunity to seize the vessel for his wages, the case would doubtless be different. But the present case is one of services on board a dredge employed exclusively in dredging in the port of New York, unable to leave the port, and where there is no voyage or limitation of the time of service. In such a case it is not seen how such a stipulation as this contract contains can work injustice.

Moreover the contract, while it postpones payment of wages by the employer to a future definite day, also contains provisions to the advantage of the employe; as, for instance, it gives the libelant the right to demand on the 25th of September wages up to the 12th of September, notwithstanding the fact that he had been discharged for drunkenness on the latter date. To such a contract the decisions made in favor of seamen upon ships do not seem to me to be applicable. So far as the wages earned after the written contract are concerned, the suit will be held to be premature.

THE ROCKAWAY.[1]

THE SEABOARD.

LOMBARD *et al. v.* THE ROCKAWAY.

BRENNAN *et al. v.* THE SEABOARD.

(*District Court, E. D. New York.* October 1, 1890.)

COLLISION—STEAM-VESSELS CROSSING—UNWARRANTED BACKING.

The steam-boat R. was going through the Kill von Kull, bound for New York, on a course some 500 feet off the New Jersey shore. The propeller S. had been lying at a dock on the New Jersey shore, and started to back out into the stream, and across the course of the R., as the latter approached. The S. gave no signal to indicate her intention, and continued to back almost to the moment of collision. The R. backed as soon as the intention of the S. was seen, but the vessels came together. *Held*, that the collision was the fault of the S.

In Admiralty. Cross-suits for damages caused by collision between the steam-boats Rockaway and Seaboard.

The steam-boat Rockaway was going through the Kill von Kull, bound for New York, some 500 feet from the New Jersey coast. The tug Seaboard, lying at a pier on the New Jersey shore, attempted to back out as the Rockaway approached, but gave no signals of such intention. The Rockaway reversed and backed as soon as the intent of the Seaboard was discovered, but a collision followed.

Goodrich, Deady & Goodrich, for the Seaboard.

Whitehead, Parker & Dexter, for the Rockaway.

BENEDICT, J. The collision which gave rise to this suit was, in my opinion, caused by the fault of the tug in backing directly under the bows of the steam-boat, then approaching in plain sight, without any signal having been given the steam-boat to show an intention on the part of the tug to back across her bow. I see no fault on the part of the steam-boat. There was no time after the intention of the tug to cross the bows of the steam-boat was manifest for the steamer to do more than she did. The libel against the Rockaway must be dismissed, and in the action against the Seaboard there must be a decree for the libelant, with an order of reference.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

HERMAN *v.* McKINNEY *et al.*

(Circuit Court, D. South Dakota, E. D. November 8, 1890.)

COURTS—ADMISSION OF STATES—TRANSFER OF CAUSES.

The right to remove to the federal courts causes pending in the territorial courts of Dakota when the two states were admitted to the Union depends not upon Act Cong. Aug. 13, 1888, upon removal of causes in general, but upon the enabling act of Feb. 22, 1889, § 23, which provides that cases which would have been of federal jurisdiction when brought if such courts had existed shall be removed upon the request of either party, and hence a motion to remand cannot be sustained upon the ground that the removal was made at the demand of a defendant residing in the state.

In Equity. Motion to remand.

McMartin & Carland, for complainant.

Kieth & Bates and *Winsor & Kittredge*, for defendants.

SHIRAS, J. The complaint in this cause was filed November 2, 1888, in the district court of Minnehaha county, Dakota territory, the complainant then being a citizen of the state of New York, the defendant McKinney being a citizen of Dakota territory, and the defendant corporation being then a national bank, created under the statutes of the United States, and having its principal place of business at Sioux Falls, in the then territory of Dakota. The citizenship and residence of the several parties has remained unchanged, except as that of the defendants has been affected by the admission of South Dakota as one of the states of the federal Union, under the provisions of the act of congress approved February 22, 1889, and commonly referred to as the "Omnibus Bill." Under the constitution and laws of the state of South Dakota, the court of original trial jurisdiction is known as the "circuit court." Upon the admission of the state, the record and files in this cause passed into the custody of the state circuit court, and on the 10th day of May, 1890, the defendants filed a written request in that court for the transfer of the cause to this court, which request was granted, and the papers and record have been in due form transferred to and docketed in this court.

Complainant now moves for an order remanding the case to the state court, on the ground that this court has not jurisdiction thereof; that the defendants, on whose request it was brought into this court, were, when the suit was brought, residents of the then territory of Dakota, and, when the removal was requested, residents of the state of South Dakota; and that a removal from a state court to this court cannot be had upon petition of a resident of this state. The right of removal in this cause is not dependent upon the act of congress of August 13, 1888, amending the act of March 3, 1887. It depends upon the provisions of the act under which South Dakota was admitted to the Union, and which, in terms, made provision for the disposition of causes pending in the courts of the territory. By the twenty-third section of that act it is, in substance, declared that cases which would have been of federal jurisdiction when brought, if South Dakota had then been a state with a federal court

organized therein, are, at the request of either party, transferable to the federal court. This statute not only does not limit the right of transfer to the non-resident defendant, as is the fact in many of the clauses of the removal act of 1888, but it expressly confers it upon all the parties, regardless of their position on the record as plaintiffs or defendants, and without limitation as to their residence. In this particular the statute is too clear to need construction to show its meaning. In substance, the federal court is made the successor of cases of federal jurisdiction,—that question being viewed in the light of the facts existing when the suit was brought; and, if the case is one of federal jurisdiction, then either of the parties may cause it to be transferred to the federal court. It is not strictly a question of removal from a state court, but the determination of the question whether, under the omnibus bill, the case is one of successorship in the federal court. When the suit was brought, it involved over $2,000. The parties were residents and citizens of different states, viewing, as the act requires us to do, the territory of Dakota as being then a state; in other words, if, when this suit was brought, there had then been in existence a federal court for South Dakota, it would have had jurisdiction of this cause. This being so, then under the omnibus act, either party could cause it to be transferred into the federal court. This view is in accordance with the construction placed upon this section of the omnibus bill in the written opinion delivered by Judge EDGERTON upon a similar motion to remand, filed in the case of *Dorne* v. *Mining Co.*, *infra*, to which reference may be made for a more full discussion of the question. Motion to remand overruled.

EDGERTON, J., concurring.

DORNE *v.* RICHMOND SILVER MIN. CO.

(*Circuit Court, D. South Dakota.* November 11, 1890.)

1. COURTS—ADMISSION OF STATES—TRANSFER OF CAUSES.
Act Cong. Feb. 22, 1889, under which the Dakotas were admitted as states of the Union, provides, in section 23, that, upon the written consent of a party, all cases pending in the territorial courts at the time of admission "whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases," shall be transferred to the said federal circuit and district courts. *Held*, that the provision applies to a case in which the plaintiff was a citizen of Dakota territory, and the defendant a citizen of another state, at the commencement of the suit.

2. SAME—CONSTITUTIONAL LAW—DIVERSE CITIZENSHIP.
Said section 23 does not attempt to give the federal courts jurisdiction, on the ground of diverse citizenship, of cases between a citizen of a state and a citizen of a territory, and therefore does not extend such jurisdiction to cases not warranted by Const. U. S. art. 3, § 2, in the words, "to controversies * * * between citizens of different states."

3. SAME—STATE COURTS—CONSTRUCTION OF STATUTE.
Section 23 provides that no action pending in the territorial courts shall abate by the admission of the state, "but the same shall be transferred and proceeded with

in the proper United States circuit, district, or state court, as the case may be: provided, however, that in all civil actions, causes, and proceedings in which the United States is not a party transfers shall not be made to the circuit and district courts of the United States except upon written request of one of the parties to such action; * * * and, in the absence of such request, such cases shall be proceeded with in the proper state court." *Held* that, upon such request, the state court is deprived of jurisdiction, and the federal court gains exclusive jurisdiction.

On Motion to Remand to Supreme Court of South Dakota.

Van Cise & Wilson, for appellant.

Martin, Mason, Moody, and *Washabough*, for respondent.

EDGERTON, J. This action was brought by the plaintiff, Victor Dorne, against the Richmond Silver Mining Company in the month of October, 1883, in the district court of the territory of Dakota for the county of Lawrence, to recover damages for breach of contract. The case was tried in April, 1889, and a verdict rendered in favor of the plaintiff April 15, 1889, for $15,375.75. The defendant appealed from the judgment to the supreme court of the territory of Dakota, and the cause was pending on appeal at the time of the admission of South Dakota as a state, on November 2, 1889. The defendant moved to transfer the case from the supreme court of the state to this court, upon the ground of diverse citzenship. At the February, 1890, term, the supreme court of South Dakota transferred the case to this court. The plaintiff now moves the court to remand the case to the supreme court of South Dakota. The motion to transfer the case from the state court to this court was not *ex parte*, but the question was fully presented, *pro* and *con*, by the plaintiff and defendant, and was carefully considered by that court. See 44 N. W. Rep. 1021.

The contention of the respondent is that section 2, art. 3, of the constitution of the United States only authorizes congress to extend the jurisdiction of the federal courts, in cases where no other cause exists than diverse citizenship, "to controversies between citizens of different states," and not between citizens of a state and territory. Section 23 of the enabling act attempts to confer jurisdiction on the federal courts of the states admitted under it in all cases "whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases;" that at the time this action was commenced, the plaintiff was a citizen of a territory, and consequently could not transfer his case to the federal court. Therefore, if this section attempts to give the federal court jurisdiction in this class of cases by reason of diverse citizenship, to that extent the law is unconstitutional. This is the contention of the respondent, and upon this ground he asks for an order remanding the case to the state court.

There are three propositions submitted to the court in the consideration of this question: *First*. Was it the intention of congress in the enabling act to embrace this class of cases among those to which the federal courts should succeed the territorial court? *Second*. If it was, is that portion of the act in conflict with article 3 of the constitution of the

United States? *Third.* If so, what court, if any, has jurisdiction of this case?

When a territory is admitted into the Union, the cases then pending in the territorial courts abate, unless congress in some measure, either directly or inferentially, provides for their survival. The territory of Dakota was not admitted by congress into the Union as one state, but was divided into two states, and the two states admitted at the same time. Neither state succeeded the territory except as provided in the enabling act, and, unless congress, by some legislation either in the act of admission or elsewhere, provided for the survival of causes pending at the time of admission, then all such cases abate.

The supreme court, in *Benner* v. *Porter*, 9 How. 246, said, *inter alia:*

"The territorial courts were the courts of the general government, and the records in the custody of their clerks the records of that government; and it would seem to follow, necessarily, from these premises, that no one could legally take the possession or custody of the same without the assent, express or implied, of congress. Such assent is essential, upon the plainest principles, to an authorized change of their custody."

In *Hunt* v. *Palao*, 4 How. 590, the court held that—

"The territorial court of appeals was a court of the United States, and the control over its records, therefore, belongs to the general government, and not to the state authorities; and it rests with congress to declare to what tribunal these records and proceedings shall be transferred, and how these judgments shall be carried into execution, or reviewed upon appeal or writ of error."

Also, in *Express Co.* v. *Kountze*, 8 Wall. 342, Mr. Justice DAVIS, in delivering the opinion of the court, says:

"Before proceeding to consider the merits of this controversy, it is necessary to dispose of the point of jurisdiction which is raised. It is urged that the circuit court had no jurisdiction over the cause, because there was no authority to transfer it. This depends on the construction of the acts of congress relating to the subject. On the admission of a new state into the Union, it becomes necessary to provide, not only for the judgments and decrees of the territorial courts, but also for their unfinished business. In recognition of this necessity, congress, after Florida became a state, passed an act providing, among other things, that all cases of federal character and jurisdiction pending in the courts of the territory be transferred to the district court of the United States for the district of Florida. The provisions of this act were made applicable, at the time of its passage, to cases pending in the courts of the late territory of Michigan, and were afterwards extended to the courts of the late territory of Iowa. Congress, in making this provision for the changed condition of Iowa, thought proper in the same act to adopt a permanent system on this subject, and extended the provisions of the original and supplementary acts to cases from all territories which should afterwards be formed into states. * * * It is said, if cases of a federal character were properly transferable to the circuit court, this was not one of them; because it does not appear that the suit was between citizens of different states. * * * The course of proceeding in the court below shows that the parties to the suit recognized it as being of federal jurisdiction, and it could only be so, as there was no federal question involved, on the ground that the plaintiffs and defendant were citizens of different states."

See, also, *Baker* v. *Morton*, 12 Wall. 153:

"Whenever a territory is admitted into the Union as a state, the cases pending in the territorial courts of a federal character or jurisdiction are transferred to the proper federal court; but all such as are not cognizable in the federal courts are transferred to the tribunals of the new state. Pending cases, where the federal and state courts have concurrent jurisdiction, may be transferred either to the state or federal courts by either party possessing that option under the existing laws."

This action was commenced in the territorial court of Dakota, and was pending in the supreme court of the territory when its courts ceased to exist by the formation and admission of the states of South Dakota and North Dakota into the Union. The inquiry is, what provision, if any, was made for the survival of cases pending in the territorial courts at the time of the admission of the states? Section 23 of the enabling act for the admission of the states professes to make full and complete provision for the survival of all such cases, and reads as follows:

"That, in respect to all cases, proceedings, and matters now pending in in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction, under the laws of the United States, had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and, in respect to all other cases, proceedings, and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such territory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that, prior to the admission of any of the states mentioned in this act, shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be: provided, however, that in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States except upon written request of one of the parties to such action or proceeding, filed in the proper court; and, in the absence of such request, such cases shall be proceeded with in the proper state courts."

It is admitted that the appellant filed the written request in the proper court.

It is conceded that the United States circuit court would not have had jurisdiction of the action at the time of its commencement, for the reason that the plaintiff was a citizen of a territory; but that is not the question involved in this inquiry. The law provides that, upon a written request, all cases shall be transferred to the federal circuit and district courts after admission, provided such courts would have had juris-

diction of the same under the laws of the United States when the action was commenced, had such courts existed, and that, as to such cases, the federal courts shall be successors of the territorial court. Now no circuit court of the United States can exist except in a state admitted into the Union. Then, to state the proposition differently, the enabling act gives jurisdiction at the commencement of the action, provided South Dakota had at that time been a state in the Union, and the circuit court of the United States organized therein. This much for the intention of congress in the matter. In view of the history of the admission of new states and the legislation of congress, and the decisions of the supreme court upon this question, it leaves no doubt in my mind as to the intention of congress to provide in the enabling act that the federal court should succeed the territorial courts in this class of cases whenever a written request was filed, as provided in the act. The next inquiry is whether that provision of the enabling act is unconstitutional. Courts are very reluctant to decide that particular legislation is unconstitutional. The supreme court of the United States, in *Mayor* v. *Cooper*, reported in 6 Wall. 247, makes use of the following language when the question of the constitutionality of an act of congress was raised:

"This court has the power to declare an act of congress to be repugnant to the constitution, and therefore invalid. But the duty is one of great delicacy, and only to be performed where the repugnancy is clear and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law."

The case of *Gaffney* v. *Gillette*, reported in 4 Dill. 264, was in many particulars like the case at bar. The court was asked to remand, and the motion was allowed upon the sole and only grounds that the petitioner had waived his right for removal to the federal court, and had elected to remain in the state court. It would be a matter of surprise that neither the attorneys nor the court should allude to the fact if the petitioner was precluded, upon constitutional grounds, from removing his case to the United States courts, and that the federal court had no jurisdiction because one party was a citizen of a territory when the action was commenced.

I have examined with some care the numerous cases to which my attention has been called, and find that they are cases in which the courts construe the meaning of the words embraced in the several removal acts as to when the diverse citizenship must exist to entitle the petitioner to a transfer from a state court. Now in this case the same difficulty does not exist, for entirely different terms are used, and what construction courts may place on doubtful words in prior laws furnishes slight authority for the interpretation of this. Congress did not attempt to transfer cases to the federal court, where the federal jurisdiction was based upon diverse citizenship, in controversies between citizens of a state and a territory, but only between citizens of different states. The transfer could only be made after the admission of the state. It was then that the case became one of a federal jurisdiction; and the fact that congress declared that the federal courts should succeed in those cases where the cit-

izenship was diverse when the action was commenced did not prevent the cause from becoming one of federal character and jurisdiction after the state was admitted, if the citizenship was diverse when the state was admitted and the cause transferred. It is solely a question of survival and succession. The territory had ceased to exist, and it became a controversy between a citizen of this state and the citizen of another state when, by the act of congress, the succession was established and the transfer effected. The antecedent date, to-wit, the date of the commencement of the action, neither established nor deprived the cause of its federal character. That became fixed when the state was admitted.

Have the state courts any jurisdiction in the premises? Congress has established the succession of cases pending in the territorial courts at the time of admission in the following words: "No proceeding," etc., "shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be," etc., with the proviso in reference to the request.

By the terms of the enabling act, "in the absence of such request, such cases shall be proceeded with in the proper state courts." This becomes a condition attached to the grant of jurisdiction to the state court by congress, or, in the words of the act, to the transfer of the case to the state court. This court, then, is the only court which has any jurisdiction of this class of cases pending in the territorial court at the time of admission, where the conditions in the proviso to section 23 of the enabling act have been observed. In order to give the state court jurisdiction, congress, and possibly the state, must have conferred the jurisdiction. After the performance of the conditions of the proviso of section 23, congress has conferred exclusive jurisdiction on the federal courts in this class of cases, and the state in its ordinance has ratified the terms. Consequently either this court has the exclusive jurisdiction, or else no court has jurisdiction.

If the congressional legislation in reference to the survival of this class of cases is unconstitutional, then there is no provision for their survival, and they must abate. The case has been transferred to this court by the supreme court of South Dakota, under the provisions of the enabling act and the constitution of this state, and I find no reason to remand the same.

MYERS *et al.* *v.* MURRAY, NELSON & CO.

(Circuit Court, S. D. Iowa, W. D. September Term, 1890.)

1. REMOVAL OF CAUSES—RESIDENCE OF CORPORATION.
A corporation, though carrying on business in several states, can have a residence only in the state in which it was created; so that the averment that a corporation was created under the laws of a certain state precludes the idea that it may have become a resident of another state, and is sufficient in a petition for removal of a cause from a state to a federal court. Dissenting from *Hirschl v. Threshing-Machine Co.*, 42 Fed. Rep. 803.

2. SAME—NOMINAL PARTIES.

The averments of a bill showed that a person joined as defendant of record was merely the attorney of the defendant corporation; that he had no personal interest in the controversy; that he held possession of certain notes involved in the litigation, not in his own right, but solely for the corporation. *Held*, that the presence on the record of such person would not affect the right of the defendant corporation to have the case removed from a state to a federal court.

In Equity. Motion to remand.

L. L. De Lano and *Willard & Willard*, for complainants.

Berryhill & Henry and *R. G. Phelps*, for defendant.

SHIRAS, J. When the bill in this cause was filed, the complainants were, and have ever since continued to be, citizens of Iowa. The defendant Murray, Nelson & Co. was and is a corporation created under the laws of the state of Illinois, and the defendant R. G. Phelps was and is a citizen of the state of Iowa. The suit was brought in the district court of Cass county, Iowa, and, upon the petition of the defendant corporation, Murray, Nelson & Co., the same was removed to this court. Complainants now move to remand the cause, on the ground that R. G. Phelps, one of the defendants, was and is a citizen of Iowa, of which state the complainants are likewise citizens. The averments of the bill show that Phelps is merely the attorney of the corporation; that he has no personal interest in the controversy; that he holds possession of certain of the notes and collaterals involved in the litigation, not in his own right, but solely for the defendant corporation. The facts presented on the record bring the case within the rule laid down in *Wood* v. *Davis*, 18 How. 467, in which it is held that the presence upon the record of one who is merely an agent or attorney for the principal defendant will not affect the right of removal as between the principal parties to the controversy. That case, in its facts, is similar to the one now under consideration, and the ruling therein made sustains the right of removal in the present suit.

It is urged, as a further objection, that although Murray, Nelson & Co. is a corporation created under the laws of the state of Illinois, and so averred to be upon the record, yet that it is not made to appear that the corporation is not a resident of Iowa; and, in support of this contention, reliance is placed upon the ruling made by Mr. Justice MILLER in *Hirsch* v. *Threshing-Machine Co.*, 42 Fed. Rep. 803. Until this decision was made, it had been the settled doctrine in this circuit that a corporation could be a resident only of the state under whose laws it was created. *Fales* v. *Railroad Co.*, 32 Fed. Rep. 673; *Booth* v. *Manufacturing Co.*, 40 Fed. Rep. 1. In the latter case Judge BREWER cites several of the decisions of the supreme court upon the point, and holds that thereby the rule is established that a corporation cannot acquire a residence in any state other than that under whose laws it was created. In the conflict of the rulings in the circuit, resort must be had to the decisions of the supreme court. I cite a few thereof:

In *Insurance Co.* v. *Francis*, 11 Wall. 210, it is said:

"A corporation can have no legal existence outside the sovereignty by which it was created. Its place of residence is there, and can be nowhere

else. Unlike a natural person, it cannot change its domicile at will; and, although it may be permitted to transact business where its charter does not operate, it cannot, on that account, acquire a residence there."

In *Ex parte Schollenberger*, 96 U. S. 377, it is declared that—

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter."

In *Railroad Co.* v. *Koontz*, 104 U. S. 5, it is again affirmed that—

"By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."

In *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094, it is said:

"It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also."

In *Goodlett* v. *Louisville & N. R. Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254, it appeared that a corporation, originally created under the laws of the state of Kentucky, had been, by an act of the legislature of Tennessee, authorized to construct and operate an extension of its line in the state of Tennessee; and the supreme court, after an exhaustive examination of the authorities, held that the company must still be deemed to be a Kentucky corporation, and as such to be entitled to remove a suit brought against it in a state court of Tennessee. The ground upon which it was, after some conflict in the earlier cases, finally decided that corporations could sue or be sued in the courts of the United States was that it would be conclusively presumed that a suit by or against a corporation is a suit by or against citizens of the state which created it; it being assumed that the corporators or stockholders are citizens of that state. It is now settled that this is a legal presumption, which cannot be gainsaid. *Railroad Co.* v. *Letson*, 2 How. 497; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Railroad Co.* v. *Whitton*, 13 Wall. 270; *Muller* v. *Dows*, 94 U. S. 444.

In the latter case it is said:

"A corporation itself can be a citizen of no state, in the sense in which the word is used in the constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such case it is regarded as a suit brought by or against the stockholders of the corporation; and for the purposes of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state, which by its laws created the corporation."

Therefore, when, in a petition for removal by a corporation, it is averred that the corporation was created under the laws of a given state, the legal effect of such averment is that the suit is to be regarded as brought against the stockholders of such corporation, who are all conclusively deemed to be citizens of the state creating the corporation. If, then, it be true that, as applied to an individual, the averment that he is a citizen of a named state necessarily includes the averment that he is a resident of such state, residence being the test of state citizenship, the same

conclusion must follow in case of a corporation, from the averment that the corporation was created under the laws of the given state.

Much of the doubt and uncertainty thrown around this class of questions arises, it seems to me, from not keeping in mind the distinction between national and state citizenship. Thus it is said that citizenship and residence are not synonymous terms. As applied to national citizenship, this is true. An alien cannot become a citizen of the United States by mere residence in this country. Therefore, when the question of national citizenship is under consideration, proof that a person resides in the United States does not necessarily prove that he is a citizen of the United States. Notwithstanding such residence, he may be an alien, and therefore, when the issue is as to national citizenship, the proof must be upon the point whether the person is native born, or, if born an alien, whether he has since been naturalized according to the requirements of the statute. When the issue is as to the state citizenship of one who is admitted or proven to be a citizen of the United States, then the point of inquiry is, of what state is the person a legal resident? A citizen of the United States, native born or naturalized, is a citizen of that state in which he has his legal residence. He may to-day be a resident in, and therefore a citizen of, the state of Illinois, but if to-morrow he should remove to Iowa, with the intent to take up his permanent abode in the latter state, he would then become a citizen of Iowa. If he does not reside in Iowa, he cannot be said to be a citizen of Iowa. If he does in fact reside in Iowa, he is a citizen of Iowa, and cannot, so long as he is a citizen of Iowa, become a citizen of any other state. An individual cannot, within the meaning of the removal statutes, be a citizen of two or more states at one and the same time. He must be deemed to be a citizen of the state in which he has his fixed, permanent, or legal residence, and he cannot be a citizen of any state other than the one in which he resides. Therefore, when it is averred that A. B. is a citizen of the state of Iowa, such averment clearly includes the idea that A. B. is a resident of that state; and, as he can be a resident of but one state at a time, the averment that A. B. is a citizen of Iowa negatives the idea that he is a legal resident of any other state.

Article 14 of the amendments to the constitution of the United States declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." So far as applicable to the question under consideration, this constitutional provision only recognizes the rule already in existence, to-wit, that a citizen of the United States is a citizen of the state wherein he resides; but it puts the proposition beyond question or cavil. Therefore an averment, that A. B. is a citizen of a given state, of necessity includes the averment that he is a resident of that state, and precludes the assumption that he may be a resident of any other state. The same is true of the averment that a corporation was created under the laws of a named state. So far, therefore, as it is held in *Hirschl* v. *Threshing-Machine Co.*, that the same rule is applicable to corporations as to natural persons, no exception can be taken thereto; but

when it is said that either natural persons or corporations can be deemed to be residents of states other than that of which they are citizens, or under whose laws the corporations were created, such statement is clearly adverse to the uniform rule given us in the decisions of the supreme court. Furthermore, if it be true that, within the meaning of the statute regulating the jurisdiction, original and by removal, of the United States circuit courts, a corporation may be a resident of every state wherein it carries on business, then it follows that, under the provisions of the act of 1888, the number of districts in which the corporation may institute suit is largely increased. Section 1 of that act provides that, in cases wherein federal jurisdiction exists by reason of the diversity of state citizenship, suit may be brought in the district of the residence of either plaintiff or defendant. If railroad, insurance, manufacturing, commercial, and other corporations are to be deemed to be residents of the states in which they carry on business, as well as of the states under whose laws they were created, then a single corporation may have the right to sue in the federal courts of every state in the Union. Again, if a corporation may become a resident of a state by engaging in business therein, what character or amount of business must it carry on before it acquires a residence in the state. Neither the statute nor the authorities give us any guide or rule by which the fact of residence is to be thus established. The difficulties and uncertainties that would be created in the attempt to introduce this new rule upon the question of residence can hardly be estimated, but that they would be of the most serious character is apparent to every one, and that fact should have great weight in determining whether congress, in adopting the act of 1887 and the amendatory act of 1888, intended to introduce a radical change in the previously well-settled rule that corporations are deemed to be residents of the state under whose laws they are created, and cannot, by engaging in business in other states, change or affect such residence.

In the face of the repeated utterances of the supreme court upon that question, and the reasons given therefor, it does not seem to me that it can be held to be an open question, and that safety lies in following the rules thus given us. Therefore, I hold that the averment in the record that the defendant corporation was created a corporation under the laws of the state of Illinois in legal intendment precludes the idea that it could become a resident of Iowa, and it is thus sufficiently made to appear that the removal was sought by a non-resident defendant, within the meaning of the removal act.

The motion to remand is overruled.

SOWLES *v.* WITTERS *et al.*

(*Circuit Court, D. Vermont.* October 17, 1890.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION.
A suit to recover property acquired by the removing defendant, as receiver of a national bank, by authority of the laws of the United States, arises under the laws of the United States, within the meaning of the removal act of 1888, (25 St. U. S. 434.)

2. SAME—TIME OF APPLICATION.
Said act provides that the petition for removal shall be filed at or before the time the defendant is required to plead. A rule of the chancery court provided that the subpœna should require defendant's appearance on the first day of a stated term, and that he should answer within 40 days from the return-day, or the day fixed for entering appearance. A subpœna required the defendant to answer on the first day of the April term, but the suit was not entered until the last day of court. The next stated term began on the second Tuesday in September. *Held*, that a petition for removal filed September 4th was in apt time.

In Equity. On motion to remand. See 28 Fed. Rep. 121, 218.

Edward A. Sowles, for complainant.

Chester W. Witters, for defendants.

WHEELER, J. This suit was brought in the court of chancery of the state, was removed into this court on petition of the defendant receiver, and has been heard on motion of the oratrix to remand, because, as said, not arising under the constitution or laws of the United States, and removed out of time. The bill on its face shows the suit to be brought to recover property solely acquired by the removing defendant, as receiver of a national bank, under direction of the comptroller of the currency, by force of the laws of the United States, and that his defense must rest, if any he has, upon authority given by those laws. The words in the act of 1888 (25 St. 434) on which this question arises are the same as those of the act of 1875, (18 St. 470,) upon which *Tennessee* v. *Davis*, 100 U. S. 257, and *Railroad Co.* v. *Mississippi*, 102 U. S. 135, were decided. Those decisions seem to settle that when the acts complained of in a suit are done under a law of the United States, or the defense must rest upon such a law, the suit arises under the laws of the United States.

The act of 1888 provides for filing the petition for removal in the "state court, at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." The rules of the court of chancery of the state provide that every stated term shall be treated as continuing, though in recess, until the next stated term; that the subpœna shall require the appearance of the defendant on the first day of a stated term, or the bill will be taken as confessed; and that the defendant shall answer within 40 days from the return-day of the process, or the day fixed for entering an appearance. Rules, 1, 9, 24. The subpœna required the defendants to appear on the second Tuesday in April,—the first day of the April term. The petition was filed on the 4th day of September. The next stated

term began on the second Tuesday of September. If the suit had been entered on the first day of the April term, the petition would have been clearly too late. The petition, however, alleges that the suit was entered "out of time upon the last day of said court," and this is not controverted. The defendant could not enter an appearance in the suit until the suit itself was entered. The requirement to appear was in that suit. The mode of entering an appearance in that court is by writing the name of the defendant, if the defendant appears in person, or the name of the solicitor if the appearance is by solicitor, in the proper place upon the docket entry of the suit. If the suit was not there, the appearance would have no place. The requirement of the rule implies that the suit shall be entered before the defendant is defaulted. Under these circumstances, the earliest day on which the defendant was required to appear was the last day of the court, and perhaps not then without new notice such as the court should require on permitting the entry then of the suit. The day of entering the suit is not shown otherwise than by the allegation quoted, and can be inferred only from the rule, unless the fact that the court of chancery, on the filing of the petition and bond, ordered the removal of the suit, is to be taken as a finding that the filing of them was in time. The oratrix could not justly withhold entry of the suit, and insist that the time of the defendant to answer was at the same time expiring. An enlargement by the court of the time to answer might, and doubtless would, not enlarge the time for removal; but this removal does not appear to be within enlarged time merely, but within the first and only requirement of the rules. Motion denied.

BRUSH ELECTRIC CO. *v.* BRUSH-SWAN ELECTRIC LIGHT CO.

(*Circuit Court, S. D. New York.* August 22, 1890.)

EQUITY PRACTICE—CROSS-BILL.

Where a defendant asks leave to file a cross-bill, and for an injunction against the complainant, leave to file the cross-bill may be given without determining the right to the injunction.

In Equity. On motion for leave to file cross-bill. See 41 Fed. Rep. 163.

Carter, Hughes & Cravath, for complainant.

G. H. & F. L. Crawford, for defendant.

LACOMBE, Circuit Judge. When this motion was decided upon the first argument, it was treated as an application for a stay or injunction, the practical effect of which, if granted, would be to suspend, if not to cancel, the operation of Judge COXE's decree. That such stay was sought as ancillary only to the main relief asked for was a circumstance not suf-

ficiently considered, partly through the inadvertence of the court, and partly because the oral argument was mainly directed to the question whether such stay should or should not be granted. Upon the reargument, the fact is made plain that what is really asked for is leave to file a cross-bill. In view of the averments contained in the cross-bill submitted on the argument, that relief should be granted. Whether or not sufficient can be shown to entitle the complainant to an injunction staying the operation of Judge COXE's decree may be determined when the proofs are in, or as a separate motion.

BACKER *v.* MEYER *et ux.*

(Circuit Court, E. D. Arkansas. November 28, 1890.)

1. HUSBAND AND WIFE—GIFT—DELIVERY.
   A statement by a husband to his wife that he has certain bonds which are to be hers, when not accompanied by delivery of the bonds or any change in his treatment of them, does not pass title to the bonds, or make him liable to her for their conversion.
2. SAME—FRAUDULENT CONVEYANCE.
   Property purchased by a man in his wife's name with money borrowed by him in her name, but on his credit, and that of the property, is liable for his debts.
3. HOMESTEAD—FRAUD—HUSBAND AND WIFE.
   Property purchased by an insolvent husband in his wife's name, and occupied by them as a homestead, is, as against his creditors, exempt as a homestead, in spite of the fraud

In Equity.

Cohn & Cohn, for complainant.

Hemingway & Austin and *Blackwood & Williams*, for defendants.

CALDWELL, J. The defendant Gabe Meyer executed three promissory notes payable to the plaintiff, for borrowed money,—one dated April 2, 1884, for $5,000; one dated July 5, 1884, for $2,500; and one dated July 28, 1884, for $3,523. The plaintiff recovered judgments on these notes on the law side of this court. Two of the judgments aggregating $8,964.42, and costs, were rendered on the 27th of October, 1886, and the third judgment for $6,750.73, and costs, was recovered on the 14th of November, 1888. Executions were issued on these judgments, and returned *nulla bona*. Thereupon the plaintiff filed this bill for the purpose of subjecting to the payment of his judgments the real estate and personal property mentioned in the bill. On the face of the record, the defendant Bertha Meyer, wife of the defendant Gabe Meyer, appears to be the owner of the real estate, and she also claims the personal property, consisting of goods, wares, and merchandise, as her separate property. Gabe Meyer has been for many years a merchant, planter, and general trader. His business was quite extended in the lines indicated. His business career has been marked by those vicissitudes of fortune which

not unfrequently befall persons engaged in his pursuits. In 1860 he failed, but in the course of six or seven years he was again prosperous, paid off his old debts, and continued to do a large business as a planter, merchant, and trader, until 1884, when he failed, owing a large amount, a portion of which remains unpaid. Concurrently with his failure, he began to purchase and cultivate plantations, in the name of his wife; to buy and sell lands in her name; and to purchase stocks of merchandise, and conduct mercantile pursuits, such as a boot and shoe store, liquor store, etc., in her name. The business pursuits conducted by Meyer, after his failure, in his wife's name, were about as extensive and varied, and of the same general character, as those conducted in his own name, before his failure.

The bill calls on the defendants to explain this sudden and wholesale change from the husband's to the wife's name in the purchase and ownership of property, and the conduct of business. The first and chief explanation offered is a statement to the effect that in 1868, when Meyer was solvent, he gave his wife $8,000 in United States bonds. But an inquiry into the circumstances of this alleged gift shows it to have been a mere phantom, so far as the law is concerned. On one occasion he told his wife he had $8,000 in United States bonds which were to be hers, as a gift. If the bonds were exhibited at all, they remained in his own hands. He did not at that or at any other time deliver them to his wife, or to any other person for her. He did not separate them from his other moneyed assets, or put any mark on or about them to indicate they were his wife's. He never at any time made an entry in his books giving his wife credit for the bonds or their proceeds, but treated them in all respects as his own property, and used them in the purchase of a plantation in his own name. The gift began and ended in words. There were no acts corresponding to the words to make them effectual. Fourteen years afterwards, Meyer's pleasant but delusive speech to his wife is brought forward to explain and support the wife's claim to the property in controversy. It is ineffectual for that purpose. A mere declaration that one gives another a certain thing does not constitute a gift, unless it is followed up by giving the donee possession of the thing, or by the doing of something equivalent to a transfer of the possession. *Peters* v. *Construction Co.*, 34 N. W. Rep. 190; *Flanders* v. *Blandy*, 12 N. E. Rep. 321. If Meyer's pleasing declaration to his wife made these bonds her property, then she and all other wives have good title to all the worldly goods of their husbands, for every husband at the marriage altar declares: "With this ring I thee wed, and with all my worldly goods I thee endow,"—and this declaration is made in the presence of witnesses, and is followed on the instant by a symbolic delivery of the goods, by the gift of the ring. In this case there were no witnesses, and no delivery of the bonds in fact or by symbol. The defendant's case would have been quite as strong if it had rested on the gift at the marriage altar. Meyer declared that he gave her the bonds, but he did not do it. He kept them, and used them himself, and never seems to have thought of them again until after the lapse of 14 years, and after he had

become insolvent. Mrs. Meyer acquired no sort of legal or equitable right or claim to the bonds or their proceeds by the husband's simple declaration that they were hers, and they cannot therefore be made the basis of a legal or equitable claim on her husband or his estate. Cases, *supra;* and see *Humes* v. *Scruggs*, 94 U. S. 22, 27. After his failure, Meyer used $2,500 of his money, collected on outstandings due him, in purchasing property in the name of his wife; but it is said he did this for the purpose of recompensing his wife in some measure for her bonds, which he had used. But the bonds were not hers, and any claim resting on them must share the fate of her claim to the bonds.

It is said much of the property in controversy was purchased with money borrowed in Mrs. Meyer's name, and on her credit. This contention rests on the form of the transaction, rather than the facts. Meyer signed his wife's name to the notes, but his wife had no credit, and could have had none. She is shown to be a very domestic lady, who knows absolutely nothing about business or business affairs, and who has no personal knowledge of the business conducted in her name by her husband. It is vain to talk of one having good credit with banks and wholesale merchants who has neither money nor property nor business capacity. Meyer's property was in his wife's name, and this made it necessary for him to use her name in his business transactions. Mrs. Meyer's name represented nothing of value to a bank or merchant, except Meyer's property, which stood in her name, and the credit must therefore have been given on the faith of this property, and Meyer's business capacity. *Hyde* v. *Frey*, 28 Fed. Rep. 819; *Blum* v. *Ross*, 10 Atl. Rep. 32, 116 Pa. St. 163; *Vowinkle* v. *Johnston*, 11 Atl. Rep. 634; *Trust Co.* v. *Fisher*, 25 Fed. Rep. 178. The burden of proof is on the defendant to make out her right to this property, (*Seitz* v. *Mitchell*, 94 U. S. 580, 583;) and this obligation has not been met at any point. Undoubtedly an insolvent husband may devote all of his time, skill, and talents to the management and care of his wife's property, without rendering the property, or the rents or income from it, liable for his debts. But the property must be the wife's. Property purchased in the wife's name, with the husband's means, or upon his credit when he is insolvent, is not her property, as against the claims of his creditors. In such a case, in a contest between the wife and the husband's creditors, the latter have the better right to the property, and the rents and income from it, whether produced by the labor and skill of the husband or others. Mrs. Meyer received at one time $1,200 as her distributive share of an estate in the state of Mississippi. That was her money, and with it Meyer purchased, in her name, the Park View property. The plaintiff cannot subject this property to the payment of these judgments.

The homestead of the defendants was purchased by Meyer after his insolvency in the name of his wife, but this fact does not make it any the less the family homestead. If Meyer had purchased the homestead in his own name, it would, under the constitution and laws of this state, have been exempt, and the creditors were not therefore defrauded or prejudiced by the fact that it was purchased in the name of he wife.

As to the Park View property and the homestead the bill is dismissed. A decree will be entered directing the sale of the other property to satisfy the plaintiff's judgments.

KENNEY *et al. v.* CONTNER *et al.*

(Circuit Court, W. D. Pennsylvania. September 29, 1890.)

1. EQUITY—LACHES—ACTION TO CANCEL DEED.
   The heirs of the grantor filed a bill against the widow, children, and executor of the grantee, to set aside a deed of land on the alleged ground that it had been obtained without consideration from the grantor, an aged and feeble woman, when mentally incompetent, by an abuse of a fiduciary relation existing between her and the grantee, and also by an actual fraud practiced by the grantee and one of the subscribing witnesses. The grantor died a few weeks after the date of the deed, and it was then immediately recorded, and the plaintiffs had actual knowledge of its contents. Fifteen years had elapsed before the bill was filed, and in the mean time the subscribing witness whose integrity was assailed and the grantee, both of whom survived the grantor a number of years, had died. *Held*, that the plaintiffs' laches and these deaths were, of themselves, sufficient to preclude equitable relief.
2. SAME—UNDUE INFLUENCE.
   The case, however, considered on its merits, and the conclusion reached that the deed was executed when the grantor was in possession of her sound mental faculties, and was her free, voluntary, and deliberate act, procured by no improper influence, and untainted by any actual or constructive fraud.

In Equity.

O. W. Aldrich, *Rufus C. Elder*, and *Andrew Reed*, for plaintiffs.

D. W. Woods and *James C. Doty*, for defendants.

ACHESON, J. The plaintiffs are the heirs at law of Elizabeth Kenney, late of Menno township, Mifflin county, Pa., who died May 25, 1874, aged 82 years. James Kenney, one of the plaintiffs, is the son, and the other two plaintiffs are grandchildren, of John Kenney, a brother of Elizabeth. The defendants are the widow and children and the executor of Davis McKean Contner, who died on or about January 1, 1889. The bill of complaint was filed May 6, 1889. The purpose of the suit is to set aside an article of agreement or lease between Elizabeth Kenney and Davis McKean Contner, and a deed of conveyance from her to him. The article of agreement bears date November 8, 1870, and it was duly acknowledged before Samuel B. Wills, a justice of the peace of Mifflin county, but was not recorded. Dr. T. A. Worrall and Wills are subscribing witnesses to the agreement. After reciting that "whereas, the said Elizabeth Kenney has been for a long time living with and kindly cared for by the said Contner, and whereas, she is desirous to reward him for his care and kindness, as well as to improve her farm,"—a tract of about 130 acres of land in Menno township,—the agreement provides that Contner shall find the materials for and erect on the farm a good two-story house and other buildings, at a cost not to exceed $6,500; the account of the cost to be kept by him and verified by his affidavit, which shall be sufficient evidence of correctness; and, further, that he

shall support, maintain, provide for, and take care of, the said Elizabeth during her life-time, and that, in consideration of these things, Contner and his heirs shall have the possession of the land at the annual rent of $150, to be applied to the payment or liquidation of the cost of the improvements, without interest. The deed conveyed the farm to Contner, and virtually superseded the lease, as it passed the whole title. It bears date April 23, 1874, and is for the recited consideration of $500 paid by Contner, as well as his "care and services in taking care of" the said Elizabeth "for many years." Dr. T. A. Worrall and Dr. T. S. Pyle are subscribing witnesses to the deed, and at the end thereof is the official certificate of Samuel B. Wills, justice of the peace, that on the 23d day of April, 1874, the grantor, Elizabeth Kenney, before him personally acknowledged the same to be her act and deed. The deed was recorded in Mifflin county on June 1, 1874.

The bill charges that at the date of the lease or article of agreement Davis McKean Contner was, and for many years had been, the agent of Elizabeth Kenney, having the entire management of her business; that she was then 78 years of age, and in feeble health, and that Contner, taking advantage of her feeble condition and of her confidence in him as her agent, induced her to execute the agreement, the terms of which were unfair and inequitable to her; that the agreement was not read to her before or at the time she signed it; and that T. A. Worrall was not then present, but his name had been placed to the agreement as a witness before the said Elizabeth signed it; that Contner failed to comply with the terms of the agreement in that he did not commence the buildings until the next year after the time fixed, and had not built the house at the time of the death of said Elizabeth; and that the plaintiffs had no knowledge of the agreement until December, 1888. In impeachment of the deed, the bill alleges that, at the date thereof, and for some time before, Elizabeth Kenney was confined to her bed with the disease of which she died shortly thereafter, and was in a feeble condition of mind and body, and entirely unfit to transact any business, or comprehend the effect of her actions; that the relationship between her and Contner was of such a fiduciary character that she was in the habit of trusting him with the management of all her affairs, and that, in fraud of her heirs, Contner obtained the deed from her by taking advantage of her confidence in him, upon a grossly inadequate consideration, and that the pretended money consideration of $500 was never paid in fact; and the bill charges, further, that the deed was not executed when Elizabeth Kenney was in a conscious condition, but that, by the procurement of Contner, her name was written thereto by T. A. Worrall, one of the subscribing witnesses, when she was in a stupor and was unconscious, and that the other subscribing witness was induced to attest the deed by the assurance that Elizabeth Kenney had no heirs. In explanation of the delay in instituting proceedings to set aside the deed, the bill states that soon after the death of Elizabeth Kenney the plaintiffs "caused inquiries to be made in regard to the transfer of said land, and were not able to get any information to lead them to suspect that the deed was not properly ex-

ecuted, or that the said Elizabeth was not competent to make the same," and it was not until some time in the autumn of the year 1888 that they received any such information. That information, it seems proper in this connection to state, came to one of the plaintiffs in a letter from Dr. T. S. Pyle, one of the subscribing witnesses to the deed, and now the chief witness in behalf of the plaintiffs to impugn the deed. It ought also to be here stated that Dr. T. A. Worrall, the other subscribing witness, and whose good faith in the matter is now questioned, died in the month of October, 1877. All the allegations of fact contained in the bill of complaint upon which the plaintiffs' right to relief depends are denied by the answers, but the bill waived answers under oath.

As preliminary to the consideration of the particular transactions here involved, certain facts disclosed by the proofs, connected with the family history of the Kenneys, should be stated. The land in dispute originally belonged to Elizabeth Kenney's father, Matthew Kenney, who devised it to his son James, as his share of the paternal estate. In the year 1829 James, out of natural love and affection, gave and conveyed the land to his sisters, Martha and Elizabeth, and to the survivor of them. Martha died in the year 1838, and Elizabeth was then the last survivor of her race in Pennsylvania. None of her deceased brothers or sisters had left issue. She herself never married. As early as the year 1819, John Kenney had removed from Pennsylvania to the state of Ohio, where he settled, and continued to reside until his death, which occurred on February 7, 1873. Between him and his sister Elizabeth there was very little intercourse. James Kenney testifies to a visit of short duration made by his father and himself to Elizabeth Kenney at her home in Mifflin county about the year 1832. Speaking of that visit James says: "They, Aunt Elizabeth and my father, were on good terms enough, but she was a little envious, thinking he had come to disposses her." In explanation, James further states that to his father's inquiry as to her health she responded that "she was none the better of seeing him;" adding: "I suppose you have come to take possession of the place." "He then told her," James says, that "he never should disturb her in her life-time; * * * and they were reconciled friends and jolly after that." Not long after the death of Martha Kenney, John Kenney revisited his sister Elizabeth. On that occasion, as appears from her statements to several of the witnesses, he gave her great offense in some way, and she never got over her feelings of resentment. Five witnesses testify to her declarations made at various times that John Kenney should never have any of her property.

Turning now to the matter of the alleged fiduciary relationship between Elizabeth Kenney and Davis McKean Contner, it must, I think, be said that the proofs do not sustain the averments of the bill in that particular. It is not satisfactorily shown that Contner was ever the general agent of Miss Kenney, or charged with the entire management of her business. She seems to have been an intelligent, shrewd, and capable woman, and she gave active personal attention to her business affairs down to a late period in her life; although, no doubt, in those mat-

ters she had Mr. Contner's assistance and services. The true nature of the relation between the two may be deduced from the following facts shown by the evidence: When a boy, Contner came to live with and work for Miss Kenney. Two of the witnesses speak of her having raised him, and, with the exception of two terms he served as sheriff of Mifflin county, he spent his whole life-time from boyhood on Miss Kenney's place, and much of the time lived in the same house with her. At the time of the execution of the article of agreement of November 8, 1870, Miss Kenney lived in the family of Mr. Contner, on the farm, and she continued to live in his family until her death. At different times between the years 1862 and 1874, and to several different persons, Elizabeth Kenney stated that she intended to give her property to Mr. Contner. That she was in a perfectly sound mental condition when she made these declarations, there is no reason to doubt.

The only evidence in the case bearing directly upon the execution of the article of agreement is the testimony of Samuel B. Wills, the justice of the peace, who states that he signed it as a witness, and took the acknowledgment of the parties at the home of Elizabeth Kenney on the evening of November 8, 1870; that he went in consequence of a message from Mr. Contner; that all the signatures except his own were already to the agreement; that Miss Kenney said she knew the contents when he asked her; that he proposed to read the paper, but she said it was not necessary, as she knew what it meant; that Mr. Contner and his family were present; that Miss Kenney seemed to be in good health for a person of her age, and he thought her mind was all right,—"as well as a person's could be."

As already intimated, by far the most important witness in the whole case on the part of the plaintiffs is Dr. T. S. Pyle. He attended Elizabeth Kenney in her last sickness; his visits beginning about April 1, 1874, and ceasing about the 29th of that month. He testifies that during all that time he would not consider her competent to transact any business. Dr. Worrall was called in to give his opinion, and a consultation took place on April 22d. The next morning Dr. Pyle and Dr. Worrall met in the sick-room, and the substance of Dr. Pyle's testimony as to what then occurred is this: He states that he found Miss Kenney in a much lower condition than she yet had been, and when he spoke to and touched her she neither answered nor moved, and she seemed to be in a comatose state; that Dr. Worrall and he raised the old lady up in bed, and propped her up, but she made no effort to hold her head or steady herself at all; that he kept her in a sitting position while Dr. Worrall got from the table a paper which he brought to the bed, saying, "Aunt Betsey, we want you to sign this, making the sheriff your son;" that Dr. Worrall took in his own hand a pen and the old lady's fingers and wrote, or pretended to write, and then took the paper to the table and wrote some; that Dr. Worrall told him to put his name to the paper, which he then saw was a deed, and he (Pyle) signed it as a witness; that Contner was present while all this happened; that on that occasion nothing was said about there being no heirs, but Contner had once so told him; that

when Dr. Worrall and Contner left that morning they told him to remain until the justice came, and he did so; that he handed the paper to the justice, Esquire Wills, when he came, and the justice sat down at the table and wrote something, and then got up and left the house; that the justice said nothing at all to Miss Kenney, and no words passed between them. Dr. Pyle further says that about a year and a half before he gave this testimony, which was in August, 1889, one Robert Campbell told him Elizabeth Kenney had relations, and afterwards he wrote to James Kenney.

This certainly is extraordinary testimony. It implicates Mr. Contner and Dr. Worrall, both in their graves when the witness spoke, in an atrocious fraud upon a helpless and unconscious woman, the patient of Dr. Pyle, perpetrated in his presence, and with his acquiescence, at least, and puts him in the attitude of having given, by his attesting signature, authenticity to a deed which he knew was little less than a downright forgery. Furthermore, it imputes to the justice of the peace gross official misconduct, for it represents him as making an untrue and fraudulent certificate; and this guilty secret Dr. Pyle kept locked up in his own breast for a period of 14 years, when he voluntarily divulged it. The testimony of Samuel B. Wills in respect to the acknowledgment of the deed flatly contradicts Dr. Pyle, and is wholly irreconcilable with his account of the matter. Mr. Wills testifies that when he took Miss Kenney's acknowledgment no one was present in the room, nor while he was with her; that "her body was weak, but her mind was clear;" that the paper was on a table near the bed on which she was lying, and she directed him to it; that he asked her if he should read it to her, and she replied it was not necessary, and said: "I know what it means. This is a deed I am making of this property to D. M. Contner. I want him to have it;" that he then asked her if she acknowledged it to be her act and deed, and she said she did. The testimony of Mr. Wills appears to be that of a disinterested and impartial witness, and, aside from Dr. Pyle's implied aspersion of him, his integrity is unquestioned. The discrepancy between him and the witnesses Richard and Gilbert Brindle, as to which of them carried the message which summoned him to Miss Kenney's house in November, 1870, and the precise terms of that message, involves merely a matter of recollection as to collateral circumstances, in themselves of no great moment. Nor do I find anything in what Mr. Cline and Mr. Aldrich recount as said by Mr. Wills in the interviews of which they speak, which in fairness ought to impair the force of his testimony. In this connection, the testimony of Miss Mary A. Bailey, a visiting acquaintance of Elizabeth Kenney, is worthy of special mention. She was a member of Dr. Worrall's family, and went with him to see Miss Kenney about 10 days before she died. She says that on that occasion she was alone with Miss Kenney, and in conversation with her, for about half an hour, and that her mind was clear and strong. Miss Bailey states:

"She was glad to see me, and reprimanded me for not coming oftener. She told me she was feeling more comfortable now; that she was satisfied; that

she had gotten things fixed now as she had wanted them; and that she wanted to give Kean and the children the farm, and she had made Kean a deed of the farm, and that now she was satisfied; that she had got things fixed as she wanted them."

Miss Bailey says she knew nothing about a deed before Miss Kenney told her of it. Miss Bailey is an unimpeached witness, and I am unable to discover any reason for doubting either her truthfulness or the accuracy of her recollection.

There is other important testimony in the case bearing upon the deed of conveyance which I shall not recite. It is enough to say that some of it goes to discredit Dr. Pyle, while much of it directly tends to sustain the transaction as fair and honest. Taking the evidence as a whole, I am of the opinion that it fully warrants the conclusion that the conveyance of the land to Davis McKean Contner by Elizabeth Kenney was her free and voluntary act, procured by no improper influence, and untainted by any actual or constructive fraud, and that she executed the deed when in the full possession of her sound mental faculties, in view of her approaching death, and in consummation of a long cherished and fixed purpose.

But were the correctness of this conclusion questionable, still, it seems to me that the great delay of the plaintiffs in proceeding to have the deed annulled should preclude them from redress. *Landsdale* v. *Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350. Undoubtedly, they had timely knowledge of the nature of the relationship which had so long existed between Elizabeth Kenney and Mr. Contner. They have put in evidence several letters written by him to members of John Kenney's family, the first of so early a date as August 3, 1857, and the last dated July 10, 1874, and those letters reveal plainly enough his footing with Elizabeth Kenney. The deed, with its disclosure of the consideration, the names of the subscribing witnesses, and the justice of the peace who took Elizabeth Kenney's acknowledgment, was spread upon the records of Mifflin county on June 1, 1874. The letter of July 10, 1874, from Contner to James Kenney gave prompt and full information of the disposition Miss Kenney had made of her estate. Contner therein wrote: "Aunt Elizabeth made no will in writing, but gave me her real estate by a deed of conveyance," etc. He further explained that she desired that her personal estate, which was small, together with "500 dollars of consideration money," should be taken to pay funeral expenses, etc.; and he also frankly informed James that upon his (Contner's) return from Lewistown, "we moved into the house, and Aunt Betsey just boarded and lived with us, * * * reserving but one room in the house for her own use, except where she slept, and that was in our room, until she died." Very soon after Miss Kenney's death, the plaintiffs sent an agent to Mifflin county, who made inquiries touching the conveyance of the land. By reference to the bill of complaint, it will be perceived that the plaintiffs do not pretend that they did not know or then learn every fact affecting the integrity of the transaction, except "information to lead them to suspect that the deed was not properly executed, or that

the said Elizabeth was not competent to make the same." But the plaintiffs do not allege that they applied for information on that subject to either of the subscribing witnesses or to the justice of the peace, nor do they assert that Contner in any manner misled them. Therefore, are they without reasonable excuse for their long delay in bringing suit. *Badger* v. *Badger*, 2 Wall. 87, 95. The lapse of 15 years changed the whole situation to the great prejudice of the defendants. Dr. Worrall, who would have been an invaluable witness, survived Elizabeth Kenney three and a half years, and Mr. Contner lived eleven years still longer, but death had sealed the lips of both before the plaintiffs saw fit to move in the assertion of their claim.

In the case of *Jenkins* v. *Pye*, 12 Pet. 241, which was a suit to set aside a deed by which a daughter, 23 years old, had conveyed all her remainder in real estate, which had belonged to her mother, to her father for a nominal consideration, it was said by Mr. Justice THOMPSON that "lapse of time, and the death of the parties to the deed, have always been considered in a court of chancery entitled to great weight, and almost controlling circumstances, in cases of this kind;" and in *Godden* v. *Kimmell*, 99 U. S. 201, 210, this principle was reaffirmed, and was applied to a case where 14 years had elapsed from the date of the deed to the filing of the bill. In any view, then, that can be taken of this case, under the proofs, the plaintiffs are not entitled to any relief.

Let a decree be drawn dismissing the bill of complaint, with costs.

AMERICAN PRESERVERS' CO. *v.* NORRIS *et al.*

(*Circuit Court, E. D. Missouri, E. D.* September 1, 1890.)

1. CORPORATIONS—CONTRACTS.
A manufacturing corporation sold its business to its principal stockholders, who thereupon sold it to a third person, with an agreement not to enter into the same business, directly or indirectly. This agreement was not signed by the corporation. *Held*, that the corporation was not bound by the agreement.

2. INJUNCTION—WHEN ISSUED.
An agreement not to enter into a certain business will not be enforced by preliminary injunction, at suit of the assignee of the covenantee, where the defendants are abundantly solvent, and there is doubt whether the agreement, being general, is valid, whether it is supported by an adequate consideration, and whether it is assignable.

In Equity. On motion for injunction.

Chester H. Krum, *Frank K. Ryan*, *A. Leo Weil*, and *M. F. Elliott*, for complainant.

Judson & Reyburn, for defendants.

THAYER, J. The material facts on which the decision of the present motion depends are substantially as follows:

The Taylor Manufacturing Company is a corporation duly organized under the laws of Missouri, and for several years has been engaged in

manufacturing and selling flavoring extracts, baking-powders, shelf-goods, and grocers' sundries, and until about the 15th of June, 1888, was also engaged in manufacturing preserves, jellies, fruit-butters, etc. The other defendants, that is to say, L. E. Taylor, James N. and E. R. Norris, are its principal stockholders, and for some years have been officers and directors of the company, and have had full control of its business and have directed its policy. On the 22d of March, 1888, all of the defendants, including the Taylor Manufacturing Company, signed an agreement, the purpose of which was to form an association styled the "American Preservers' Trust," composed of a large number of firms and corporations then engaged in the fruit-preserving business in various parts of the country. The object of forming such a trust, as stated in the bill, was "to consolidate the property and business, and to identify the interests of the respective members of the association, to the end that they might secure an economical, profitable, and satisfactory conduct of the fruit-preserving business." After the trust had been duly organized and put in operation, the Taylor Manufacturing Company conveyed to defendants Taylor and E. R. and James N. Norris all of its machinery and tools for the manufacture of preserves, jellies, fruit-butters, etc., as well as all of its trade-marks and brands in use in that department of its business, at an agreed valuation of $17,850, which sum was charged against the purchasers on the books of the company, and thenceforth the company ceased to manufacture preserves, jellies, fruit-butters, etc. Thereafter, on June 15, 1888, Taylor and E. R. and James N. Norris transferred the same property to the St. Louis Preserving Company, a Missouri corporation, then recently organized, whose stock was all owned by the trustees of the American Preservers' Trust. For the conveyance thus made to the St. Louis Preserving Company, Taylor and the Norrises received 1,145 trust certificates of the American Preservers' Trust, each of the par value of $100. The trustees of the trust agreed at the time to find a purchaser for these certificates at the price of $17,850, whenever Taylor and the Norrises desired to sell the same; and the last-named parties entered into a covenant with the St. Louis Preserving Company, that, so long as the trust existed, they would not, either directly or indirectly, engage in the manufacture of preserves, jellies, fruit-butters, etc., within 20 miles of the city of St. Louis, and that they would not buy or deal in such articles, unless they had been prepared by persons or corporations concerned in the trust. A year afterwards, that is, on or about May 15, 1889, the Messrs. Taylor and Norris elected to sell the 1,145 trust certificates by them acquired, as aforesaid; but, before the trustees of the trust would fulfill their obligation to find a purchaser for the same, they required the Messrs. Taylor and Norris to sign what is termed an "agreement of co-operation." By the terms of the last-mentioned agreement, the defendants L. E. Taylor, E. R. and James N. Norris agreed with the trustees of the trust, among other things—

"That for * * * the period of twenty-five years, the contemplated duration of the trust, or until its earlier termination in the manner provided for

by the terms of the agreement of association, they [Taylor and the Norrises] would not, within the territory of the United States of America, engage, be employed, or become interested, either personally or by representative, pecuniarily or in any manner, except through the medium of the American Preservers' Trust, in the manufacture or sale of preserves, jellies, fruit-butters, and mince-meat, or in any way obstruct the work of said trust, or in any manner assume a position adverse thereto, but at all times, and in every way, * * * would give it cordial * * * support," etc.

The Taylor Manufacturing Company did not sign the first covenant entered into by its stockholders with the St. Louis Preserving Company on or about June 15, 1888, nor the subsequent "agreement of co-operation," as it is termed, for the reason that it was advised by counsel that it could not lawfully become concerned in a trust, either directly or indirectly. The trustees of the American Preservers' Trust have recently assigned all their rights under the agreement of co-operation, to the present plaintiff, the American Preservers' Company, a West Virginia corporation. Although the fact is not averred in the bill, yet from affidavits on file it appears that the present complainant has recently acquired all the properties and manufacturing plants heretofore controlled by the trustees of the trust, and is, in one sense, at least, the successor of the trust. All of its stock appears to be vested at present in those persons who have heretofore acted as trustees of the trust. Within the past three months, the Taylor Manufacturing Company has erected a new plant for the manufacture of preserves, jellies, fruit-butters, etc., and has actually begun to manufacture such articles, but does not make use of any of the trade-marks, brands, etc., formerly in use in that department of its business. The purpose of this suit is to restrain such manufacture, the theory on which the suit is prosecuted being, that the prosecution of such business by the Taylor Manufacturing Company, is in violation of the agreement of co-operation above mentioned; that such agreement was and is binding on the Taylor Manufacturing Company, although not signed by it; that the rights acquired by the trustees of the American Preservers' Trust under and by virtue of that agreement, as against the Taylor Manufacturing Company and its principal stockholders, were and are assignable, and may be enforced by an assignee of the agreement; and that, as such assignee, the present complainant is entitled to an injunction restraining the defendants from engaging in the manufacture of preserves.

The complainant professes itself willing to supply the defendants with all the preserves, jellies, etc., that they, or either of them, may need in the transaction of their business. As the case is now before the court merely on a motion for a preliminary injunction, the questions now considered and decided will, of course, be open for further discussion, if counsel so desire, either on final hearing, or on the hearing of a general demurrer to the bill.

It is obvious that an injunction, to be effectual to preserve the complainant's alleged rights pending the suit, must run against the Taylor Manufacturing Company, as well as against the other defendants; and,

as at present advised, the court is of the opinion that complainant is not entitled to an injunction against the manufacturing company, because it did not sign the "agreement of co-operation," as it is termed, and is not bound by any of its provisions. It is true that the bill avers that the Messrs. Taylor and Norris, in executing that agreement, "were acting as well for the Taylor Manufacturing Company as for themselves, * * * and were duly authorized * * * by said company to act in its behalf;" but by none of the recitals or provisions of that agreement, which is set out in full in the bill, does it appear that the Taylor Manufacturing Company was a party to the agreement, or that Messrs. Taylor and Norris undertook thereby to bind the corporation; nor is there any evidence that the corporation ever authorized them to make such an agreement in its behalf, if they had so attempted. The agreement in question professes on its face to be the individual contract of L. E. Taylor, E. R. and James N. Norris, with the trustees of the American Preservers' Trust; and it cannot be construed as the contract of the Taylor Manufacturing Company without the aid of extrinsic proof, which has not been furnished, even if such proof is admissible. Evidently, therefore, the contention that the Taylor Manufacturing Company is bound by the agreement must rest wholly on the ground that Messrs. Taylor and Norris are its largest stockholders; that the business of the company inures mainly to their benefit; and that, by virtue of their relation to the corporation as principal stockholders and officers, they have power to control its action, and are bound to so control it as to harmonize with their own individual contracts. But such relation on their part to the company is clearly not sufficient to cast on the corporation the burden of discharging any obligations that such stockholders in their individual capacity may have assumed. As officers and directors of the corporation, it is their duty to serve the interests of the corporation, considered as a distinct legal entity. It is familiar law that a corporation has a personality of its own, distinct from that of its stockholders; that it is not affected in the most remote degree by contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and is not bound to discharge any personal obligations assumed by its stockholders. *Pullman's Palace Car Co.* v. *Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. Rep. 194; *Moore & Handley Hardware Co.* v. *Towers Hardware Co.*, 87 Ala. 206, 6 South. Rep. 41, and 13 Amer. St. Rep. 23, and citations; *Davis, etc.*, *Wheel Co.* v. *Davis, etc.*, *Wagon Co.*, 20 Fed. Rep. 700.

In the case of *Beal* v. *Chase*, 31 Mich. 490, which bears a stronger resemblance to the case at bar than any other cited by complainant's counsel, a corporation was enjoined from engaging in a certain publishing business, at a given place, which one of its largest stockholders, previous to the formation of the corporation, had covenanted not to engage in. But in that case it appeared that all the stockholders of the corporation before its formation were aware of the covenant incapacitating the principal stockholder from engaging in the business in question, and that one purpose had in view in organizing the corporation was to enable him

to evade his covenant. The decision in question evidently rests on the ground that the persons who organized the company, and owned all of its stock up to the time the suit was filed, had entered into a conspiracy to aid one of their number, who was the largest shareholder, in avoiding a valid covenant, and that, under the circumstances, he should not be allowed to shelter himself behind the corporate entity. The decision referred to cannot be regarded as impugning, much less as overturning, the general doctrine that an incorporated company is not liable on the covenants of its stockholders, made in an individual capacity, and not as agents of the company. In the case at bar it is not pretended that the defendants have acted fraudulently. The Taylor Manufacturing Company was a going concern, doing an extensive business, when the agreement made by certain of its shareholders not to engage in the business of manufacturing preserves, jellies, fruit-butters, etc., was made. The company was not organized after the covenant was entered into, as in the case of *Beal* v. *Chase*, merely to enable certain persons to do indirectly what they might not do directly. It declines to be bound by what is termed the "agreement of co-operation," because it never executed the same, and because, as the affidavits tend to show, it was not supposed, at the time the agreement was made by the Messrs. Taylor and Norris, that the company, in its corporate capacity, had any power to enter into such an engagement.

I conclude, therefore, from the consideration given to this question alone, that the corporation defendant has the right to resume the manufacture of preserves, jellies, etc., because it never agreed to abandon the manufacture of the same, and that an injunction restraining it from so doing would be an improper order.

There are several other important questions also raised by the present motion, notably the question whether a covenant, such as is contained in the agreement of co-operation, not to engage in a given business anywhere in the United States, is a valid covenant; also the question whether, under the circumstances disclosed by the affidavits, that agreement was supported by a consideration that would render it enforceable in equity, even assuming it to be in other respects valid; also the question whether the covenant sought to be enforced is assignable, and, under the circumstances disclosed by the affidavits, may be enforced by the present complainant; and, finally, the question arises whether the trust agreement itself, in pursuance of which the other agreements appear to have been executed, was not in violation of public policy, and for that reason void.

With reference to all of these questions, and without undertaking to decide either, it is sufficient to say that they are questions of so much importance, and are involved in so much doubt, that it would be manifestly improper to grant an injunction in a case where such questions are involved, and where, as in this case, the defendants are abundantly solvent, prior to a final hearing.

The motion for an interlocutory injunction is accordingly overruled.

VAN WYCK *v.* READ *et al.*

(*Circuit Court, N. D. Florida.* August, 1890.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—LEX LOCI.
An assignment for the benefit of creditors, made by one citizen of New York to another, and valid under the laws of that state, will pass title to a note and mortgage on land in Florida.
2. SAME—PREFERENCES—RELATIVES.
The fact that an assignor who is justly indebted to his wife and children makes them preferred creditors will not invalidate the assignment.

In Equity. Bill to foreclose mortgage.

Joseph R. Parrott, for complainant.

H. W. Cockrell & Son, for defendants.

SPEER, J. The controversy before the court has arisen on the following statement of facts: John H. Boynton, a citizen of the state of New York, was engaged in the lumber business, and made advancements to J. C. Read, of this district, taking therefor his note for $4,000, dated June 23, 1879, payable at the office of John H. Boynton in New York, and due two years after date. To secure this note, on the 23d day of June, 1879, Joseph C. Read and Mima A. Read, his wife, executed their mortgage upon a tract of land on Amelia island, in the county of Nassau, and the buildings thereon, known as the "Amelia Steam Saw-Mill of Fernandina, Florida." The note and mortgage are of even date, and the mortgage was recorded June 27, 1879. Thereafter, to-wit, on the 18th of August, 1884, John H. Boynton, having become insolvent, executed an assignment, general in its purpose, but with certain references to favored creditors, to Samuel Van Wyck, with instruction and power to convert all of his assets so assigned into cash, and to pay, among others, the following preferred debts: To Louisa B. Boynton, $26,808.05; to Theodosia Boynton, $20,356.81; to Isabel D. Boynton, $1,080; to Frederick C. Boynton, $5,536. After these and other preferred creditors were paid, the residue was appropriated to pay the remainder of the assignor's debts and liabilities. This assignment was recorded on the 28th of August, 1884, as appears from an exemplification from the record put in evidence, and the note and mortgage before described passed to the said Van Wyck by virtue of said assignment, the note bearing also the following indorsement: "Pay Saml. Van Wyck, assignee, or order," signed "JOHN H. BOYNTON." Among other creditors of John H. Boynton were Dexter Hunter, J. H. Prescott, Lettie Miller, and Wilson and Hunting, residents of this district, who held claims for different amounts. On the 24th and 25th of August, 1884, they sued out attachments, and had process of garnishment issued thereon, serving the same on Joseph C. Read and Mima A. Read, the debtors of Boynton, before mentioned, as evidenced by the note and mortgage before described. These proceedings went regularly to judgment in the state courts, and Joseph C. Read has been left until now in the possession of the mortgaged premises.

The bill is filed by Van Wyck, the assignee, to enforce the foreclosure of the mortgage, and to assert the superiority of his claims as assignee of the note and mortgage to the claims of the general creditors who have obtained judgments in attachments. The judgment creditors by way of defense insist that the assignment to Van Wyck was never executed, as set out in the bill; that after the date of its alleged execution Boynton, the assignor, remained in control of the property assigned, which they insist is a badge of fraud; that the assignment is illegal, null, and void, and not in compliance with the laws of the state of New York; and that the original bill is not prosecuted in the interest of the plaintiff, but in the interest of Daniel G. Ambler. These defenses are set up by way of cross-bill, and the defendants pray that they may be subrogated to the rights of Boynton, and that the proceeds of the note and mortgage be appropriated to pay off and discharge the liens of their judgments of attachments.

The plaintiff proved by the depositions of Frederick C. Boynton, Theodosia Boynton, Isabel Boynton, and John H. Boynton himself the nature of the debts to secure which the preferences in the assignment were made. It appears that Frederick C. Boynton was the son of John H. Boynton; that he was his father's clerk, and had an unpaid account for salary for about $1,000. He loaned his father a produce exchange ticket in 1883, but the evidence is wholly silent as to the value of such loan. He had made no loan to his father other than the undrawn salary. He maintained no separate establishment from his father, has lived with his father all the while, and it is impossible for him to estimate how much has been expended by his father in his maintenance since 1876. John H. Boynton testifies to the claim of Mrs. S. B. Boynton, his mother. She loaned him money and bonds to the amount of $27,000. The claim of Theodosia Boynton he testifies was $10,000 in cash from the sale of her house in Forty-Ninth street, and $10,000 in Houston & Texas bonds. All of this belonged to her. The claim of Isabella D. Boynton was for railroad bonds which he had borrowed from her to use as collateral. He corroborates the statement of Frederick C. Boynton as to his claims. His mother, he states, received her money from his father's estate, his wife from her father's estate, Isabella's was the acccumulation of birthday gifts, her mother giving her $100 on each birthday. In that way she accumulated what she had. She had passed 17 birthdays. She loaned her father a St. Paul, Minneapolis & Omaha bond for $1,000. She has no separate establishment from her father's, and has always been maintained by him; is unable to say what has been disbursed in her maintenance. Mrs. Theodosia Boynton testifies that she gave her husband money and securities at different dates. Whenever her income came in she gave it to him. She also gave him the proceeds of her house on Forty-Ninth street.

The plaintiffs in the cross-bill have not furnished any evidence which is sufficient to meet or avoid the testimony of the witnesses for the complainant in the original bill as to the validity of the debts to prefer which the assignment was made. While it is true that several of the benefi-

ciaries of this assignment, were relatives of the assignor, a circumstance always important to be considered in cases of this character, the testimony is plain, uncontradicted, and positive that the husband and father was indebted to the wife and children.

The only question then remaining depends for its decision upon the validity of the assignment. It is in our opinion valid by the law of New York, and a contract valid at the place where it is entered into is, as a general rule, valid in all other places, and this rule extends to all assignments of property. It is besides a general rule, with few exceptions, that in construing contracts made in another state the decision is to be governed by the *lex loci* as to the rights acquired and the obligations created. *Railroad Co.* v. *Glenn*, 28 Md. 287; *Guillander* v. *Howell*, 35 N. Y. 657; *Moore* v. *Willett*, 35 Barb. 663; *Hanford* v. *Paine*, 32 Vt. 442. The property transferred by this assignment was the mortgage now sought to be foreclosed, and the transfer was made in New York between residents of that state. This question has been decided favorably to the complainant in *Bacon* v. *Horne*, by the supreme court of Pennsylvania, reported in 16 Atl. Rep. 794. The case seems precisely in point. It was held that an assignment for creditors made in New York in conformity with the laws of that state passes the title to property in Pennsylvania as between residents of New York, although the assignment has never been recorded in Pennsylvania in accordance with the Pennsylvania laws. The ample notes to this case by Mr. Desty throw much light on the subject, but furnish nothing to change the rule above stated. The power of a state to regulate the transfer of all property in its territory with certain exceptions is well established. Story, Confl. Laws, par. 390, *Green* v. *Van Buskirk*, 7 Wall. 139. In the case at bar the proceeding of garnishment was not had until August 24 and 25, and in November and December, 1884. The assignment was made on the 18th of August, 1884, was recorded in New York the same day, and was recorded in Florida on August 18th. It does not appear that this record was necessary. A mortgagee of land in Florida has no legal estate in the land. *McMahon* v. *Russell*, 17 Fla. 698. The mortgage was merely a security for the payment of the note, and the transfer of the note carried the mortgage with it.

The controversy depends, we have seen, on the validity of its transfer with the note by the assignment. The *situs* of the property transferred was in New York, and at the time of the first attachment Boynton had parted with his entire interest in it. Assuming the assignment to be valid, on its execution and delivery the maker of the note and mortgage became indebted to the assignee, and no longer had the assignor anything subject to attachment. The assignment with preferences appears to be likewise valid in Florida. *Holbrook* v. *Allen*, 4 Fla. 87.

The assignments of fraud made in the several cross-bills are not sustained by the proof, and the complainants in the original bill negative their charges. There are, it is true, four judgments in attachment, all post-dating the assignment, all obtained on proceedings taken subsequent to its execution. The right of Van Wyck or his transferee, if it has been

transferred, to foreclose in accordance with the prayer of the bill, will be allowed, and a decree, with costs, so entered. In view of the general appearance of the case, the court will direct that the costs be paid by Van Wyck.

FECHHEIMER *et al.* v. BAUM *et al.*

(Circuit Court, S. D. Georgia, W. D. July, 1890.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES—MORTGAGE.
Under Code Ga. § 1953, which provides that a debtor may prefer one creditor to another, where a mortgage is given by an insolvent debtor to one of his creditors on all his property, and is followed immediately by other mortgages which in effect constitute a general assignment for creditors, the first mortgage does not constitute part of the assignment. Distinguishing *White* v. *Cotzhausen*, 9 Sup. Ct. Rep. 309.

2. SAME.
An assignment by an insolvent debtor to a creditor, who knows of his insolvency, of all his property, consisting of choses in action, in order to secure such creditor, is a general assignment for the benefit of creditors.

3. SAME.
A mortgage which provides that the surplus, after paying the mortgage debt, shall be paid to the mortgagor's creditors, constitutes a general assignment for creditors. Following *Coggins* v. *Stephens*, 73 Ga. 414.

4. SAME—REQUISITES AND VALIDITY.
An assignment for the benefit of creditors, which is not accompanied by a sworn schedule and statement of assets as required by Act Ga. Sept. 28, 1881, is void.

5. FRAUDULENT CONVEYANCE—WHAT CONSTITUTES—MORTGAGE.
The provision in a mortgage that the surplus after satisfaction of the debt shall be returned to the mortgagor does not render the mortgage fraudulent. Following *Calloway* v. *Bank*, 54 Ga. 441.

6. SAME—RECORDING.
The fact that an agreement by a debtor to prefer a certain creditor in case of insolvency is not recorded does not render it fraudulent, since such an agreement is not required by law to be recorded, and its record would therefore not constitute notice. Distinguishing *Blennerhassett* v. *Sherman*, 105 U. S. 100.

7. EQUITY PRACTICE—COSTS.
Where a subsequent creditor brings suit to set aside such agreement he will be entitled to recover costs, even though he fail in his suit, where it appears that his ignorance of the agreement caused him to give the debtor credit.

8. ATTORNEY AND CLIENT—COMPENSATION—MORTGAGE—EQUITY PRACTICE.
Where the foreclosure of a mortgage, which provides for 10 per cent. attorneys' fees, is enjoined in a suit in which a receiver is appointed to sell the property for the benefit of all interested parties, the mortgagor is entitled to recover such attorneys' fees out of the proceeds.

9. SAME.
Where a creditor has by suit brought into the custody of the court property of his debtor which had been appropriated by certain creditors to the exclusion of the others, and which the court distributes for the benefit of all the creditors, the attorneys of such creditor are entitled to compensation for their services out of the proceeds of such property. Following *Railroad Co.* v. *Pettus*, 5 Sup. Ct. Rep. 387.

In Equity.

Patterson & Hodges, *Marion Erwin*, and *C. H. Cohen*, for complainants.
Denmark, *Adams & Adams* and *Hill & Harris*, for defendants.

SPEER, J. The character of this case is outlined in the decision of the court given on the application for injunction, and reported in 37 Fed.

Rep. 167. After granting the injunction and appointing a receiver, the cause was referred to the standing master, with instructions to that officer—*First.* To audit and ascertain the several liens, or alleged liens, upon the fund in the custody of the court, and to report to the court the entire amount, including principal, interest, and attorneys' fees due on each, and the relative dignity and priority of said liens. *Second.* To report to the court as to the right of Fechheimer & Co., Claflin & Co., and Gibian & Co. to a recaption of the goods sold Baum & Bro. and Baum & Co., and, if such recaption is allowed, to ascertain the particular goods upon which it is to operate, and how much of the fund there is to allow therefor. *Third.* To report also as to the claim of Comer & Co. to the uncollected notes, accounts, and choses in action now in the hands of the receivers, the title of which is claimed by Comer & Co. under an assignment of Baum & Bro. and Baum & Co. to them. *Fourth.* To take and state the accounts of all the general creditors before the court, and to report as to the amounts, if any, to be paid each. The master, after full and protracted hearing, has reported that the sales of goods made by Fechheimer & Co., by Claflin & Co., and Gibian & Co., to the Baums were legal and valid, and that the charges of fraud by which the complainants sought to rescind such sales were not sustainable from the evidence. The master further finds that the mortgage executed and delivered by Baum & Bro. and Baum & Co. to Comer & Co., dated the 13th and recorded the 20th of November, 1888, is a legal, valid mortgage, according to the Code of Georgia, and entitled to priority over all other claims; and, further, that the assignment dated November 16, 1888, by the Baums, of all their book-accounts, notes, and mortgages to Comer & Co. is a legal, valid assignment under the law of Georgia. The master concludes:

First. That the defendants H. M. Comer & Co. are entitled to a decree against the fund in the custody of the court for the sum of twenty-eight thousand six hundred and fifty-four dollars and thirteen cents, ($28,654.13,) the same being the principal, interest, and attorneys' fees stipulated in the mortgage which was executed by N. B. Baum & Bro. and Baum & Co., and delivered to the said H. M. Comer & Co. November 13, 1888, and recorded within the time prescribed by law. *Second.* That the remaining specialty creditors of N. B. Baum & Bro. and Baum & Co., whose mortgages are enumerated in the second class of liens, are also entitled to have and recover the full amount of their debts, with the stipulated interest and attorneys' fees. In case of a deficit in the fund in the custody of the court, then, in conformity with section 1956 of the Code, the court will distribute the proceeds to the mortgagees according to their claims, an exception to be made in favor of the minor mortgage of Dennis Doke, should the proceeds of the sale of the land subject to this lien be sufficient to satisfy its claim. *Third.* When the mortgage creditors have been paid, if a surplus remain, the simple contract creditors, the master reports, are entitled to the priority of the distribution of the surplus. The creditors who filed the original bill have no preference thereby over those who came in by intervention as parties complainant.

A number of exceptions have been filed to the report of the master, and the cause has been fully heard upon argument on the report and the exceptions thereto. In view of the importance of the cause, the

court has taken time for consideration, and, after careful inquiry, has reached conclusions which may be stated as follows: The Baums were merchants, having places of business at Irwinton and Toomsboro in this district. They had been dealing for a number of years with H. M. Comer & Co., a firm of commission merchants of Savannah. In the course of this business, and, so far as the evidence has disclosed, without any intentional fraud on the part of Comer & Co. in the negotiations which led to the arrangement, Baum & Bro. executed to Comer five notes, dated March 10, 1888, each for $3,200, bearing 8 per cent. interest from maturity, and due, respectively, September 15, October 1, October 10, November 1, and November 10, 1888; also four notes of N. B. Baum & Bro., indorsed "Baum & Co.," each for $5,000, with interest from maturity at 8 per cent., three of them dated Savannah, October 12, and one Toomsboro, November 13, 1888, and due, respectively, November 20, December 1, December 10, 1888, and January 12, 1889; and also one note of Baum & Co., indorsed "N. B. Baum & Bro.," for $2,000, with the same interest, dated March 10, 1888, and due October 20, 1888; thus making 10 notes, aggregating in all $38,000. On March 10, 1888, which, it will be observed, was of even date with several of the notes, the Baums executed to Comer & Co. a written agreement which recited that in consideration of advances to them by Comer & Co. amounting to $18,000 as evidenced by the five notes of $3,200 and one for $2,000 above mentioned, and to secure the payment of the same, the Baums agreed to deposit as collateral security notes and mortgages of good planters and others equal in amount to twice their indebtedness, and also to transfer their insurance policies to Comer & Co., and also to ship all cotton they control during the season to them, and further agreeing that all advances over the $18,000 be paid first out of the proceeds of the cotton shipments, and agreeing finally that in case they become financially embarrassed, or fail to meet the notes, they would give Comer & Co. a first lien or mortgage on all their real estate and their stock of merchandise. On December 13, 1888, the complainants filed their bill against Baum & Bro. and Baum & Co. under the statute of Georgia, (section 3149*a* of the Code,) by which it is competent for a creditor whose debt is due and unpaid to put his debtor, who is an insolvent trader, into the hands of a receiver. The bill also alleged on the part of several complainants that as to the purchase of their goods there was such fraudulent representation on the part of the Baums as to their solvency and means that it was manifest the purchase was made by the Baums without any intention of paying therefor, and as to all such goods in possession of the defendants those contract creditors prayed a rescission of the trade and reception. On December 28, 1888, the complainants filed an amendment to their bill, in which they charge that Comer & Co. were participants in this fraudulent conduct, and that the debt of Comer & Co. was a pretended debt, and that Comer & Co., with actual notice of the insolvent condition of the Baums, received the liens and mortgages upon which they rely; that the defendants deliberately bought a large stock of goods on credit, with the intent not to pay for

them, that they deliberately schemed and planned to get an immense stock on hand, and, confederating with Comer & Co., created the preferences and liens above mentioned, which covered the entire stock of goods, as well as all other property owned by the defendants, and that in these frauds Comer & Co. participated. Plaintiffs insist that at the time of the failure of the Baums their financial condition was as follows:

Merchandise, as indicated by the receiver's inventory at ten per cent. above invoice price,	$ 31,457 91
Notes and accounts collected by the receivers thereafter up to March 1, 1889,	5,522 85
Real estate, at their own valuation,	10,000 00
Amount of all other notes, accounts, and old *fi. fas.*, which are regarded by the receiver as being wholly worthless,	39,080 42
Aggregating assets of	86,061 18

LIABILITIES.

Secured debts proved before the master,	$ 54,702 00
Unsecured creditors who proved their debts before the master,	29,841 39
Total liabilities,	135,702 00

—showing that the Baums were wholly unable to pay $49,640.83, and upon their own showing were insolvent to that amount. It appears, however, from the report of the receivers that by the most diligent efforts they have been able to collect less than $30,000 of the alleged assets of more than $80,000, from which it is apparent that the Baums at the time of their failure were absolutely in debt for more than $100,000. This is an enormous degree of insolvency for a business like that of the Baums, carried on in the small villages of Toomsboro and Irwinton. The plaintiffs insist that the secret contract between the Baums and Comer & Co. was a fraud to give to the Baums a delusive credit, or that it had that effect. It is in evidence that the fact of its secret character, and that subsequent creditors had no knowledge of its existence, enabled the Baums to purchase large quantities of goods in fraud of the vendors and to the advantage of Comer & Co.; that in May, 1888, after this agreement on the part of the Baums to execute a mortgage to Comer covering their entire property whenever they should become financially embarrassed, the Baums stated to Bradstreet that they were worth in the neighborhood of $30,000 over and above all their liabilities, that there were no incumbrances whatever upon their property, and that their annual business amounted to about $75,000. In November the failure came, to the amount of $150,000 with $30,000 of assets covered with mortgages to Comer & Co., and with second mortgages on the same stock to other persons for about $30,000.

The solicitors for Comer & Co. rely, of course, upon the report, and insist, by virtue of the mortgage and assignments of choses in action to their clients, they are entitled to take the entire fund, or so much thereof as will fully discharge their indebtedness. The solicitors for the plaintiffs object to this, for the important reasons: (1) Whether the Baums are guilty of fraud or not, that the execution of the several mortgages, which the plaintiffs insist were all made as part of a scheme to

dispose of the entire estate, to avoid the laws of the state relative to assignments, and were, in legal contemplation, an attempt to make an assignment, and, failing to comply with any of the requisites of the statutes, they are void, and the preferences must be disregarded. (2) The plaintiffs insist that the master erred in his finding that the Baums were guilty of no fraud in the statement to the Bradstreet Commercial Agency and to the credit agent of Claflin & Co. They insist that they were then wholly insolvent; that they knew their condition, and misrepresented it, and as the consequence defrauded people who sold them goods for credit. (3) They insist that Comer & Co. must have known the financial condition of the Baums at the time of the secret agreement in March, and, if so, to withhold that agreement from the knowledge of the public was to give to the Baums a delusive credit to the advantage of Comer & Co., who had this agreement to mortgage, and to the injury of subsequent creditors. That if, as a consequence of this secret agreement, loss must ensue to one of two persons dealing with the Baums, it must fall upon that person concerned in the secret arrangement, and not on him who was not aware of its existence. As a consequence they insist that Comer & Co., who were at fault, should be made to bear the loss. (4) They insist that, as the Baums obtained the goods of Fechheimer & Co. and Comer & Co. by fraud and misrepresentation, they got no title, and, having no title, that Comer's mortgage did not attach, and should not therefore take the proceeds of their goods, which they insist were sufficiently identified. (5) They insist further that the mortgage executed to Comer & Co. on the 13th of November was made to secure a debt pre-existing at the time of the purchases, and for that reason that it should not attach as against their right to recover the purchase money. There are other questions made by the report and the exceptions thereto, but the decision must be controlled by those above stated.

Do the several mortgages covering the entire property of the Baums and the assignment of their choses in action to Comer constitute such an attempt to avoid the law of the state as to voluntary assignments as to justify the law to declare this invalid for failure to comply with the statute? The plaintiffs direct the attention of the court to the mortgage of November 13, 1888, covering all the merchandise and real estate given to secure a series of old notes, many of which were then overdue, with a power of sale authorizing Comer & Co. to sell the mortgaged property on 10 days' notice, execute title to the purchaser, apply the proceeds to their debts, with 10 per cent. attorneys' fees, and pay over the surplus, if any, to the mortgagors or their assigns; also to the assignment of choses in action aggregating $50,000; also a mortgage on November 17th, similar to that of November 13th, covering certain other merchandise that had been omitted in the first mortgage; also to the fact that on November 13th, the date of their first mortgage to Comer & Co., the Baums executed, as appears from the dates of the mortgages themselves, 17 other mortgages covering the same property already mortgaged to Comer, all of which latter mortgages are identical in form, and given to secure debts to the amount of $28,130.70, with 10 per

cent. additional in attorneys' fees. Great stress is laid upon the fact that all of these mortgages contained power of sale, with direction to apply proceeds to the debts due the mortgagees, with this notable clause: "The surplus, if any, to be paid over to our creditors." Attention is called to the fact that there was no equity of redemption left by these latter mortgages, and it is insisted that there was an absolute appropriation of the property to the mortgagees, or, as the plaintiff insists, to the assignees. Was this an assignment for the benefit of creditors? The statute of the state upon this subject can be found in the act of the general assembly of Georgia of 1884, p. 100. This act provides: In all cases where voluntary assignments are made by failing or insolvent debtors for the benefit of their creditors it shall be the duty of the firm, person, or corporation making such assignment to comply with certain technical requisites of the act, such as annexing a schedule of the debts, etc. These statutes are very strictly construed by the decisions of the state appellate court against the debtor and his assignee; and, when the instrument of assignment is not prepared in compliance with the statute, it is invariably declared to be null and void as an assignment. It is proper, at this point of the discussion, to state that the policy of the law of Georgia authorizes preferences by insolvent debtors to creditors, Code, § 1953, providing as follows:

"A debtor may prefer one creditor to another, and to that end he may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit or that of any other favored creditor, to the exclusion of other creditors."

The last clause has been held to be repealed by the act of 1866, and the surplus may now be controlled to other favored creditors. *Powell* v. *Kelly*, 82 Ga. 1, 9 S. E. Rep. 278. The argument of plaintiffs' solicitors, that the mortgage of Comer & Co. and the mortgages of the 17 other mortgagors were drawn the same day, and that, while the equity of redemption was preserved in the former, the latter mortgages had no such feature, but, on the contrary, provided that the surplus should be distributed to the general creditors. They insist that the entire series of conveyances bearing date November 13, 1888, shall be construed together as indicating the purpose of the makers, and the disposition to dispose of the entire property by a voluntary assignment. They insist, what seems to be indisputable, that the indebtedness of the Baums referred to in the conveyances of that date, November 13, 1888, aggregate $66,130.70 principal, besides interest and 10 per cent. attorneys' fees. This is exclusive of Comer & Co.'s exclusive mortgage of November 17, 1888. Thus they had, as the plaintiffs insist, appropriated their entire assets to the payment of certain preferred creditors having claims aggregating nearly three times the value of their assets. They insist this is an assignment. The plaintiffs lay stress on *White* v. *Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. Rep. 309. That case resulted from an attempt by a creditor to secure an illegal preference in the face of a statute which was enacted to secure absolute equality among the creditors of an insolvent

debtor, the language of the law being: "Every provision in any assignment providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provision of the assignment shall be paid *pro rata* from the assets thereof." "The main object of this legislation," said Mr. Justice HARLAN in rendering the opinion of the court, "is manifest. It is to secure equality of right among the creditors of the debtor who makes a voluntary assignment of his property." This is widely variant, as we have seen, from the law of Georgia. We gather from the opinion just cited that, in Illinois, a debtor, when financially embarrassed, may in good faith compromise liabilities, sell or transfer property in payment of his debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditors. This language has reference to the action of the debtor while he retains dominion over his property; "but when," as announced in what Justice HARLAN terms the 'leading case' upon this subject in the supreme court of Illinois, (*Preston* v. *Spaulding*, 120 Ill. 208, 10 N. E. Rep. 903,) "he reaches the point where he is ready and determines to yield the dominion of his property, and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate not exempt by law to his assignee,—rendering void all preferences, and bringing about the distribution of his whole estate equally among his *bona fide* creditors; and we hold that it is within the spirit and intent of the statute that when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken,—the law will regard all acts having for their object and effect the disposition of his estate as parts of a single transaction, and, on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and, if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside as in fraud of the statute."

If that were the law of Georgia, we should be obliged, in our judgment, to adopt the reasoning of the plaintiffs' solicitor, and be governed thereby. Is it true, however, that to obtain equality between the creditors of an insolvent debtor is the purpose of legislation in the state? It is clearly otherwise. This appears, not alone from the language of the statute, but from repeated and the latest decisions of the supreme appellate court of the state. We have seen that the Code provides: "A debtor may prefer one creditor to another, and to that end he may, *bona fide*, give a lien by mortgage or other legal means, or may sell in payment of the debt, or he may transfer negotiable papers as collateral security." Section 1953. In the case of *Powell* v. *Kelly*, 82 Ga. 1, 9 S. E.

Rep. 278, a case decided long after the enactment of the assignment act upon which the plaintiffs rely, the supreme court holds:

"The act does not prescribe any particular manner or form in which a debtor may prefer one creditor to another. In our opinion he may do it by an assignment of all his property to one creditor or a class of creditors," etc.

The court then proceeds to meet the argument that the preference therein described would be a virtual repeal of the policy of the legislature in regard to assignments, and says: "These acts, [meaning the statutes upon which plaintiffs here rely,] as will be seen by reference thereto, apply only to assignments," etc. In that case the preference was made by a sale to the preferred creditors of a part of the debtor's property, and the other portion was sold to other creditors. It follows logically, as the purpose of the law of Illinois was wholly different as to preferences from the law of Georgia, a decision in *White* v. *Cotzhausen* is not to be regarded as controlling upon the question in controversy here. The mortgage to Comer & Co. was made in consequence of a promise by the Baums to give them a preference in case of subsequent embarrassment. It was made and delivered before the remaining mortgages were executed. Comer & Co. for themselves had carefully provided against the financial embarrassments which now surrounded their debtors, and the laws of Georgia are not in conflict with the ancient and salutary maxim, "*vigilantibus non dormentibus jura subveniunt.*" "It is not to be disputed," says Mr. Justice WOODS, (*Blennerhassett* v. *Sherman*, 105 U. S. 100,) "that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interest."

It is insisted, however, by the plaintiffs that the mortgage to Comer & Co. is void as creating a preference, because it contains a provision that the surplus, if any, after satisfaction of the debt is to be returned to the mortgagors, the Baums. It is sufficient, in reply to this proposition, to cite the case of *Calloway* v. *Bank*, 54 Ga. 441, in which we find that "where one in failing circumstances made a mortgage with a power of sale, on which he procured money to be loaned to him, and the power of sale provided that if the property brought more at the sale than the debt, the surplus was to be reserved to the mortgagors, it is held that this was not such a reservation of a trust or benefit to the mortgagor as made the mortgage and power of sale fraudulent." Judge MCCAY, delivering the opinion, says: "The surplus in such a case is no benefit to himself. The land is subjected to his creditors." See, also, *Lay* v. *Seago*, 47 Ga. 82. Upon this point we must overrule the objections to the mortgage.

It is further insisted by the plaintiffs that what they term the secret agreement of March 10th, by which Comer & Co. received the promise of the Baums to prefer them, was a fraud on other creditors to the extent that it was withheld from the record, and that the Baums were thus given a delusive credit, thus enabling them to obtain the goods of the plaintiffs without either the ability or the intention of paying for them. This instrument is nothing more than an agreement to prefer in case of

insolvency. The law of Georgia authorizing an insolvent debtor to prefer a creditor, it is difficult to perceive why a promise to prefer in itself can be regarded as the beginning of fraud. Great reliance is placed by the plaintiffs upon the case of *Blennerhassett* v. *Sherman*, 105 U. S. 100, as authority to support their view of this transaction. But it is easy to distinguish that case from this. There an instrument, a mortgage, by the law should have been recorded, but was withheld from record. Here the instrument was merely a promise to give a mortgage, and there is no provision of the state law for the record of such a paper. It has been held by the supreme court of this state that the registration of such conveyances only as are required by law to be registered is constructive notice to all subsequent purchasers. *Williams* v. *Logan*, 32 Ga. 165. It follows, therefore, to have registered this paper would have been a nullity. The agreement in question between Comer & Co. and Baum & Co., had it been merely in parol, Comer & Co. having performed their part of the contract, would have been as valid as if in writing. We know of no obligation which requires Comer & Co. to publish such an agreement had with one of their customers. In *Blennerhassett* v. *Sherman*, the creditor, to use the language of the court, actively concealed the mortgage, and represented the debtor as having a large estate and unlimited credit. Nothing of the sort appears here. In the case of *Neslin* v. *Wells*, 104 U. S. 428, the single question was whether, under the laws of Utah in force at that time of the transaction, a junior mortgage, taken without notice, actual or constructive, of a prior mortgage, is to be preferred in its lien to a mortgage prior in execution but subsequently recorded. Mr. Justice MATTHEWS for the court held that 'there arose a duty on the part of Neslin, the vendor, to record his purchase-money mortgage towards all who might become subsequent purchasers for value in good faith, a breach of which in respect to Kerr, the subsequent mortgagee without notice, constitutes such negligence and laches as in equity requires that the loss, which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned. Not only, therefore, does it appear that Comer & Co. had no opportunity to register this paper, but that if registered it would have been a nullity as a notice; and, it not appearing that they had any purpose to participate in any subsequent fraud of the Baums on other parties, it must be registered merely as a vigilant effort on their part to provide for possible insolvency of that firm, in whose solvency they were so deeply concerned. To repeat the language of Mr. Justice WOODS in *Blennerhassett* v. *Sherman*, *supra*, "it is not to be disputed that a debtor has the right to prefer one creditor over another, and that a vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests;" and, conceding that this is in effect, as insisted by plaintiffs, an unrecorded mortgage, they are met by the following announcement immediately succeeding that just quoted: "Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors, who have acquired no specific lien on the property described in the mort-

gage." After careful consideration, we sustain the master's report on all grounds with reference to the mortgages of Comer & Co. They are entitled to be paid principal and interest from the fund in the custody of the court.

It is objected that they are not entitled to attorneys' fees. This, however, was a part of the contract expressed in the mortgage, and is as valid as any other stipulation therein. This precise question has been decided by the supreme court of Georgia in the case of *McCall* v. *Walter*, 71 Ga. 287, nor does it matter that the mortgage was not foreclosed. Comer & Co. having been enjoined, the court took jurisdiction of the whole matter, and their mortgage will be considered as foreclosed by the decree here.

With reference to the mortgage executed by the Baums to Comer & Co. on November 17th, we think it merely an attempt to perfect the original mortgage, it being intended to cover certain merchandise which had been omitted from the first because it was not in the store.

With reference to the assignment of choses in action aggregating some $50,000, executed on November 16, 1888, by the Baums to Comer, with a power to collect, compromise, or settle the same, and apply the proceeds to his indebtedness, it is insisted by the plaintiffs that this is a voluntary assignment, and should have been made in compliance with the law of Georgia relative to such assignment. To secure the debt for which the mortgages to Comer & Co. were given, the Baums, on the 16th day of November, executed a written assignment, which contains this language:

"We hereby assign and transfer unto them all book-accounts, notes, and mortgages now in our possession, and belonging to us, including those belonging and appertaining to the business now being done by us at Toomsboro, in Wilkinson Co., and Dublin, in Lawrence Co., the aggregate amount of which is about fifty thousand dollars, more or less, a correct list of which we agree to furnish said H. M. Comer & Co. as soon as practicable, to be hereunto attached."

Comer & Co. were given the power to make such compromises of these notes and accounts as they thought proper, to pay the proceeds on their debt, and to return to the Baums such accounts, notes, and mortgages as may remain uncollected. This, in our judgment, is a voluntary assignment by a debtor who has parted with the custody of all the remainder of his property, and who was known to the assignees to be insolvent. It is therefore an assignment in the meaning of the act of September 28, 1881, and, not being accompanied by the sworn schedule and statement of assets required by the statute, it must be declared void, and the sums collected by the receiver from such choses in action as were included in this assignment will be distributed to the creditors of the Baums under the usual rule.

With reference to all those mortgages which contain a clause that the surplus existing after the payment of the debts due the mortgagees therein mentioned shall be paid over to the creditors of the mortgagors, they are, in our judgment, likewise voluntary assignments for the bene-

fit of creditors. They come fully up to the rule laid down in Burrill on Assignments, § 6. They constitute an absolute appropriation of the property for the payment of the debts of the creditors of the Baums. None of them contain any reservation of the equity of redemption. They pass, therefore, both the legal and the equitable title beyond the control of the assignor, and the persons accepting them, had they been technically perfect as assignments, would have assumed the trust to collect any resulting surplus, and disburse the same to the indebtedness of the Baums. *Martin* v. *Hausman*, 14 Fed. Rep. 160; *Clapp* v. *Dittman*, 21 Fed. Rep. 15. A Georgia case precisely in point is *Coggins* v. *Stephens*, 73 Ga. 414. There the conveyance was made in consideration of $870, "a part of which was to be paid to Silvey & Dougherty, and the remainder to debts, I, Faulkner, am owing." Coggins, on the execution of this instrument, took possession of the property, paid off a mortgage *fi. fa.* which had been levied thereon, and certain other debts. The supreme court held this transaction to be a voluntary assignment by Faulkner to Coggins in trust that Coggins would pay his debts, and that as an assignment it was void because not in compliance with the technical requisites of the statute. This wise and salutary law, the court says, when invoked, should be enforced according to its express terms, and in a liberal spirit, to suppress the evil at which it aims a blow. In *Crittenden* v. *Coleman*, 70 Ga. 293, we held that this act must be liberally construed in favor of creditors and strictly against the debtor and his assignee. These mortgages, which we hold as constituting voluntary assignments conformably to the law, must be held invalid, and the court will inquire, if it becomes necessary to do so, as to the existence of the alleged debts they were nominally given to secure. It is by no means satisfied from the evidence that such debts existed.

With reference to the mortgage of S. Waxelbaum the master made no finding thereon. It stands upon an independent footing, and, if not settled by consent of the parties, will be disposed of by the court in accordance with its equities.

The court is unable to assent to the finding of the master that the Baums were guilty of no fraud in the purchases from Fechheimer & Co. and Claflin & Co. Upon this subject it is sufficient to say that the evidence has not removed the impression which was formed by the court and announced in the decision granting an injunction and appointing a receiver. It is, however true that the evidence offered by the plaintiff does not sufficiently, in the opinion of the court, identify and distinguish the goods so purchased as to justify an order for recaption. This holding is perhaps not very important to the parties in view of the small amount which will probably remain after the mortgages of Comer & Co. receive their share of the fund in the hands of the court. The court is not satisfied from its consideration of the evidence with the measure of identification upon which the solicitors have thought proper to rely.

In consideration of the premises, it will be decreed that the mortgages of Comer & Co., principal, interest, and attorneys' fees, shall be paid, as far as that fund will suffice, from the proceeds of the sale of the prop-

erty upon which the lien of such mortgages attached, after certain charges thereon hereafter to be indicated. The 17 mortgages which have been decided to constitute an assignment void under the statute will be so declared, and the right of the alleged mortgagees thereof to participate as general creditors will be, if necessary, further examined. The assignment of choses in action hereinbefore mentioned as likewise void under the statute will be so declared, and the sum heretofore or hereafter collected on such choses in action will be distributed among the creditors. Messrs. Patterson & Hodges, solicitors for complainants, whose bill brought the fund into the custody of the court, and by whose professional labors all the general creditors will have been benefited, will be accorded from such fund appropriate compensation for their services, in accordance with the precedent fixed in *Railroad* v. *Pettus*, 113 U. S. 116, 5 Sup. Ct. Rep. 387. This will be 5 per cent. on the entire fund collected by the receivers.

This being an equity cause, in which the question of liability of cost is one for the discretion of the court, the costs will be assessed in accordance with what appears to be the equities of the case as affecting cost. That Fechheimer & Co. were grossly defrauded, there can be, in the opinion of the court, no doubt. The statement to Bradstreet by the Baums, that their property was unincumbered at a time when they were under a written private promise to Comer & Co. to execute a mortgage for every farthing of its value, was the grossest fraud. It is true that the evidence does not connect Comer & Co. with that fraud, but they must have known that the Baums were buying goods largely on credit, and they also knew that in case of possible, and it is not an extreme statement to say probable, collapse of the latter that the private agreement in their possession would utterly deprive subsequent creditors of the opportunity to recover the purchase price of their goods. It was the private agreement, then, which was the occasion of the great losses of Fechheimer & Co. and Claflin & Co., for it is not to be supposed that merchants of character and intelligence would give credit to men who had obliged themselves to prefer a particular creditor to the extent of their entire estate. This, indeed, is the evidence. The plaintiffs were wholly justified in filing their bill. They knew nothing of the secret agreement. It was this secret agreement to prefer, and the preference made in consequence thereof, which has in large measure defeated their recovery of the greater portion at least of their demands. Under all of these facts, upon which we have been compelled to maintain these preferences, to express the sense of the court of the injuries to the mercantile community by contracts of this secret nature, it is in the judgment of the court its duty to assess all the costs save the charge against the fund for Patterson & Hodges against the Baums and against H. M. Comer & Co. jointly and severally, and it will be decreed accordingly.

SMITH *v.* FLORIDA CENT. & W. R. CO. *et al.*

(Circuit Court, N. D. Florida. August, 1890.)

NEGOTIABLE INSTRUMENTS—RAILROAD BONDS—BONA FIDE HOLDER—FRAUD.

In a suit to enforce the collection of railroad bonds which had been declared fraudulent it appeared that the bonds were given to a firm of which plaintiff was a member in payment for work alleged to have been done for the railroad company, and that another member of said firm was an active participant in the fraud which rendered the bonds invalid. *Held*, that plaintiff was not an innocent holder.

In Equity.

C. L. Robinson, *C. K. Davis*, and *J. W. Losey*, for complainant.

John A. Henderson, for defendants.

SPEER, J. This is a bill filed by the complainant, who avers himself to be a citizen of the state of Wisconsin, residing at La Crosse in that state, against the Florida Central & Western Railroad Company, a corporation created by and under the laws of the state of Florida, having its place of business at Jacksonville in said state; the Florida Central Railroad Company, a corporation created by and under the laws of the state of Florida, having its place of business at Jacksonville, in this district, against Sir Edward J. Reede, who is an alien, and the subject of the queen of Great Britain and Ireland, and against J. Frederick Schutte, Jans Prins, Adrianus Prins, and 28 others, who are aliens and subjects of the king of the Netherlands, and against the Guarantee Trust & Safe-Deposit Company, a corporation created by the laws of the state of Pennsylvania, and a citizen of that state. The bill is brought to enforce the collection of 376 bonds of the Florida Central Railroad Company for $1,000 each, which will be hereafter more particularly described. It is one of several cases, which it seems have sought to avoid the decision of this court, subsequently affirmed, in *Schutte* v. *Railroad Co.* 103 U. S. 127. The history of this litigation is familiar. The decree in the *Schutte Case* was rendered in this court by Mr. Justice BRADLEY, as circuit justice. That decree held that the trustees of the internal improvement fund of the state of Florida had the first lien upon this and other railroads to secure the sum of $464,175.37, with interest thereon since March 20, A. D. 1869, at the rate of 8 per cent. per annum. That the complainants, who are many of them defendants here, should have a second lien upon both railroads before mentioned, and upon the entire interests of the Jacksonville, Pensacola & Mobile Railroad Company between Quincy and Chattahoochee, to the amount of all the bonds of the state of Florida held and owned by them, mentioned in the pleadings in the case, and numbered 3,000 and under, together with the interest. That the amount of said state bonds now owned by the complainants was $2,751,000, and the interest now matured amounted to $1,655,001. That the complainants had a first lien upon the railroad running from Lake City to Jacksonville to the amount of the bonds of the state of Florida exchanged for the bonds of the Florida Central

Railroad Company, numbered 3,001 and upwards, held and owned by them, with the interest. The amount of the last-numbered bonds is $197,000, and the amount of interest now matured is $118,515.20. That the railroad and property and franchises extending from Lake City to Chattahoochee, including the branch road to Monticello, mentioned in the bill of complaint in this case, and the railroad from Tallahassee to St. Marks, and the property and franchises pertaining thereto, be each sold subject to the lien thereon, fixed by the decree to satisfy the lien of the said complainants thereon. That the sale be made by Sherman, Conante, and Hawkins, as special masters, and be advertised for at least 90 days before the day of sale in some newspaper of general circulation published in Jacksonville, and also in some newspaper of general circulation published in the state of New York. That the purchaser or purchasers at said sale may deposit with said special masters in payment of his or her bid the said Florida state bonds numbered 3,000 or under, in the proportion which the whole amount of the bid bears to the whole amount of the said state bonds outstanding, and 97 numbered 3,001 or under, and the interest matured thereon, which is $4,406,001.60. *Fifth.* That the said railroad from Jacksonville to Lake City be sold by the said special masters at the same time to satisfy the lien of complainants declared by the decree. That the purchaser or purchasers at said sale shall be authorized to deliver to the special masters, in payment of the bid, said bonds of the state of Florida numbered 3,001 and upwards, in the proportion which the whole amount of the bid bears to the whole amount of said state bonds outstanding, numbered last as aforesaid; that is, $315,515.20. *Sixth.* That the balance of every bid for either of the roads hereby directed to be sold above the amounts to be paid in bonds shall be paid in cash, and at the time of said sale, and, if not paid at once, the masters shall immediately reoffer said property for sale, etc. The amount paid in cash at either of the sales shall be paid into court by the masters, to be disposed of by the court on the coming in of the said master's report. After said sale or sales shall be confirmed the purchaser or purchasers shall be placed immediately in possession of the property purchased. *Seventh.* That, unless the purchaser of the railroad from Lake City to Chattahoochee, and the branch to Monticello, and the railroad from Tallahassee to St. Marks, shall, within one year from the date of the sale thereof, discharge and satisfy the liens of the trustees of the internal improvement fund of the state of Florida thereon, respectively, as hereinbefore declared, then the said railroad property and franchises thereto respectively pertaining extending from Lake City to Quincy, including the branch road to Monticello, and the railroad property and franchises thereto belonging extending from Tallahassee to St. Marks, shall be taken possession of and sold by the marshal of the United States for said district, separately, to satisfy the liens thereon respectively fixed by this decree, and said decree shall be advertised to take place at Tallahassee, in said state, in a newspaper of general circulation published in said Tallahassee, and also in a newspaper of general circulation published in

the city of New York, at least 90 days before the day of sale; and the purchaser or purchasers at said sale or sales may pay to the marshal for satisfaction of their bid for either of said roads the bonds which are a lien upon said road,—that is, the bonds to pay which the last vendor exists as declared by this decree, in the proportion which the whole bid bears to the whole amount of bonds, which were a lien as aforesaid on said road, and shall pay the balance in cash at the time of said sale, and the marshal shall return said bonds so received by him and the balance, if any, of cash into court, to be disposed of as the court shall direct. This decree was, upon appeal, affirmed by the supreme court of the United States in the case of *Railroad Cos.* v. *Schutte*, above mentioned. The bill before the court prays that all proceedings subsequent to the decree above mentioned in the *Schutte Case* made as to the balance be evaded and annulled and set aside, or that the decree may be so modified that plaintiff's rights may be established in said suit, and said property resold. He prays further that the entire line of railroad from Jacksonville to Lake City, and all property appurtenant thereto, may be decreed to be subject to and charged with the mortgage lien in favor of the plaintiff for the amount of his said bonds and interest thereon, and that the said property may be sold to satisfy the same, or that his rights in the premises against those who claim the property under the decree may be enforced upon such terms as may be equitable, and that he may have the benefits of the provision of the statutes of the state of Florida, which created a lien on said railroad for the security and payments of his bonds; that the defendants, and each of them, may be enjoined from operating said railroad, or in any way interfering with it or any of said property, pending this action; that a receiver of said railroad and property may be appointed by the court pending this litigation; that the defendants, and especially the defendant the Florida Central & Western Railroad Company, may account for the rents and profits of said railroad and property since it has had possession thereof. There is a prayer for subpœna as to all the parties heretofore mentioned.

Without stating more in detail the voluminous record in this case, which, under the stipulations, involves 1,472 pages of printed matter, and besides all of the other evidence taken, which is voluminous, the ascertainment of the right of the controversy will be greatly facilitated by the consideration of the case of *Trask* v. *Railroad Co.*, 124 U. S. 515, 8 Sup. Ct. Rep. 574. The facts are sufficiently stated in the opinion of the court, delivered by Mr. Chief Justice WAITE:

"The suit was brought by Spencer Trask to collect 192 of the 1,000 bonds of the state of Florida issued to the Florida Central Railroad Company, which were the subject of consideration by this court in *Railroad Cos.* v. *Schutte*, 103 U. S. 118. In that case it was decided that, although the bonds were void as against the state, the railroad company that sold them was estopped from setting up their invalidity as a defense to an action brought by a *bona fide* holder to enforce the lien the company had given on its property to secure their payment. Accordingly a decree was rendered establishing the lien of the holders of 197 bonds on the railroad of the company, and ordering a sale

to pay the amount due thereon. Trask now claims to be a *bona fide* holder of the 192 bonds he sues for, and seeks the same relief as to them. He concedes the invalidity of the bonds so far as the state is concerned, but as against the railroad company and its property claims the benefit of the same estoppel that was adjudged in the other case to exist in favor of those who recovered there.

"The general facts as to the issue of the bonds are stated in the *Case of Schutte*, beginning at page 127 of the volume in which it is reported, (103 U. S.) The correctness of our findings then is not denied now. Indeed, Trask relies upon that decision as the basis of his right to recover, and the only disputed question is whether he does in law and in fact occupy the position of a *bona fide* holder. That is substantially a question of fact only, and it presents itself in a double aspect. Trask got his title from Thomas B. Coddington, and the inquiry is, first, as to his own position separate from that of Coddington, and, if that is not sufficient, then, next, as to that of Coddington, under whom he claims. We have carefully considered the testimony bearing on these questions both in the record as it has been printed in the present case, and in that of the *Schutte Case*, brought into this also by stipulation. It would serve no useful purpose to refer to this testimony in detail, and it is sufficient to say that we have had no difficulty in reaching the conclusion that Trask, as a purchaser of the bonds, occupies no better position than Coddington, from whom he bought. His purchase was made September 12, 1881, at an auction sale in the city of New York. The bonds had then been running ten years and more, and no interest had ever been paid upon them. As the sale was made under the agreement of August 29, 1872, Trask is chargeable with notice of the contents of that instrument, which showed on its face that the bonds had been the subject of litigation, and had not been obtained by Coddington in the ordinary course of business. His debt, for which they were held, was $40,000, and the bonds, without interest, which had been running ten years at eight per cent. per annum, amounted to $192,000. As the bonds were state bonds, the mere fact that no interest had ever been paid furnished the strongest presumptive evidence that they were dishonored. The interest alone, if collected, would much more than pay the debt for which the bonds were held. The circumstances connected with the sale also were entirely inconsistent with the idea of a purchase of commercial paper in good faith for a valuable consideration without notice. No one present at the time could have had any other understanding than that the sale was of bonds which had been commercially dishonored. We are equally well satisfied that Coddington was never in any commercial sense a *bona fide* holder of the bonds. According to his own testimony, he was originally the mere agent of those who were engaged in perpetrating the fraud upon the railroad company, and employed by them to get the bonds from Florida to London, so that they might be sold, and a large part of the proceeds applied to the payment of the personal debts of one of the guilty parties. He undoubtedly did that because he had been told that it would enable 'the parties in interest' to pay him the cash for $24,465 of coupons of another company, for which they were bound. He entered into no contract with the Florida Central Company, and it could never have been supposed by him that any part of the proceeds was to be paid into its treasury or for its use. He could not but have known that the whole purpose of his employment was to get the bonds to London, where they had been contracted to be sold at a price that would yield less than half their face value, and that he was himself to apply more than half of this to the payment of the individual debts of one of the large stockholders of the company, by whose influence and in whose interest the railroad bonds had been executed, to be exchanged for the state bonds, which he was to take away. Under such circumstances, it is certain

that he could have acquired no lien on the bonds as security for any services he might render in transferring them to London, or for any liability he had incurred to third parties in order to get the bonds away. His contract for the service, and for the compensation he was to receive, was not with the railroad company itself, but with the president of the Jacksonville, Pensacola & Mobile Railroad Company, who was engaged in appropriating the bonds issued to the Florida Central Company to his own use. This disposed of his claim of lien on account of his services and liabilities as agent. He was not the agent of the Florida Central Railroad Company, and, as it must be conceded that those for whom he was acting had no title as against this company, there was nothing in his hands to which any lien could attach in his favor any more than in favor of his principals.

"As to the contract made with the Jacksonville, Pensacola & Mobile Company on the 29th of August, 1872, by which the 192 bonds were given to Coddington as security for a debt owing him by that company, little need be said. The Jacksonville, Pensacola & Mobile Company had no legal right to the bonds, and it could not, therefore, pledge them as security for its debts. All this Coddington knew, or ought to have known. And besides, when this contract was made, the fraud and illegality in the original issue of the bonds, both by the railroad company and the state, had become notorious, and it is impossible that Coddington, situated as he was, could have been ignorant of the facts. In order to get the bonds away from Florida he was compelled to arrange with certain stockholders of the Florida Central Company, who had begun a suit to prevent their removal by the president of the Jacksonville, Pensacola & Mobile Company, on the ground that he had no right to use the road of the Florida Central Company, 'and cover it with liens to raise money to pay private debts, notwithstanding he is the owner of a majority of the stock.' It is unnecessary to refer more particularly to the evidence. It is full and conclusive, and leaves no doubt on our minds as to the knowledge of Coddington of such facts as would prevent him from acquiring any title to the bonds he took away by purchasing them from any of the parties engaged in the transaction, which he could enforce as a *bona fide* holder against the Florida Central Company."

The complainant in this case, according to the stipulation in evidence in the case, had practically come into the possession of the bonds which he seeks to enforce in August, 1882. The decree, the substance of which we have set forth, was rendered in this court in favor of Schutte on the 31st day of May, 1879. It was affirmed by the supreme court of the United States in October, 1880. The sale under the decree of all the property of the Florida Central Railroad Company, including everything which is sought to be evaded by the prayers of the bill here, was made in February, 1881, and was confirmed by the court in the same month. The deed conveying the title to this railroad property was made to Sir Edward Reede, and Reede conveyed to the Florida Central & Western Railroad Company, organized under the general laws, for the purpose, among others, of holding and operating these purchases. All of that is made to appear by the stipulations and the copy of the deed from Sir Edward Reede to the Florida Central & Western Railroad Company.

It is insisted by the defendants with great force, that the stockholders of this last-mentioned organization were innocent holders, taking the property upon the faith of the judicial decrees of this court, having the high sanction of the supreme court of the United States. It is true, also,

that the issues in this case were made upon the same theories presented by the complainants in the *Trask Case*, and, indeed, were standing for hearing when the supreme court affirmed in that case the decree of this court. The plaintiff attempts to evade the decision in the *Schutte* and *Trask Cases*, and especially the latter, by insisting that he is a *bona fide* holder of these bonds, without notice, and that a certain deed of trust between the Jacksonville, Pensacola & Mobile Railroad Company and C. L. Chase, T. H. Flagg, and D. G. Ambler was an actual application of the bonds therein sued on to the partnership of which the plaintiff was a member, for the construction of the line of road from Quincy to Mobile. This deed will be found in the Schutte record, pages 1454–4–5–6 and –7. He insists further that the actual delivery of the bonds —which, as we have seen, did not take place until August, 1882—was such a delivery as related back to the date of the trust-deed, October, 1871, or at any rate to the time when the work was done. But it seems that this contention has been directly negatived by the decision of the supreme court of Florida in the case of *State* v. *Railroad Co.*, 15 Fla. 709. The court held that the instrument in question did not support the claim of a sale of its bonds to the trustees mentioned. It is not alleged in the bill that the complainant and his partners, the Florida Construction Company, ever contracted to receive these bonds for their work of construction, or to take their pay in bonds. Such does not appear to be the fact. The proper construction of the instrument above referred to will lead to the conclusion that they were to be paid in money; and if, after the bonds had been declared invalid by the most lofty tribunals in litigation which was made notorious from one end of the country to the other, and indeed in Europe, they then having failed to obtain the money, accepted the bonds in consideration of work previously done, they cannot, with any force whatever, insist acceptance of the bonds would relate back to their original construction contract in such manner as to avoid the effect of the decree, nullifying their bonds and transferring the properties upon which they purport to be a lien. It appears, too, that the Florida Central Railroad Company was an entire stranger to this instrument. It appears to be nothing but an attempt to provide cash with which to make the payments to a firm of which the plaintiff was a member; nor was the plaintiff a party to it. The construction company of which he was a member was ousted by a pre-existing contract, and acquired no rights under this deed of trust. In the *Case of Trask*, *supra*, Coddington acquired possession of his bonds pending the litigation in the *Schutte Case*, while here the possession came on after the decree and the sale, and after the property covered by the liens therein declared had passed into the hands and ownership of a company whose every stockholder was apparently an innocent purchaser for value without notice, and indeed with all the encouragement which comes from the decision of a court of final resort. Trask was held chargeable with notice of all that Coddington knew. Coddington having notice of the *mala fides* of this entire transaction, which was notorious throughout the country, it was held to attach to Trask.

It appears from the evidence that in the transaction in consequence of which the complainant insists he received these bonds he was a partner with one E. G. Smith and one Converse S. Chase and one J. H. Gardner, the firm name being "The Florida Construction Company." This is plain from the Schutte record, page 1453. This is otherwise shown from the transcript of the Leon county judgment, hereinafter to be mentioned, and the assignment of May 27, 1879. Converse S. Chase was a trustee for the Florida Construction Company, as well as a member of it, and it follows that notice to him of the unlawful character of these bonds was notice to his partner, the complainant. Wade, Notice, § 59; *Stevens* v. *Goodenough*, 26 Vt. 676. On the 11th of April, 1879, three years before the complainant received the bonds, Chase testified as follows: "I know there were some bonds issued about that time to said Railroad Co.; about three thousand, according to my recollection." Being asked by counsel whether any question was raised about the validity of the bonds, he answered: "There was quite a controversy about that time about the constitutionality of issuing those bonds. I of course know that from reading it in the public press and by hearing it. Again I visited Europe in June, July, August, and September, 1872. My visit was in reference to said bonds, for the sale of the same. I found the bonds being held by one John Collinson and a Dutch syndicate." On the next page he states that he received a telegram containing this expression with reference to certain litigation: "State and company hopelessly discredited, unless," etc. "Also there were damaging reports in Europe. I learned them first from Mr. John Collinson in person, on the 4th day of July, 1872; and the reports were published in a Dutch paper in Amsterdam, as I was informed, at the time, though I could not read the paper." On page 701 of the Schutte record the partner of the plaintiff further is recorded as testifying to the effect that these bonds were disposed of at a price of 40 cents on the dollar. He admits that he knew of their unconstitutionality and illegality being matter of common report. So damaging were these reports that the agent Collinson requested Chase to procure from the attorney general of Florida, the judge of Florida, and the governor, statements to counteract these damnatory reports. This duty was admirably performed, as we see from pages 1239 and 1240 of the Schutte record. The testimony thus received from high officials in Florida was unquestionably misleading, and Chase himself was active in attempting to contradict the damaging statements in reference to the bonds which were being considered by the shrewd and wary financiers of Holland. He knew that the interest on the bonds was to be provided for out of the proceeds of sale of other bonds. They took out, says Chase, the payment for 3 coupons on 2,800 bonds, which amounted to about £95,400, or about $460,736 in gold. By thus selling these fraudulent bonds to pay matured interest on bonds of a similar character, these conspirators, against the credit and honor of the state of Florida, sought to give them a temporary and delusive value on European exchange. Chase himself was charged with the sale of 1,200 bonds, including the 396 involved in this controversy. He attempted

to compromise litigation pending in London involving these bonds by their fraudulent misapplication. He identifies a consent decree in which he was concerned, and to which his signature is attached, (page 28, Schutte record,) the decree being taken in the English chancery, and he testifies this decree, which involved these bonds, was never complied with, and that the bonds were never otherwise disposed of to his knowledge. It would be difficult to imagine a stronger array of facts to bring home to the partner of the plaintiff the knowledge of the worthlessness of these obligations. It is insisted, however, that the 1,200 bonds of which the plaintiff's 360 were a part were specially dedicated to the purposes of the construction company, which we have seen was no company at all, at least no corporation, but merely a partnership. It is true, however, as appears from the record, that at the date of the trust-deed under which the construction company claims, their 1,200 bonds were subject to what is known in the history of this famous litigation as the "Houston Draft." This draft was for $16,326.70. The agreements to that effect appear solemnly signed by M. S. Littlefield, the president of the Jacksonville, Pensacola & Mobile Railroad Company, and by Edward Houston. Two hundred and ninety-four of these bonds were excessively issued, and with great scrupulousness were afterwards returned and cared for. This appears in a memorandum of compromise proposed by Converse S. Chase to settle all outstanding claims and differences. The third point in this memorandum is important. It reads as follows:

"*Thirdly.* The proceeds of the balance of the bonds to be used to repay the Florida Construction Company for the money expended by them on the works of the J., P. & M. R. R. Co., and in satisfaction of several claims of all the other creditors of the company."

This memorandum must not have been effective, although it is clear from its third clause that the construction company was not to have the negotiable paper itself as *bona fide* holders, but merely the proceeds. Instead of relying on the bonds the construction company should have proceeded against those persons or corporations who employed but did not pay them. But it appears that Littlefield and his associates had other uses for these bonds. Two were lost, but the remainder, or the proceeds of their sale, were to be equally divided between Littlefield for himself and his company on the one hand, and the Western North Carolina Railroad Company on the other part. We observe, therefore, that the burdens placed on these 1,200 bonds, including the 396 of the plaintiff, were of an onerous and multitudinous character. As we have seen, they were to satisfy in part a decree of the English chancery on the other side, to meet the draft of Edward Houston on this side, to satisfy the demands of the Florida Construction Company, and finally to be divided dollar for dollar between Littlefield for the company and the Western Division of the Western Railroad of North Carolina. It will not be difficult to understand in all of these historical transactions that Chase, occupying a threefold relation,—of partner with the complainant, trustee for the construction company, and attorney in fact for the railroad company,—became saturated with the knowledge of the vicious character of these

transactions, and it is equally demonstrated that the plaintiff shared the legal responsibility of this knowledge with him. See pages 1242, 987, 988, of the Schutte record. See, also, pages 722–724 of the same record for Collinson's reply to a proposition of Chase, in which he is fully put on notice of the fraud upon the state and all parties he is contemplating. Other stupendous frauds upon the state of Florida and its railroad were developed by this same agent, contractor, and partner for the plaintiff. They are fully presented in the Schutte record, and have been passed upon by the supreme court of the United States. The New York World, a paper of wide circulation, had called the attention of the public to this matter in its article of Wednesday, June 15, 1870. After stating the issue of the bonds, the article states that the bonds first above mentioned have already been issued, and are on their way to New York, and some of them to Europe, it is said for negotiation. It is well, perhaps, that capitalists should be put on their guard. Attention is called to the clause of the state constitution upon which these bonds were finally declared unconstitutional. The article prints extracts from a letter of George W. Swepson of North Carolina, to which reference has already been made, as the president of the Western Division of the Western Railroad of North Carolina, with whom it was stipulated that his road should receive the "dollar for dollar" division of a large portion of these bonds. It is addressed to Gov. Reid, and it reads as follows:

"I regret my inability to be in your town during the extra session of the legislature. General Littlefield has the bills and act, and will fully explain everything to you. * * * You will remember, when in New York our agreement was this: You were to call the legislature together, and use your influence to have our bills passed as drawn by us, and if you were successful in this you were to be paid $12,500 in cash."

The legislature was accordingly convened in extra session only about three months after its regular session, and did pass the railroad bill required of them. But, the majority not then being thoroughly corrupted, a clause was inserted in the act authorizing the issue of the bonds after a severe struggle requiring the railroad company to give to the state mortgage security for its protection. This clause, though notoriously adopted by both branches of the legislature, was found to have mysteriously disappeared from the act as signed by the governor, among the rolls of the secretary of the state. A bill in chancery was therefore filed to enjoin the issue of the bonds, on the ground that the act authorizing their issue had been fraudulently changed by Littlefield and his associates, or by their procurement and for their benefit. The injunction was granted by the court, and no motion was ever made by the parties to have it dissolved. At the next session of the legislature, held in January last, the operations of the railroad ring thus arrested by the court were renewed at the capitol, and a bill was actually prepared by these shameless parties, introduced, and passed, whereby validity was given to the law pronounced void by the court for fraudulent alteration of it, with authorization for the issue of bonds in immensely augmented quantities. And it is under this bill, claiming to be a law, that the four millions of Florida state

bonds now on their way to northern and European markets for negotiation have been issued. See pages in the *Schutte Case*, 682, 683. But this is not all. S. M. Hopkins & Co., the London agents, in view of the questionable character of the bonds, were given permission by Littlefield to sell the bonds at 50 cents on the dollar, and less, in order to induce buyers. This was done, and they were afterwards at £128. 10s. 1d.

This lamentable array of fraud and corruption is recounted to show the impossibility that a man largely interested, as he insists, with Chase in these transactions could be ignorant of their notorious and universally understood character. The "construction company," as we have seen, was at no time entitled to these bonds. It was stipulated that they should be paid from the proceeds of a portion thereof; but if they had taken the bonds after the occurrences herein set out had been passed on by the state courts of Florida, by the circuit court for the United States for this district, by the supreme court of the United States, and given besides the widest publicity in this country and in Europe, it is asking too much of a court of equity to believe that a subsequent holder of these bonds, himself a contractor on one of the roads to build which the bonds were ostensibly issued, could be ignorant of their character, and therefore a *bona fide* holder for value; and this view is irrespective of the representations of Chase above presented. Smith, the plaintiff, must have had knowledge of the truth in the *Schutte Case*. It was to marshal the assets of the wrecked corporation, to determine priority of loans, and to award the property in kind. The plaintiffs in the *Schutte Case* were obliged to buy the Florida Central Railroad to protect themselves from loss. It is impossible to doubt, notwithstanding this denial, that the plaintiff might have intervened and asserted his rights on that trial, and he is now estopped. Mr. Henderson, in the brief filed in the record, gives a record of the ultimate disposition of these bonds, which is satisfactory to the court, but which it is not necessary to reproduce here.

It appears further from the evidence that the Florida Construction Company, though never having built any of the railroad, had judgment on award for arbitration for all of its claims for work and material. This amounted to $36,000. Chase and Glagg, trustees under the deed of trust providing for the payment of the proceeds of sales of certain bonds to the work of construction, operated the road from October, 1871, until the receiver took charge, in the spring or summer of the year 1882. They have never accounted for the earnings, although, as we have seen, Chase was a partner in the construction company. It is insisted that the revenue from this source alone was more than three times the debt of the construction company, and payment to Chase was payment to the company. Be this as it may, if the construction company relied upon their award, which is yet unsatisfied, it is difficult to understand how for the same debt the company, or a member thereof, can lawfully claim to be the *bona fide* holders of $396,000 worth of bonds. It is insisted, further, that Chase never in any way accounted for £19,200, which it is asserted was received by him in the sale to Collinson of the bonds; and the application of this statement, which the court is, however, not

able to decide upon the facts, is that, being a member of the construction company, the payment to him of this amount was payment for that company. It seems indisputable, however, from the evidence that Converse S. Chase left Florida, and has never returned to protect the interests of his construction company, the management of his trust, the development of the Florida railway system, or any of the litigation. He does not appear in the litigation again except to testify that not one of the bonds numbered above 3,000 was ever issued or sold. This he testified in New York. Besides, it does not appear that Smith was ever a purchaser of these bonds. The Florida Central Company never owed him a dollar; and it does not appear that he credits any account against the company or against the Jacksonville, Pensacola & Mobile Company, because of the possession by him of these bonds.

There was offered in evidence on the trial, and admitted subject to the objection of defendants' counsel, a judgment in favor of the Florida Construction Company against the Jacksonville, Pensacola & Mobile Company, and also the record of a case from a Minnesota state court between Smith, the plaintiff, and the same company. This was offered on the trial, and it was objected that the time for hearing or taking testimony had long passed, and no sufficient reason was shown for opening the case. It was objected, further, that there were no allegations in the bill to support such proofs, and that there was a manifest inconsistency between the evidence offered and the facts as stipulated in the case. Also that the defendant was in no way a party to the proceedings in Minnesota; that they were collusive and fraudulent. The depositions of Smith were also offered. It was objected that they were wholly *ex parte*, simply an affidavit made in a foreign and remote jurisdiction. The judgment of the construction company against the Jacksonville, Pensacola & Mobile Company was on an award of arbitration of all matured demands and claims. This was entered in Leon county, and never made a matter of record in any county in which the property of the defendant is situate. It is objected that the plaintiffs in that submission are not a corporation, but were only partners, and the title was simply the firm name. It is stated that the construction firm never built any of the extension contracted for; that the road even now extends only from Quincy to Chattahoochee; and that the constructed portion of the Jacksonville, Pensacola & Mobile Company is the 21 miles from Quincy to Chattahoochee. It is stated that Gibbs built for the company, Davis & Bunkwright being the subcontractors; that these parties had separate suits in the state court for compensation, and intervened in this case for payment. See *Gibbs* v. *Drew*, 16 Fla. 147. As to the Minnesota judgment, if it were otherwise admissible when offered on the argument, we would be compelled to regard it as an additional step in the tortuous journey of fraud which has traveled its slow length through the vast record before the court. It plainly has no jurisdiction of the defendant company. That the same M. S. Littlefield, whose unscrupulous and daring corruption stains well-nigh every page of this record, assisted in the work of obtaining this judgment, by collusion,—a judgment of over $900,000,—to be added

to the award of $36,000 after full submission of all claims, shows how the Minnesota court was misled. The judgment of the Minnesota court, without jurisdiction of the subject-matter or the parties, must be regarded as a nullity so far as this case is concerned.

Like the *Trask Case*, the controversy here is mainly of fact, and, as we have seen from a lengthy review of the evidence, which the court has felt it incumbent to attempt in a case of this magnitude, it is impossible to doubt that the plaintiff fully understood the illegality and fraudulent character of his bonds when he received them. The notorious character of the men with whom he and his agent dealt, the continuous and unblushing wrongs which they perpetrated, were known to the country, and have received the scathing condemnation of the supreme court of the United States. "Littlefield's character," says Chief Justice WAITE in *Railroad Cos. v. Schutte*, 103 U. S. 144, "as it appears all through this voluminous record, is not such as to entitle him to any favorable consideration as a witness or otherwise. He and Swepson have both shown themselves capable of the most shameless frauds, and we cannot but look with suspicion upon everything they do or say." In the later *Case of Trask*, 124 U. S. 515, 8 Sup. Ct. Rep. 574, the reasoning of the court, as we have seen, is fully applicable to the case at bar. Coddington, whose bonds were held as invalid and of no effect in his hands, had bought them at an auction sale September 12, 1881. The plaintiff obtained his in 1882. No interest had been paid on either. No one can believe that either Coddington in that case, or Smith in this case, was in any commercial sense a *bona fide* holder of the bonds.

It is difficult to understand at this period of peace, prosperity, and enforcement of law, how our country's history could have been sullied by such shameless occurrences as we have been obliged to recall, and the participants escape the severest penalties of the outraged law. They occurred, however, when the vast caldron of revolution, boiling by the fierce and lurid fires of civil war, had thrown to the surface much of the scum of society. Good men of all parties were powerless in the hands of these adventurers, who, in that period of public prostration, rode into places of influence on the wave of corruption and ignorance. The opportunity for such blots upon the history of the country is fortunately past, and the patriotic, the pure, and the wise should be ever careful lest that opportunity may return with its resulting paralysis to such empires as the state of Florida. A most anxious and deliberate consideration of this record has induced the conclusion that the prayers in the bill should be all denied, and that it be dismissed at the plaintiff's cost.

CUTTING *v.* FLORIDA RY. & NAV. CO. MEYER *v.* SAME. BROWN *v.* SAME. CENTRAL TRUST CO. *v.* SAME. GUARANTEE T. & S. D. CO. *v.* SAME. DAVIS *v.* SAME, (MALLORY *et al.*, Intervenors.)

(Circuit Court, N. D. Florida. August, 1890.)

EQUITY PRACTICE—MASTER'S REPORT.

Where the exceptions to a master's report make no allusion to the evidence, and are not supported by the master's statement, and such statement is sufficient to sustain his conclusions, the report should be confirmed.

In Equity. On exceptions to master's report.

H. Bisbee, for intervenors.

John A. Henderson, for respondent.

SPEER, J. The petition in this case was filed on the 1st day of July, 1887, and the answer thereto on November 25, 1887. It was referred to the master to take testimony, and report what amount, if any, was due the petitioners.

The petition avers that the New York & Texas Steam-Ship Company is a corporation, whose vessels have been for years plying between the ports of New York and Fernandina and Jacksonville, with railroad connections with the defendant company, and with the predecessors of said company; that the defendant's line of railroad extended from the Florida ports above mentioned to the Chattahoochee river, and that the Central Railroad Company of Georgia, and the Savannah, Florida & Western Railroad Company, each had a line of railway extending from Savannah, in Georgia, with connections at Savannah with the Ocean Steam-Ship Company for New York. The petition further avers that prior to the summer of 1886 the defendant company and the Georgia companies were competitors for the inward and outward bound freight of the Chattahoochee valley. In this competition, the Ocean Steam-Ship Company was involved as a through connection to Georgia railroads, and the petitioner likewise was involved as a connection for the defendant company. That a sharp cutting of rates had been indulged in as the result of such competition. That for 10 years prior to the summer of 1886 the petitioner had through business connection with the defendant company and its predecessors, and that upon through freight to and from New York to the Chattahoochee valley it had received 60 per cent. of the total freight charges for carrying such through freight. That in the summer of 1886, to avoid another war of rates, the Georgia company's and the defendant company's railroad entered into a pooling contract, by which the freight to and from the Chattahoochee valley to Fernandina and Savannah was to be divided; and Virgil Powers, of Georgia, was appointed commissioner to receive and divide out freight moneys according to the percentages named in the contract. The petitioner insists that it is entitled to its share of 60 per cent. net profits derived under said pooling contract by the receiver of the defendant company, and avers

that it had assurances from the receiver of the Florida Railway & Navigation Company and his traffic manager that it was to be included therein. That the receiver relied and depended exclusively upon the petitioner to maintain freight rates fixed by him in competition with the said Georgia companies and their steam-ship connections, or, on the other hand, to maintain the said pooling contract. The petitioner has maintained the freight rates agreed upon by the said pooling contract in good faith, believing that it was a party thereto. Respondent admits the existence of the pooling contract, but denies that it included the petitioner's line of steamers; that it was limited in terms to South Atlantic ports; and that not only petitioner's steamers, but all ships carrying between South Atlantic ports and the ports of Boston, New York, and all eastern points were excluded from participation in the distribution of the revenue arising therefrom. The respondent admits having received under said contract the gross amount of $14,210.97, of which $11,085.03 was received by the carriage of cotton from the Chattahoochee valley to the port of Savannah for local delivery or foreign export. For these purposes the petitioner had no facilities whatever, but respondent denies that there has ever been any contract between the petitioner and the defendant company as to a division of percentages of freight moneys earned, but that this was a matter of special agreement, and not a general contract for 60 per cent. to be given to the petitioner.

The master took a great volume of testimony, which is in part set out in his report. It appears from the testimony that the steam-ships of the petitioner and the defendant company and its predecessors had each honored the tickets and bills of lading of the other. The petitioner's line (which, for convenience, we will call the "Mallory Line") was the main connection coastwise for New York to respondent's railroad, although other lines existed, viz., the Charleston & Florida Steam-Ship Line, the New York & Charleston Line, and the Ocean Steam-Ship Company, via Live Oak, Callahan, and Savannah. The averments as to the competition for the business of the Chattahoochee valley, and especially for the cotton shipped therefrom, was shown by the evidence. The effort to avoid a war of rates, in pursuance of which the traffic managers of the three railroads above mentioned met at different times through the spring and summer of 1886, was also shown. Their conferences resulted in a so-called "pooling contract," executed at Washington, D. C., on July 16, 1886, which contract was signed by the traffic managers of the railroads above named. The rates were fixed by agreement entered into at Savannah on July 21, 1886, when Virgil Powers, of Georgia, was agreed upon as the party to whom statements should be made, and who should act as clearing-house agent. The practical effect of this arrangement was that no cotton was carried out of the Chattahoochee valley by the Florida Railway & Navigation Company during the season of 1886 and 1887. The net amount which accrued to that company arising out of the pooling contract was $14.210.97. Petitioner claims that, without its line as a through connection, the Florida Railway & Navigation Company would not have been recognized in the pooling contract

by the other parties, and that, pending the negotiations for that contract, the petitioner had assurances by letters and telegrams from F. B. Papy, then traffic manager of the Florida Railway & Navigation Company, that the Mallory Line should be beneficiaries in the contract to be made. These letters, or the substance of them, are set out in the master's report. The correspondence is lengthy, but it may be summed up in the following letter from F. B. Papy, traffic manager, to R. W. Southwick, Esq., the representative of the petitioner:

"When this question was open for discussion and agreement the proposition was to include all the lines running through to New York, Boston, and Philadelphia; and upon that theory I presented figures to C. H. Mallory & Co., which would yield the lines an interest between sixty and seventy-five thousand dollars per annum. The discussion of this matter took several months. However, the Georgia Central and the S. F. & W. R. R. finally determined that the pool should not extend beyond South Atlantic ports, and a division of the business must be upon the basis of rates to these South Atlantic ports, and not beyond. They also insisted that the business from Savannah proper to Chattahoochee Landing should not be included. I understood that it should. The matter was then taken out of the hands of the agents, and was settled by Mr. Haynes and Mr. Duval, which made the pool apply only to South Atlantic ports, and to exclude Savannah from it as well as the several steam-ship lines. The agreement on that basis went into effect, I think, in August, 1886, after the agreement was concluded; and, as evidence that the several steam-ship lines were not included, I wrote C. H. Mallory & Co., suggesting there was nothing in the contract which forbade them from taking freight."

The witness F. B. Papy, whose letter has been quoted, was at the time of making the pooling contract the traffic manager for the Florida Railway & Navigation Company, who is the respondent here. It is undoubtedly true from all of the correspondence that it was originally his purpose to have included the steam-ship line represented by the petitioner; but it is equally true that this line was not taken into the pooling contract, and that no contract between the Mallory Line and the Florida Railway & Navigation Company as to percentages on freight had been made. The testimony of Mr. Duval, the receiver, is exceedingly important in this connection. He states that, had it been the intention to include the Mallory Line in the pooling contract, a much larger percentage would have been claimed by the Florida Railway & Navigation Company; that the Mallory Line was interested in keeping up the rates, especially as it was interested in another pool, and was compelled to abide by the rates established by the Southern Railway & Steam-Ship Association; that, had there been a war of rates and a cutting made in the through business, the entire cutting on the rate would have come out of the Florida Railway & Navigation Company connection, the Mallory Line claiming their full portion of the rates as established by said association. He further testifies that 80 per cent. of the Chattahoochee valley cotton would have gone over the line of the railroad companies to Savannah, as in former years, via Live Oak, Callahan, and Fernandina, as most of his business is Savannah business properly; that there was no consideration that entitled the Mallory Line to compensation out of the pooling contract; that he, as receiver, did not rely upon

the Mallory Company, but put off Chattahoochee business to the Savannah, Florida & Western Railroad Company and the Georgia Central.

The master concludes from all of the evidence that it was the original intention of the traffic manager of the Florida Railway & Navigation Company to include the Mallory Line in the pool which was to be formed. In this we agree with him. We are convinced that this intention was changed, as we have already indicated, in consequence of the position of the Georgia Central Railroad and the Savannah, Florida & Western Railroad Company as to extending the pool beyond the South Atlantic ports. The small amount realized by the Florida Railway & Navigation Company as its share of the pool, viz,, $4,291, confirms the theory that the pooling contract did not extend beyond the South Atlantic ports. It clearly did not, but F. B. Papy, traffic manager for the receiver, notified C. H. Mallory & Co., on August 11, 1886, that the pooling contract was so officially considered by him. This contract appears to have been entered into by the parties to avoid a war of rates. Its practical operation was to give all cotton from the Chattahoochee valley to the Georgia railroads, and it is exceedingly doubtful whether the steamships of the petitioner had anything to do with fixing the terms of the pooling contract of July 16, 1886, between the three railroads above mentioned. The conclusions of the master seem, from the evidence, to be irresistible, and he recommends that the prayer of the petitioner be denied.

The exceptions filed to this report are as follows:

First. That the master erred in not finding that there was a valid contract between the petitioner and H. R. Duval, receiver, established, under which the petitioner was entitled to its share of the pool moneys received by the said H. R. Duval, receiver, as alleged in the petition and as therein prayed for.

Second. The master erred in finding that the pooling contract finally entered into between the Georgia Central Railroad Company and the Savannah, Florida & Western Railroad Company, and the said H. R. Duval, receiver, was not substantially the same contract which was being negotiated between the said parties at the time the said receiver, through his traffic manager, F. B. Papy, assured the petitioner that it should have a share, to-wit, 60 per cent., of the pool moneys which were realized from the said pooling contract by the said H. R. Duval, receiver.

Third. The master erred in finding that when the said H. R. Duval, receiver, by his said traffic manager, F. B. Papy, assured the petitioner that it and the said receiver would realize jointly from the proposed pooling contract the sum of over $27,000, the said Papy referred to and was considering a different pooling contract than the one that was finally consummated as shown by the evidence.

Fourth. The master erred in finding that the petitioner is not entitled to any portion of the pool moneys for which it sued in the said petition, and in recommending that the said petition be dismissed.

Fifth. The master erred in divers other respects, both upon the law

and facts in the case, to be pointed out *ore tenus* at the hearing of these exceptions.

They do not comply with the rule in equity with reference to exceptions of this character. Exceptions to the master's report are regarded so far only as they are supported by the statement of the master, or by evidence to which the attention of the court is called by reference to the particular testimony. *Jaffrey* v. *Brown*, 29 Fed. Rep. 476, and cases there cited; *Taylor Manuf'g Co.* v. *Hatcher Manuf'g Co.*, 39 Fed. Rep. 440. The exceptions make no allusion to the evidence, whereas they should have set out that portion of the evidence upon which the exceptor relied. This, however, involves no testimony, and the only reference to it by the master, unsupported, was probably not deemed advisable by the solicitor for the petitioner. We are, as a consequence, limited in our consideration of the case exclusively to the master's report; and, since all the presumptions are in favor of the finding of the master, and since they appear to be satisfactory, and indeed conclusive, it is ordered and adjudged that the master's report recommending that the prayer of petitioner be denied shall stand confirmed, at the costs of petitioner, and that a decree be framed accordingly.

CUTTING v. FLORIDA RY. & NAV. CO., (MALLORY *et al.*, Intervenors.)

(Circuit Court, W. D. Florida. August, 1890.)

CARRIERS—DISCRIMINATION IN CHARGES—RECEIVER.

The receiver of a railroad in Florida, where discrimination in freight rates is a criminal offense, (Act Fla. Jan. 6, 1855, c. 1564,) has no right to make such discrimination. Following *Missouri Pac. Ry. Co.* v. *Texas & P. Ry. Co.*, 31 Fed. Rep. 862.

In Equity. Petition in intervention.

H. Bisbee, for intervenors.

John A. Henderson, for respondent.

SPEER, J. This case arises on a charge of the petitioners, who own and operate a line of steam-ships between New York and Fernandina, that the respondent, who is the receiver of this court in charge of the property of the Florida Railway & Navigation Company, which is a line of road extending west and south to various parts of Florida, unjustly discriminated in the carriage of freights and passengers over its lines against the petitioners, and in favor of another and rival line of steamships, to-wit, the Clyde Line, between the same ports of New York and Fernandina. The specifications are that the respondent (1) makes through bills of lading at special rates with the Clyde Line, and refuses to make same with petitioners' line, and carries out these contracts to the injury of the petitioners; (2) that respondent charges over his road, on all freights and passengers carried by petitioners' steamers, full local tariff

from Fernandina to the local stations on his line, and on such as are sent or received in like manner by the Clyde Line he prorates in such manner that shippers and passengers pay the railroad less than on similar business via the petitioners' line, to the manifest injury of petitioners; (3) that respondent exacts from petitioners on their business prepayment of freight charges, and does not make the same exactions from the Clyde Line, which places the petitioners at a disadvantage with the business community. The respondent admits the facts to be as charged, but justifies them on the ground that the facilities offered by petitioners were not of that satisfactory character, either in permanency or quality of service, which met the emergencies of his railroad in its active competition with a rival road and rival ocean steam-ships, and that the acts complained of were necessary to be done in order to inaugurate and maintain the efficient service of the line complained against. The acts complained of terminated with the enforcement of the interstate commerce act, and the present hearing is on petition for an order on the receiver to pay over to petitioners the difference in the amounts collected by respondent on freights and passengers, etc., over the charges for like services on business via the Clyde Line, while such rates were in force. The intervention was referred to the master, the Honorable Joseph H. Durkee, to take and state an account between the petitioner and the receiver, the court reserving all questions of law and equity. This master filed his report, which is as follows:

"The petitioner owns and operates a line of steam-ships between the ports of Fernandina and New York, and the intermediate ports of Port Royal and Brunswick, which are engaged in general freight and passenger business. These steamers made connection at Fernandina with the line of railroad now operated by the respondent, and through bills of lading, through passenger tickets, and baggage checks were used interchangeably on these lines. In November, 1886, W. P. Clyde & Co. established a line of steamers from New York to Fernandina and to Jacksonville, and with the respondent, as receiver of the Florida Railway & Navigation Company, made contracts as his connecting line. Thereafter the petitioner complains that the said receiver, through his agents, issued instructions on February 12, 1887, that on and after the 18th of that month full local rates would be demanded upon all freights delivered by petitioner to receiver at Fernandina for points in the interior of Florida, or from such points to Fernandina; and that on the same day the receiver caused freight rate No. 4,551 to be issued, whereby petitioner or shipper was compelled to pay 8 cents per cubic foot to respondent's line of railroad upon cedar from Cedar Keys to New York, leaving but 2 cents per cubic foot for petitioner, the through rate being 10 cents per cubic foot, while prior to that time the division of rates gave to the petitioner 7 cents per cubic foot on log cedar and 5 cents per cubic foot on box cedar, and to the respondent 3 cents per cubic foot on each of the above classes. On the 15th day of February, 1887, the respondent caused freight rate No. 4,567 to be issued, to take effect on the 18th day of the same month, noted "Applicable only to Mallory Line," which, while retaining totals of through rates, gave to the respondent's line of railroad a greater proportion of such rates than had been hitherto charged on through business via Mallory Line. On February 24, 1887, the respondent caused instructions to be given to his agents not to issue any bills of lading in connection with any steam-ships other than the Clyde Line, and steamers running in connection with said railroad to Brunswick and Savannah,

and not to receive from and deliver to any steamer other than Clyde Line, or to carry any freight consigned to petitioner without prepayment of all freight charges. By the operation and effect of these several orders regarding freight rates the petitioner avers that he has been improperly discriminated against to the benefit of the Clyde Line. The respondent states that these orders regarding freight charges did not affect the totals of through rates, but did affect the proportions received by the respective lines. The losses sustained by the Mallory Line by the payment of freight moneys and freight charges in excess of the freight and freight charges collected against the W. P. Clyde Steam-Ship Company for carriage of like freight appear to be as follows: [Then follows a statement of losses aggregating $1,805.32. The eleven items of overcharge in excess of amounts charged via Clyde Line amount to $1,805.32.] In regard to the claim of $105.66 it appears by Exhibit E to have been paid by the Florida Railway & Navigation Company. The claim for uncollected freight bills, amounting to $893.89, represents amounts paid by Mallory Line to the respondent for forwarding freight from Fernandina to destination, advanced charges, and have been collected wholly or in part by petitioner, and cannot be stated by the master. As to the loss sustained by the payment of freight charges on the part of petitioner, which the respondent has not refunded, there is nothing before the master to show amount uncollected.

"Respectfully submitted, JOSEPH H. DURKEE, Master.

"*Jacksonville, Florida, December* 15, 1887."

The law of Florida upon the subject of discrimination in freight rates will be found in the Internal Improvement Act of January 6, 1855, c. 1564. This makes any freight rate "discriminating against the interests of the people a criminal offense, punishable by a fine of five hundred dollars." It is to be observed that the railroad of which the respondent is the receiver was constructed under the provisions of this act, and by means of large gratuities granted to it by the state. The constitution of Florida, (article 16, § 30,) adopted in 1886, authorized the legislature to prohibit discrimination. It is true that the legislature of the state has not carried the latter provision into its statutory enactments, but in the administration of a railroad by a United States court through its receiver it would seem obligatory upon the court to have great deference and consideration for the fundamental law of the state.

It cannot be doubted from the report of the master that a discrimination against the intervenors' line of steam-ships was continuous and injurious, at least to the amount of the master's findings. This was recognized, besides, on two occasions by a distinguished jurist presiding in this court, both Hon. THOMAS SEATTLE, the district judge, presiding, and Hon. DON A. PARDEE, the circuit judge, made orders to forbid the discriminations of the receiver against the intervenors' steam-ship line. The question, indeed, seems to be settled by the decision of Hon. DON A. PARDEE, circuit judge, in the case of *Missouri Pac. Ry. Co.* v. *Texas & P. Ry. Co.*, 30 Fed. Rep. 2. The facts are similar to those found by the master. In that case the Texas & Pacific Railroad Company, like the Florida Railway & Navigation Company, was built by the aids and grants and donations of land from the state. Section 10 of the Texas act provided, like the Florida act, that any discrimina-

tion in regard to charges for freight or passengers, or in any other matter, should not be made by the Texas & Pacific Railroad Company. It is true that the Florida act made discrimination, by its corporate beneficiary, a criminal offense, punishable by a fine of $500; but it is a well-settled principle that a contract prohibited by statute, with a penalty attached, is void. *Harris* v. *Runnels*, 12 How. 79–83. Whether or not this penal statute would have the precise legal effect of the Texas enactment, certain it is that this court could not justifiably condone the continuous violation of a penal statute on the part of its receiver. The decision of Judge PARDEE is therefore in point, and, in our judgment, its clearness, force of reasoning, and weight of authority must control the decision here. "If respondents," says Judge PARDEE, "are, as they seem to say, charging the petitioner's lines less per ton per mile than the charges made on respondents' line to freight shippers, under the same condition as for distance and shipping points, then respondents are discriminating against shippers that are forced to use their lines, which ought not to be permitted under any circumstances, and particularly on a railroad to the construction of which the general government and the state of Texas contributed so large a portion of the public lands." We believe it is true that the general government likewise contributed to the construction of the railroad of which the receiver of this court has charge. "For the relief of petitioners," continues Judge PARDEE, "an order will be entered directing the receivers to give them the same rates and the same privileges for doing business in all respects as are given to other connecting lines, substantially as prayed for in their petition." Extending—legitimately, as we think—the principle of this decision to the facts found by the master, the receiver should be directed to pay to the intervenors the sums found by the master to have been exacted from the intervenors as the result of this unjustifiable discrimination. See, also, *Scofield* v. *Railroad Co.*, decided by the supreme court of Ohio, reported in 3 N. E. Rep. 907; *Messenger* v. *Railroad Co.*, 18 Amer. Rep. 754, New Jersey court of appeals; *McDuffee* v. *Railroad Co.*, 13 Amer. Rep. 72, supreme court of New Hampshire; *Railroad Co.* v. *People*, (Ill.) 8 Amer. Rep. 690; *Hays* v. *Railroad Co.*, 12 Fed. Rep. 309; Judge BAXTER; *Menacho* v. *Ward*, 27 Fed. Rep. 529, (rule of evidence;) *McCoy* v. *Railroad Co.*, 13 Fed. Rep. 3, and note, p. 11; *Railroad Cases*, 110 U. S. 667–682, 4 Sup. Ct. Rep. 185. In the latter case the court declare:

"A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against any other company seeking to do business on its road."

A multitude of similar cases might be stated, but, the principle and policy of the law having been embodied into the federal statutes relating to interest of commerce, the citation is perhaps superfluous. For the reasons stated the master's report in this case will stand confirmed, and a decree be drawn directing the receiver to pay to the intervenors, or their solicitor, the sum found in the account taken by the master.

CENTRAL TRUST CO. *v.* FLORIDA RY. & NAV. CO., (HAWKINS, Intervenor.)

(*Circuit Court, N. D. Florida.* August, 1890.)

1. JUDGMENT—VALIDITY—PARTIES.
   Where a railroad has been mortgaged to secure bonds which have been guaranteed by the state, a decree that a certain branch of the road is not subject to the mortgage lien is of no validity when made in a suit in which the bondholders are not represented, and of which the state has not been notified, and which is brought in a county in which no part of said branch road is situated.
2. MORTGAGE FORECLOSURE—NOTICE.
   Notice, at a foreclosure sale, of an adverse claim under an invalid decree of court does not affect the purchaser's title.

In Equity. Petition for intervention.

SPEER, J. This is an intervention in a bill where the complainants are trustees under deeds of trust made to secure a large amount of bonds issued on the railroad of the defendant company, to-wit, the Florida Railway & Navigation Company. This company was incorporated under a general act of the legislature of the state of Florida. It issued six million of bonds, with the deed of trust above mentioned to the Central Trust Company of New York. By the bill, in which the intervention before the court is presented, there was obtained a decree and a judicial sale of the entire line from Chattahoochee to Jacksonville. There were also sold the branch roads to St. Marks and Monticello. Upon the last —a short road—this controversy depends,—the road from Fernandina to Cedar Keys and Waldo to Wildwood, and afterwards built to Plant City, with extension to Tavares, upon which there was an issue of underlying bonds. The Florida Central & Western Railroad was also organized under a general act. They likewise issued bonds on 234 miles of railroad from Chattahoochee to Jacksonville, with branches to St. Marks, to Tallahassee, and Monticello to Drifton, 202 miles. Eight hundred and eight thousand dollars of the bonds—$12,000 a mile—were issued in March, 1881, and a deed of trust to secure the payment of the same was made to the Guarantee Trust & Safe-Deposit Company. The Florida Central & Western Railroad was formed by a combination of the lines of two companies, which were subject to foreclosure and sold, as appears in the case of Schutte against the railroad company and others; the decree having been rendered on May 31, 1879, and the sale having been made in 1881. The roads were as follows: (1) The Florida Central Railroad Company, 60 miles, from Jacksonville to Lake City; (2) the Jacksonville, Pensacola & Mobile Railroad Company, Lake City to Chattahoochee, with the branches above mentioned. There was also an issue of bonds to the state of Florida for four millions of dollars for the benefit of the Florida Central Railroad Company. These bonds were issued in exchange of three million dollars of bonds of the latter company, and one million additional, which were issued under the acts of June, 1869, and January, 1870, (chapters 1716, 1731 of the Laws of Florida.) These

bonds gave to the state of Florida a statutory lien upon the last-mentioned road. The bonds were issued on the 1st day of January, 1870. The Jacksonville, Pensacola & Mobile Railroad company was organized under a special act, and, being authorized so to do by the terms of the act, (chapters 1716 and 1731 of the Laws of Florida,) consolidated with its line other roads or parts of roads from Quincy to Lake City, from Tallahassee to St. Marks, and the particular branch in controversy here, from Drifton to Monticello. These lines were owned by the Tallahassee Railroad Company. The lines were absorbed by the Jacksonville, Pensacola & Mobile Railroad Company under the authority just mentioned. The Tallahassee Railroad Company, by virtue of the act of June 24, 1869, (chapter 1718 of the Laws of Florida,) was an organization of the purchasers, who bought on the 20th of March, 1869, at a sale made by the trustees of the internal improvement fund of Florida, the Pensacola & Georgia Railroad and the Tallahassee Railroad. The Pensacola & Georgia Railroad Company was organized under a special enactment made in January, 1853, (see chapter 484 of the Laws of Florida, McClel. Dig. 1048.) It was authorized to build a railroad from the city of Pensacola to a point on the Georgia line. Its charter was amended December 15, 1855, (chapter 728, Id.,) so as to conform to the act of January 6, 1855, which is generally known as the "Internal Improvement Act." By the same amendment certain branches were provided for, and amongst them a branch from Drifton to Monticello, four miles in length.

After the amendment to its charter referred to in the preceding paragraph, the Pensacola & Georgia Railroad Company accepted for itself the operative provisions of the internal improvement act. As a consequence this company became entitled to receive from the state on so much of its main lines, extension, and branches as conformed to the lines specified in section 4 of the improvement act the state aid and benefits derivable therefrom. These were indorsement by the state of its bonds, the guaranty of interest on the same, grants to alternate sections of state lands, exemption from taxation, and the personal exemption of its employes from the duty to serve on the militia, on the juries, and to work the roads. They were entitled to receive also alternate sections of such lands as might be thereafter granted by the general government. It was provided also that it should have the aids and benefits of these land grants on so much of the line as did not conform to the route indicated in the fourth section of the internal improvement act. In consideration of these benefits it assumed certain obligations to the state. These related to the character of road construction, of the application of the proceeds of their indorsed bonds as directed,—the payment to certain sinking funds. For all payments made by the internal improvement fund they were to turn over an equivalent amount of stock, the maps of their lines were to be deposited, and in further consideration of this performance on their part they became entitled to exclusive privileges from competition for 20 miles on either side of their lines of railway. A more important consideration moving from them to the state

for the vast franchises which were granted to them was this. The Pensacola & Georgia Railroad Company created, upon their acceptance of the provisions of the act, a mortgage on all its franchises, road-bed, workshops, iron, equipments, and depots, so that, upon a failure of the company to pay interest and the amount due to the sinking fund for 50 days, the trustees of the internal improvement fund could, by virtue of the mortgage or lien just referred to, seize and sell the property covered thereby. This result soon followed. The railroad company failed to comply with the conditions of their obligation, and the trustees of the internal improvement fund seized, advertised, and sold the assets above mentioned, under the provision of the act of March 30, 1869. They were purchased by one Dibble and his associates. The purchase included the entire road and the branch now in controversy, and was thereafter incorporated into the Tallahassee Railroad Company, and consolidated with the Jacksonville, Pensacola & Mobile Railroad. Having been mortgaged to the state of Florida under the statutory liens of June, 1869, and of January, 1870, it was sold for the satisfaction of the Schutte decree under the lien of said mortgage, and was incorporated into the Florida Central & Western Railroad Company in March, 1880, and was bonded and consolidated into the Florida Railway & Navigation Company in March, 1884, and was again bonded. All of these changes of organization and title included the branch from Drifton to Monticello, it having passed under the operation of the several liens, and, in connection with the main line, at the sale of March 20, 1869. By a disreputable trick the purchasers got possession of the Pensacola & Georgia Railroad Company by paying a portion of the purchase money and by substituting a worthless check for the balance. They at once proceeded to cover the road and the branch in question with the lien of the state bonds of January 1, 1870. In subsequent litigation to collect the balance of the purchase money and to enforce the lien of the internal improvement bonds, the question was presented whether this branch road was covered by the lien of the trustees of the internal improvement fund, and it has been uniformly held in the affirmative. *Internal Imp. Fund* v. *Jacksonville, etc., R. Co.*, 16 Fla. 708; *Holland* v. *State*, 15 Fla. 456; *State* v. *Anderson*, 91 U. S. 669; *Railroad Co.* v. *Schutte*, 103 U. S. 129; Decision of BRADLEY, justice of the fifth circuit court of the United States for Florida, in *Schutte* v. *Railroad Co.*, 3 Woods, 692, decided in May, 1879.

It is insisted upon the part of the defendant company that their title to the branch road for the foregoing reasons is perfect. This is not only true, they insist, by correct construction of all the enactments and contracts in question, but also by definite and final adjudication. They insist that, if it were an original question, the court must hold that the Pensacola & Georgia Railroad Company was an indivisibility; that its franchises covered its branches as well as its main line; that by the acceptance of the internal improvement act it put all of its railroad, whether on the main line or in the branches, under the operation of the act, and that its subsequent seizure and sale by the trustees acting under

that act because of the default of the company vested in the purchasers complete and perfect title; and they call attention to what seems indisputable, that the branch was sold with the main line under the statutory lien, and they insist that this concludes all second and junior incumbrances. For the intervenor it is insisted that the decree of the state court has adjudicated that the branch from Drifton to Monticello was not subject to the lien of the internal improvement bonds. The intervenor prays that the receiver be required to bid at a sale of the said branch road from Drifton to Monticello to the amount of its value, which shall be estimated by a master. The fund to be realized from this bidding he claims—*First.* Under the deed of trust from the Pensacola & Georgia Railroad Company, dated in 1860, conveying the lands and so forth to trustees, and providing for the issue of certain bonds, the same to be a first lien on the lands, and a second mortgage on the railroad, its franchises, etc. This deed of trust was recorded in Jefferson county, where this branch is wholly situate, in February, 1870. *Second.* By reason of a judgment under a code of practice then in force in Florida, which judgment was obtained in the circuit court of Leon county in a proceeding there pending between the trustees, who are now represented by the intervenor, and others on the one part, and the Jacksonville, Pensacola & Mobile Railroad on the other part. This judgment was obtained in 1872 or 1873. *Third.* He insists that the notice of this alleged lien was given at the sale under the Schutte decree by a Mr. Lewis, through Mr. George P. Raney. The original deed of trust, under which the intervenor claims, was made to Bailey & McGheehee, and was recorded on the 5th day of February, 1870, before the said bonds were sold. This, it is insisted, gives to that deed of trust a priority over any title acquired under the sale of the state bonds by virtue of the internal improvement lien. To the argument of defendants that there was no lien recorded in Jefferson county, in which the branch road in question is wholly situate, they insist that the deed of trust to Lewis and Hawkins is there recorded on all the property of the Pensacola & Georgia Railroad Company, and the branch to Monticello was a part of the property when the deed of trust was executed. They insist, further, that the bonds issued under the internal improvement act attached only as a lien to that portion of the Pensacola & Georgia Railroad and its property mentioned in the statute, and that the branch to Monticello was not therein included. They insist, therefore, that Lewis and Hawkins, the latter of whom is the intervenor, have the only lien on this branch. They insist there was no necessity for record of this lien. They insist that the action of the governor of Florida and the trustees of the internal improvement fund was wholly illegal, and that the intervenor and those whom he represented were not estopped upon failure to protest against the sale by the state authorities. They insist that the lien enforced by the sale under the decree in the *Schutte Case* was immaterial, as the decree in that case was rendered without reference to the rights or interests of the persons whom the intervenor represents; they insisting that, the state courts having taken jurisdiction of the subject-matter, the federal court would not presume to

interfere. They insist that the confirmation of the sale by the federal court did not have the effect to nullify the decree of the state court to the effect that the lien of the internal improvement fund did not attach to the branch between Drifton and Monticello.

In reply to the argument that the railroad company dismissed its bill against the intervenor's rights in the state court of Escambia county for the reason that the intervenor had sought the jurisdiction of this court, the intervenor insists that his purpose by the intervention was to prevent a conflict of jurisdiction, and not to try any question of title or lien in this court, as the receiver of the company can claim nothing here more than could have been claimed by the Florida Railway & Navigation Company. That company having dismissed its bill in the circuit court of Escambia county, the receiver is estopped from setting up any rights against the claim of petitioner in this court. The receiver is governed by the action of the Florida Railway & Navigation Company in dismissing its bill; he has no concern in the matter. The record in Escambia county estops him. To the point made by defendants that Hawkins, now the intervenor, was receiver of this court, and conducted the sale of the Jacksonville, Pensacola & Mobile Railroad in the *Schutte Case*, the intervenor insists that, while Hawkins, with his co-receiver, did conduct the sale, a notice of the decree in favor of the intervenor was given at that sale before the bidding, that notice being that any person purchasing the railroad from Monticello to the junction at Drifton would take the same subject to the lien of the decree in the state court in favor of the trustees of the Freeland bonds; that neither Hawkins nor any person acting with him, who was interested in the decree of the state court, was impleaded in the *Schutte Case*, and hence the decree in that case in no wise affected their interest. To the argument of the defendant that neither the petitioner nor any of his purchasers have been in possession of the branch to Monticello, and that the Pensacola & Georgia Railroad Company built it, and always had possession of it until sold by the trustees of the internal improvement fund, and that it has passed to several subsequent purchasers since that sale, the intervenor insists that, while this branch did belong to the Pensacola & Georgia Railroad, it was not covered by the lien of the Pensacola & Georgia Railroad bonds, which were indorsed by the trustees of the internal improvement fund. That it was conveyed as a security for the payment of the Freeland bonds, and that the trustees of those bonds were prompt in asserting their lien. They had the first sale set aside by a decree of the state court. They gave notice of the decree by a subsequent sale. That subsequent attempted sales have been provided, and that notice to said trustees of the decree in the state court has always been notice, not only of their lien, but of its recognition and enforcement by a court having jurisdiction.

The court has considered the arguments and briefs of the solicitors, and has examined the voluminous records in evidence, with very great care. It has thus reached the conclusion that the liens of the state bonds of January 1, 1870, covered the branch road from Drifton to Monticello, and this branch was lawfully sold by the trustees of the internal im-

provement fund. This view has received apparently the conclusive sanction of the supreme court of the United States in the case of *Railroad Cos.* v. *Schutte*, 103 U. S. 120. The recital in the language of the chief justice is as follows:

"The Florida, Atlantic & Gulf Central Railroad Company, incorporated by the general assembly of Florida in 1853, built a railroad from Jacksonville to Lake City. The Pensacola & Georgia Railroad Company, also incorporated during the same year, built a road from Lake City through Tallahassee to Quincy, in the direction of Mobile, with a branch to Monticello; and the Tallahassee Railroad Company, incorporated at a somewhat earlier date, built another road from Tallahassee to St. Marks. Each of these companies became indebted to the state of Florida under the provisions of the internal improvement law; and, as a consequence, the road of the Florida, Atlantic & Gulf Central Company was sold on the 4th of March, 1868, by the trustees of the internal improvement fund, under the authority of law, to William E. Jackson and his associates; that of the Pensacola & Georgia Company on the 6th of February, 1869, to F. Dibble and his associates; and that of the Tallahassee Company on the same day and to the same parties."

See, also, *State* v. *Anderson*, 91 U. S. 669; *Internal Imp. Fund* v. *Jacksonville, etc. R. Co.*, 16 Fla. 708; *Holland* v. *State*, 15 Fla. 456.

We find that the Pensacola & Georgia Railroad Company had authority by its charter to build and operate the branch in question, (see McClel. Dig. p. 1056, § 31;) that the Pensacola & Georgia Railroad Company was incorporated with the Jacksonville, Pensacola & Mobile Railroad Company; and that by the acts of Florida June, 1869, and the amendment of January, 1870, the statutory lien was created that all bonds issued by the railroad company under this legislation were made a first mortgage or lien on the road-bed, iron, equipment, work-shops, depots, and franchises, (McClel. Dig. p. 590, § 3;) that the holders of the bonds in a decree obtained authority for the sale of the road and the branch in controversy under the statutory lien of 1869; that in the same decree the trustees of the internal improvement fund were authorized to sell to recover the unpaid purchase money due by virtue of the sale under the internal improvement act; that this decree applied as well to the particular branch in controversy as to the entire road; and that the complainants, who are the bondholders under the acts of June, 1869, and January, 1870, in February, 1882, by regular procedure caused the sale of the road and the branch from Monticello to Drifton. The Florida Railway & Navigation Company went into possession under conveyances of February, 1882. The latter company, we further find, issued the bonds and deeds of trust which have been enforced upon the main line and as well upon the particular branch in the several causes in which this intervention is made. These findings are ascertained from the bill in the *Schutte Case* and the decree thereon, and certified copies of the reports of the masters A. B. Hawkins and S. Conant. We find further that the deed of trust from the Pensacola & Georgia Railroad Company, made to William Bailey and John C. McGeehee on April 1, 1860, which invested the said trustees with a lien on said railroad, including said branch, was second in dignity to the lien under the internal improve-

ment act, but was a first lien on all other property of the Pensacola & Georgia Railroad Company; that this deed of trust was recorded in Jefferson county, Florida, on the 5th day of February, 1870, in which county the said branch road is wholly situate. We find further that a decree was rendered in the circuit court of the second judicial circuit of Florida in and for Leon county, in a cause wherein Benjamin C. Lewis and Alexander B. Hawkins, as trustees for the bondholders of the Freeland bonds, issued by the Pensacola & Georgia Railroad Company, and John McDougall and the said Benjamin C. Lewis in their own rights, were plaintiffs, and the Jacksonville, Pensacola & Mobile Railroad Company, John G. McGeehee, trustees for the holders of the Freeland bonds issued by said Pensacola & Georgia Railroad Company, Richard A. Whitfield and William M. Miller, administrators of John Miller, deceased, and others were defendants; that this proceeding was under the practice known as the "Code Practice," then in force in the state of Florida; that the question of law raised by the pleadings was passed upon, and the court then decreed that the said branch road was not covered by the liens in favor of the bonds issued under the internal improvement act, and that the sale by the said trustees of August, 1869, did not pass the branch road, and did not carry with it the sale of the said branch road, and that the branch road was subjected to the liens of the bonds represented by the petitioner as trustee, and that the legal title to the said branch was, at the time of said decree, in the trustee for the benefit of the said bondholders; that at the sale of the said Pensacola & Georgia Railroad and branch, made under the Schutte decree by the petitioner and another as masters, in 1879, notice was given by B. C. Lewis that any person purchasing this said branch would take the same subject to the lien of said decree and the lien of the bonds issued thereunder and then outstanding, amounting to several thousand dollars; that this decree was never recorded in the circuit court records of Jefferson county; that no judgment roll was ever filed with said decree in the proper court, either of the county of Leon or Jefferson. We further find that the Pensacola & Georgia Railroad Company, by bill filed for that purpose in the Leon circuit court and transferred to the circuit court of Escambia county, Florida, enjoined the sale of said branch road as advertised to be made by the decree of the circuit court of Leon county as aforesaid; that the defendants answered said bill for injunction; that afterwards, on the 9th day of February, 1886, the petitioner intervened in this court, praying therein, among other things, that the receiver pay into this court the sum of $40,000, as the estimated value of said branch, and for such other and further relief as the court might deem the petitioner entitled to; that leave was granted to file said petition, and the petitioner became an intervenor in this suit; that afterwards, and on the 6th day of March, 1886, the Florida Railway & Navigation Company dismissed their bill for injunction, then pending in the Escambia circuit court; that the petitioner subsequently filed his amended petition, and therein prayed for an allowance to make a sale under the decree of the circuit court of Leon county, and that the receiver be directed and required to bid at said

sale such an amount as shall be ascertained by a commission of this court to be the value of said branch, and for other and general relief; that to this petition and amended petition the receiver in this cause made answer, and that upon the issue joined the several parties have filed record evidence and depositions, upon which the foregoing facts are made to appear.

With relation to the reasons presented for the relief they seek by the solicitors for the intervenor the court has reached the following conclusions: The notice given by the counsel representing the interest of the intervenor at the sale under the decree in the *Schutte Case* appears to have been superfluous, and without legal effect. It was a judicial sale, and the purchaser must have bought with notice of the existence of all previous valid incumbrances. It is insisted in the able and elaborate brief of Mr. Henderson that the solicitors who gave this notice represented also clients who, under the decree of sale, had a first lien on the property with relation to which he gave the notice of an adverse trust. That, besides that, one of the trustees who was making the sale was the co-trustee with Lewis for the interest concerning which the notice was given, and that Lewis himself was a party defendant to the suit of Schutte against the railroad companies, in which the decree was rendered; and he urges for these reasons that there was no virtue in this notice. These considerations, were it indeed practicable to evolve from the cumbersome record their merit or their refutation, we would regard as of minor importance. The notice was given to call the attention of purchasers to a judgment of the court of Leon county, which, if binding on the parties, was itself notice to the world. If invalid, the notice could not give it validity; and we are clearly of the opinion that the circuit court of Leon county had neither jurisdiction of the persons nor of the subject-matter involved in the litigation. The suit was begun long after the date of the Florida state bonds, (January 1, 1890,) and even long after their actual issue; and under the authority of *Ketchum* v. *St. Louis*, 101 U. S. 306, we think not only the trustees of the internal improvement fund, but the bondholders under the act of 1870, or their sufficient representative, were necessary parties. See, also, Story, Eq. Pl. § 178, note; *Williams* v. *Bankhead*, 19 Wall. 563. This was an exceptional case. The sovereign state of Florida had issued its bonds, having contingent liens on all their property. It was a matter of public notoriety that these bonds were in the hands of holders for value, and if it was contemplated to sell a valuable portion of the property, not merely the equity of redemption, and thus divest the lien of the state as well as the rights of the bondholders who had invested with confidence in the validity of its obligations, the case would seem to stand on a different footing from the ordinary controversy between prior and junior mortgages. The subsequent crop of litigation abundantly shows this. There were many things to be settled before the judgment of the circuit court of Leon county could be regarded as conclusive. The state of Florida would not have been made party against its will, but it might have intervened and protected its interest, had proper notice been given. *Elliot* v. *Van Voorst*,

3 Wall. Jr. 299. There was no notice given in this case in the state court, and none of the incumbrances were represented. Besides, it seems that Jefferson county had exclusive jurisdiction of the proceeding so far as it was justified by the trust-deed of 1860. Either the branch road from Monticello to Drifton was independent of the main line or a part thereof. If a part of the main line, it was clearly subject to the lien of the internal improvement bonds. If an independent line, it was wholly within Jefferson county; and it would seem that a proceeding to sell the road would not have been maintainable in Leon. Code Proc. Fla. § 74, Bush. Dig. 477; McClel. Dig. p. 766, § 5; *Railroad Co.* v. *Rothschild*, 26 Amer. & Eng. R. Cas. 57. The judgment of a court without jurisdiction of the parties or subject-matter is void, nor could the right of the bondholders be affected by the acquiescence of their debtors without their consent. This judgment in Leon county seems to have been obtained by default. The recital that "it appears from the allegation of the complaint, and not denied in the answer," etc., indicates as much. It is nevertheless recited in the complaint on which the judgment was taken in Leon county that the Pensacola & Georgia Railroad Company was authorized to construct a branch road to the county seat of Jefferson county; that this was done on the 5th day of December, 1855; that on the 10th of the preceding February the Pensacola & Georgia Railroad gave notice to the trustees of the internal improvement fund of their acceptance of its provision; that the said branch line was seized and sold by said trustees. The complaint further recites that the Pensacola & Georgia Railroad bargained, sold, and conveyed the depots, franchises, and equipments of said road to Bailey and McGeehee in the event of the payment of the Freeland bonds, and in default of the payment of the said Freeland bonds for three months the trustees should have the power to take possession of said road-way, depots, stations, franchises, and equipments of said company without any judicial or preliminary process whatever, and the same to sell, lease, or otherwise dispose of, as in their discretion they may deem best for the interest of the bondholders. It recites further that that the said McGeehee as trustee, the said Pensacola & Georgia Railroad acquiescing therein, did convey to Alexander B. Hawkins and Benjamin C. Lewis large bodies of land, to be held upon the same uses and trust as the same were conveyed to the said Bailey and McGeehee by the said Pensacola & Georgia Railroad Company. The complaint points out a doubt on the part of the said McGeehee as to whether he did divest himself of the legal ownership of the road-way, depots, stations, franchises, and equipment of the said Pensacola & Georgia Railroad Company. This doubt on the part of Mr. McGeehee seems to be not entirely without foundation. The rights of the public in railroad corporations and their franchises created and granted for the public welfare have been defined with great distinctness since the date of this conveyance to Bailey and McGeehee in 1860. It is not now regarded that to sell out and part with the title to its franchises is an ordinary and usual function of a railroad company. The power to lease a railroad, its appurtenances and franchises, is not to be presumed from the usual grant of power in a railroad

charter; and, unless authorized by a legislative action so to do, one company cannot transfer them to another company by lease, nor can the other company receive and operate them under such lease. *Oregon R. & Nav. Co.* v. *Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409. Whether or not this doctrine is applicable to the case at bar, it would seem indisputable that, if an important part of the claim in the Leon county case was on account of the foreclosure proceedings of the trustees of the internal improvement fund, they were indispensable parties, and a decree without them would be a nullity.

It is insisted, besides, with great confidence, before the judgment in Leon county could be a valid lien on real estate situate in Jefferson county it must have attached thereto a judgment roll, and must be recorded in the county where the real estate is situate. Code Proc. Fla. §§ 45, 46, 227, Bush. Dig. 469, 516; McClel. Dig. 619. It is insisted further that this has never been done. On the argument of this cause at Jacksonville the judgment roll was not produced, but since that time, and while the court has had the case under advisement, a certified copy of this paper has been forwarded the court, it having been discovered by the Honorable ——— RANEY, who was formerly of counsel in the cause. It does not appear, however, to have been recorded in Jefferson county; but, without passing on the technical question involved, which is necessarily unfamiliar to one unacquainted with the local laws of the state, and merely stating it for the benefit of all concerned, we prefer to rest our opinion upon the want of jurisdiction of the Leon county court, and the want of indispensable parties, before adverted to. It would be indeed a serious matter if a title perfected by the decrees of the United States courts, by which all parties at interest were bound, could be unsettled by a judgment by default in a county of the state where the property was not situate, and where indispensable parties were not made.

For the foregoing reasons the court is compelled, in its opinion, to deny the application of the intervenor. The present purchasers, who have succeeded to the rights and equities of the purchasers under the Schutte decree in 1879–81, obtained on the road and this branch a first lien for the trustees of the internal improvement fund on bonds authorized to be issued in 1855, and a subordinate lien second only to that last above mentioned in favor of the holders of $2,800,000 of the Florida state bonds bearing date and lien as of January 1, 1870. They also acquired under the sale of March 20, 1869, all the rights of the trustees of the internal improvement fund in and to the Pensacola & Georgia road and this branch. We gravely doubt whether the Pensacola & Georgia Company had the power to pledge their entire assets and franchises to the trust which the intervenor represented. They were authorized to borrow money to carry into effect the object of their charter, to issue certificates or other evidences of such loan, and to pledge the property of said company for the payment of the same and the interest. These powers were never enlarged. This is far short of a power to execute a conveyance which stipulates that in the event of the default in the payment of the interest or principal which shall have remained in arrears for the

space of three months the creditor shall have power to take possession of the said railways, depots, stations, franchises, and equipments of said company without any judicial or other preliminary process whatever, and the same to sell or lease or otherwise dispose of, as in their discretion they may deem best for the interest of the bondholders. The application of petitioner is refused, and the intervention is dismissed at the cost of the intervenor, and the decree of the court will be framed accordingly.

In re VAN VLIET.

(*Circuit Court, E. D. Arkansas.* October 31, 1890.)

1. INTOXICATING LIQUORS—ORIGINAL PACKAGE LAW—CONSTITUTIONALITY.
Act Cong. Aug. 8, 1890, which provides that intoxicating liquors when shipped from one state to another "shall, upon arrival, be subject to the operation and effect of the laws of such state," is a legitimate exercise of the power to regulate interstate commerce.
2. SAME—EFFECT ON STATE LAWS.
Said act subjects liquor shipped into a state to the operation of its prohibitory laws previously passed.

At Law. Petition for *habeas corpus*.
C. C. Cole, for petitioner.
John Y. Stone, Atty. Gen. of Iowa, for the State.

CALDWELL, J. The facts in the case are admitted, and are as follows: The Excelsior Brewery Company, a corporation of the state of Missouri, shipped from that state to Pella, in the state of Iowa, consigned to the petitioner, who was its agent at that place, a wooden case containing two dozen quart bottles of beer manufactured by the company at St. Louis, Mo. The case containing the bottles of beer was substantially made out of wood, and securely fastened with a metallic seal, and constituted an unbroken or original package. This case of beer, in its original form, the petitioner, as agent for the brewery company, sold at Pella. For this sale he was arrested, tried before a justice of the peace, convicted, and sentenced to imprisonment. On these facts he claims his imprisonment is illegal, and in violation of the constitution of the United States. This claim is rested on two propositions. Stating them in the reverse order from that in which the learned counsel for the petitioner presented them, they are—*First*, that the act of congress, approved August 8, 1890, commonly known as the "Wilson Bill," is unconstitutional and void; and, *second*, that the laws of the state of Iowa, under which the petitioner was tried and sentenced to be imprisoned, are unconstitutional and void.

In discussing the first question it is important to have a clear conception of what the law was, and on what it was grounded before the passage of the act, and what change the act makes in the old law. Before the passage of the act of congress, the right to transport liquor from one state to another included, by implication, the right of the importer to

sell it in the original package, in the state in which the transit ended. By the act of congress, the right which the importer previously enjoyed of selling the liquor in the original package, in the state where the transit ended, regardless of the laws of such state, is taken away, the act declaring that the liquor "shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state." The constitutionality of the act in this forum can scarcely be treated as an open question. The constitution declares that "the congress shall have power * * * to regulate commerce * * * among the several states." It was early decided that commerce among the states was subject only to regulations imposed by congress; that the states could not interfere with or regulate such commerce; and that, until congress enacted regulations on the subject, it was free and unrestricted. It was further decided that the right to transport an article of commerce from one state to another included, by necessary implication, the right of the importer to sell, in unbroken packages, at the place where the transit terminated. The rule, in the absence of congressional action, is thus stated by Chief Justice FULLER, in *Leisy v. Hardin*, 135 U. S. 100, 124, 125, 10 Sup. Ct. Rep. 681:

"Under our decision in *Bowman* v. *Railway Co.*, *infra*, they had the right to import this beer into that state, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

It will be observed that the chief justice, speaking for the majority of the court, does not say that the state, under no conditions, can interfere with the imported liquor, until it is sold by the importer or the package broken; but the statement of the law is that it cannot do so "in the absence of congressional permission." In another passage of the opinion, it is said:

"The responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Again, it is said the imported article "is not within the jurisdiction of the police power of the state unless placed there by congressional action." Again, it is said:

"Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad, or from a sister state, or, when imported, prohibit their sale by the importer?"

Again, the language of the court in *Bowman* v. *Railway Co.*, 125 U. S. 485, 8 Sup. Ct. Rep. 689, 1062, is quoted approvingly where it is said—

"That the transportation of commodities between the states shall be free except where it is positively restricted by congress itself, or by the states in particular cases by the express permission of congress."

The denial to the state of the right to deal with imported liquor in unbroken packages is uniformly accompanied by the same qualifying words, which are repeated in the opinion no less than eight times. See, to the same effect, *Lyng* v. *State*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 9 Sup. Ct. Rep. 256; *Bowman* v. *Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062. These repeated and deliberate utterances of the supreme court establish the proposition that it is competent for congress, under the grant of power to regulate commerce among the states, to determine when a subject of that commerce shall become amenable to the law of the state in which the transit ends. Congress has exercised the power, under the constitution, and has declared that liquor transported from one state to another "shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." It will be observed that, by the terms of the act, the original package, "upon arrival" in the state, is put on the same footing with liquors "produced in such state." The original package, when it arrives within the state where its transit terminates, is at once reduced to the rank of domestic liquor, enjoys no privileges not enjoyed by domestic liquor, and is "subject to the operation and effect of the laws of such state * * * enacted in the exercise of its police powers, to the same extent and in the same manner" as domestic liquor. Now, there never was any question but what the laws of Iowa prohibited the sale of liquor "produced" in the state, and that the laws for this purpose were constitutional. These laws were in full force at the date of the passage of the act of congress, and that act having, in legal effect, abolished original packages on their "arrival" within the state, by placing them on the same footing with liquor "produced" within the state, they are as much amenable to the state law as if they had never existed in the form of original packages. Congress has abolished the right of the original package to claim exemption from the operation of the state laws by abolishing, in effect, the original package itself, upon its arrival in the state where the transit terminates. The petitioner's allegation, therefore, that the beer he sold was manufactured, bottled, and boxed by the brewery company in St. Louis, and shipped to him at Pella, for sale as the agent of the brewery company, has no more legal significance, under the act of congress, than would be an allegation that the beer was brewed, bottled, and boxed in Pella. The legal effect of the two averments in respect of the operation of the Iowa law on the beer and its sale in Pella would be identical. But it is contended that all the utterances of the supreme court wherein it is said, or is necessarily implied from what is said, that congress may, in regulating interstate commerce, fix the point of time and place when the interstate carriage shall terminate, and the subject of the commerce become amenable to the state law, is *obiter dicta*, which the court should disregard. But clearly these ut-

terances are not *obiter dicta* in the usual sense of that term. The point was so intimately blended and connected with the main question in the case as to render its decision proper, if not necessary. The case was one of great gravity, and what the court said on this subject was evidently well considered, and deliberately uttered, and any inferior court of the United States that would disregard it would fairly subject itself to the charge of judicial insubordination. This court is not called upon to vindicate the soundness of the judgment of the supreme court. That court is quite capable of doing that for itself.

But it is said the act is void, because it is a delegation of legislative power to the states to regulate interstate commerce, and for want of uniformity in its operation. It must be observed that the act does not deal with the liquor after its "arrival" in the state. Congress may regulate interstate commerce, but not intrastate commerce. It may regulate commerce "among the states," but not in the states. The state may regulate purely internal, but not interstate, commerce. The act is drawn in view of these settled principles. In protects the interstate transportation of the liquor until its arrival in the state where the transit is to end, and no longer. Upon its arrival in the state, the act of congress declares it shall be subject to the laws of the state enacted in the exercise of its police powers. Such laws are not regulations of interstate commerce, but have relation to the local and internal concerns of the state. The right of the state to pass such laws is not derived from the constitution of the United States, or any act of congress; it antedates both. Nor does the act of congress confer, or attempt to confer, on the states the right to regulate the liquor traffic within their jurisdiction. It terminates the privileges previously attaching to the interstate commerce transportation of the liquor, upon its arrival in the state to which it is consigned, instead of protecting these privileges until after the package is broken or sold by the importer. It does this by declaring the liquor shall, upon arrival in the state, be subject to its laws, not as regulations of commerce, but as police regulations.

It is said the supreme court declared these laws to be unconstitutional, in so far as they prohibited the sale of liquor by the importer or his agent in the original packages, and that congress could not, in the language of the learned counsel, "vivify a dead statute." There are two answers to this contention. The first is, the act of congress relegates the original package of liquor, on its arrival in the state, to the laws of the state passed in the exercise of its police powers; and there is not now, and never has been, any doubt of the validity of those laws. It is not the laws of the state, but the original package, that is "dead." No part of the Iowa law is "dead." What was decided by the supreme court was this: That the Iowa law was broad enough in its terms to embrace all liquors and all sales of liquors by every person, but that this law, under the constitution of the United States, was inoperative on liquor imported into the state, as long as it remained in the original packages, and could not be applied to the sale of liquor in the original package by the importer, "in the absence of

congressional permission to do so;" and that any application of the law to original packages in the absence of congressional permission was unconstitutional, and an invasion of the constitutional rights of the importer. There is, therefore, no foundation for the broad statement sometimes made, but not made by the learned counsel in this case, that "the Iowa liquor law was declared to be unconstitutional and void." The court did not declare the statute of Iowa "void," but in legal effect declared its extension or application to liquor in the original packages in which it was imported, in the absence of congressional sanction, was unconstitutional. Every written law has its implications, which are as much a part of it as what is expressed. It has been said that, in view of the decision of the supreme court, it must be held that one of the implications of the Iowa statute, at the time it was passed, was that it should not apply to original packages, and that this implication adheres to it, and can only be got rid of by a re-enactment of the statute under existing conditions. Undoubtedly this statute, like all statutes, had its implications, but it had no such implication as is claimed. If the statute had any legal implication on this subject, it was that the act should not be operative on original packages, or the sale thereof by the importers until congress should give its consent thereto. That consent has been given in plenary terms. It was only by necessary implication that the right of the importer to sell his original packages was upheld. *Bowman* v. *Railway Co.*, 125 U. S. 499, 8 Sup. Ct. Rep. 689, 1062. An act of the legislature will not be declared unconstitutional in whole or in part where the legal implications fairly deducible from the act will harmonize it with the constitution. A statute is neither unconstitutional nor void for not containing an exception or qualification which the law will imply. Its operation will be restrained within constitutional limits, but the act itself will not be declared void. It was always competent for congress to invest the state with authority to apply its police regulations to liquor upon its "arrival in such state" for sale or consumption, or, what is the same thing, to declare, as the act of congress does, that such liquor shall, upon arrival in the state, be subject to the operation and effect of the laws of the state enacted in the exercise of its police powers. It is not essential that the act of congress should have been passed before the act of the legislature. What congress can authorize to be done it may ratify after it is done. It is said by the supreme court of the United States that "a legislative ratification of an act done without previous authority is of the same force as if done by pre-existing power, and relates back to the act done." *U. S.* v. *Arredondo*, 6 Pet. 714. Such consent or ratification is equivalent to an original authority, and operates precisely as though authority had previously been given. It is familiar learning that by-laws and ordinances of cities and towns, which were inoperative or "void" for want of legislative power to enact them, are rendered valid and effectual by a subsequent legislative approval or ratification. Dill. Mun. Corp. (4th Ed.) § 79. An act of the legislature, passed in the exercise of the police power of the state, inoperative on liquor in the original packages, when passed, for want of congressional license, is rendered op-

erative and effectual by a subsequent act of congress declaring that such liquor shall be subject to the state law. Such an act removes the impediment to the enforcement of the law against such packages, and has the same effect as a precedent authority of congress to pass it. Such a law does not of course give to the state law a retroactive operation so as to punish a violation of its provisions before its adoption or ratification by congress. But it is said that the state laws referred to in the act of congress are laws to be thereafter passed, and not the laws in force at the date of the passage of the act of congress. It is a notorious fact, and part of the public history of the country, of which the court is bound to take judicial notice, that the decision in *Leisy* v. *Hardin* led to the opening up in the states which prohibited the traffic in liquor, or, imposed a high license tax on the traffic, of what were popularly called "original package houses." Liquor imported in packages of all forms and sizes, but all original packages, was sold in these houses. In this way the retail traffic in liquor was practically established, and in many cases by the most irresponsible and unsuitable persons who were not citizens of the state, and were indifferent to its welfare. Peaceful and quiet communities from which the sale of liquor had been banished for years were suddenly afflicted with all the evils of the liquor traffic. The seats of learning were invaded by the original package vender, and the youth of the state gathered there for instruction were corrupted and demoralized, and disorder, violence, and crime reigned, where only peace and order had been known before. The invaded communities were powerless to protect themselves. They could neither regulate, tax, restrain, nor prohibit this traffic. The courts held, and rightly so, that the importer and vender of original packages was not subject to the state law, and that any application of the state law to him would be an invasion of his rights under the constitution of the United States, until congress, in the exercise of its power to regulate commerce, should withdraw the protecting shield of that instrument from original packages that had reached the state where they were destined for consumption or sale. Congress was appealed to for relief. Petitions flowed in upon it praying for immediate action. It acted promptly, and with more celerity than ordinarily characterizes the action of so large a deliberative body, and the president approved its action. In the light of these facts it is absurd to say that congress did not intend to subject original packages to the operation of the existing state laws, but only to laws thereafter to be passed. Why should 40 states be compelled to call together constitutional conventions or legislatures, or both, merely to re-enact *verbatim* these existing laws? for it is conceded a *verbatim* re-enactment of the existing laws would remove this objection. The obvious design and intention of congress was to withdraw at once the protecting shield of interstate commerce from original packages of liquor the moment they entered the state where their transit was to end, by placing them on the footing of liquor "produced" in the state, and declaring they should be subject to the same laws. This was what the supreme court, as I construe their opinion, had said congress might do, and it is what it did

do, in language that admits of no evasion or discussion. The act of congress is a remedial statute, and the rules for the construction of such statutes declare they are to be liberally construed, and everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it; and that, in construing a remedial statute which has for its end the protection of important and beneficial public objects, a large construction is to be given, when it can be done without doing violence to its terms. *Wolcott* v. *Pond*, 19 Conn. 597. The supreme court of the United States has said:

"The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." *U. S.* v. *Freeman*, 3 How. 565.

In the construction of a statute it is always legitimate to look at the history of the times and examine the state of things existing when it was framed and passed. The act of congress is not ambiguous or doubtful, but if it was, the application to it of these canons of construction would remove the ambiguity or doubt. It is undoubtedly true that the power to regulate commerce among the states rests with congress alone, and that any rule congress prescribes on the subject must be uniform in its operation. It is objected against the act of congress that it is not uniform in its operation, but adopts the varying liquor laws of the several states. In the constitutional grant of powers to congress to regulate commerce among the states, it is not said that such regulations shall be uniform. That requirement is implied from the nature of the subject. The constitution declares that congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States." In reference to laws on the subject of bankruptcies, the constitution itself requires they shall be "uniform," and does not leave that requirement to implication, as is done in the case of laws regulating commerce. The bankrupt act of 1867 adopted the exemption laws of the several states, and gave to the bankrupts in the several states the property exempt from execution, by the laws of the state of their residence. The bankrupt act was assailed as unconstitutional, because there was no uniformity in the amount of property exempted to bankrupts, the amounts varying with the varying laws of the states. The point arose in this circuit, and the act was held constitutional for reasons which are equally applicable to the "Wilson Bill." That opinion was concurred in by Mr. Justice MILLER, and was ultimately accepted as a sound exposition of the law by all the district courts of the United States. *In re Beckerford*, 1 Dill. 45. That case ought to be conclusive, in this circuit, of the question in the case at bar. There is no want of uniformity in the act of congress. It adopts one uniform rule, which is that the interstate transit shall end upon the arrival of the liquor in the state to which it is consigned and that thereafter it shall be subject to the state law. This rule prevails throughout the whole country, and is therefore a uniform rule. If the court entertained any reasonable doubt of the petitioner's right to a discharge, it would not discharge him, but in the exercise of

its discretion would remit him to his right of appeal. *Ex Parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734. The petition for discharge is denied, and the petitioner remanded to the custody of the state authorities in execution of the sentence imposed upon him.

KING IRON BRIDGE & MANUF'G CO. *v.* CITY OF ST. LOUIS.

(Circuit Court, E. D. Missouri, E. D. November 5, 1890.)

1. CONTRACTS—TIME—WAIVER.
   Plaintiff contracted with defendant to build a bridge "on the present stone piers," and bound himself to complete the work within ten months and one week after receiving notice to begin. Defendant failed to prepare the piers to receive the bridge until eleven months after it had given plaintiff notice to begin. *Held*, that such failure released plaintiff from the obligation to complete the bridge within the specified time.
2. SAME—ARBITRATION CLAUSE.
   A provision in a contract with a city that the street commissioner shall decide all questions that may arise relative to the execution of the contract, and that his decision shall be final, does not give him jurisdiction to determine the legal question whether the contractor has incurred a penalty provided for in the contract.

At Law.

In this case it appears from the record that on November 18, 1887, plaintiff contracted with the city of St. Louis "to furnish and erect the iron and steel work of the superstructure of the main spans of the Grand Avenue bridge, on the present stone piers, and to connect the same with the iron-work of the anchorage," in conformity with certain plans and specifications, and for the sum of $144,000. The contract contained a provision that the work embraced therein should be begun by the plaintiff "within one week after written notice so to do had been given to the plaintiff by the street commissioner," and that the work should be completed within ten months thereafter. It was also provided by the same clause of the contract that, if the plaintiff failed to complete the work within the time limited, the sum of $20 per day for the first 30 days' delay, and $30 per day for the succeeding 30 days' delay, and $40 per day for the residue of the time, until the work was completed, should be deducted from the contract price. Notice to begin the work was given by the street commissioner on December 12, 1887, but the stone piers on which the bridge superstructure was to be erected were not completed by the city, ready to receive said superstructure, until November 12, 1888,—more than one week and ten months after the notice to begin had been given. The work embraced by the contract was completed by the plaintiff on June 17, 1889, or, as admitted by the answer, on May 30, 1889. The contract also contained the following provision:

"(8) To prevent all disputes and litigation, it is further agreed by the parties hereto that the street commissioner shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for un-

der this contract; and he shall decide all questions which may arise relative to the execution of this contract on the part of the contractor, and his estimates and decisions shall be final and conclusive."

After the completion of the work on June 17, 1889, the street commissioner made out a final estimate, showing the balance due to the plaintiff to be $21,627.73; but from this sum he deducted $6,820, claiming that the city was entitled to that deduction, under the provision of the contract above mentioned, on account of delay in completing the work.

Barcroft & Bowen and *David Murphy*, for plaintiff.

Leverett Bell, for defendant.

THAYER, J., (*after stating the facts as above.*) *First.* The first question to be determined is whether the provision of the contract authorizing deductions from the contract price in case the work was not completed within one week and ten months after notice to begin the work had been given, was an operative provision when the street commissioner made his final estimate, or had become eliminated from the contract by the default of the city. There can be no doubt that the duty rested on the city to construct and prepare the bridge piers for the erection thereon of the superstructure. The contract bound the plaintiff to erect the bridge superstructure "on the present stone piers," in accordance with certain drawings; but did not, by any provision, obligate the plaintiff to do any work on the piers. It is a necessary inference from all the terms of the agreement that the city undertook to provide such stone piers for the erection of the superstructure as the drawings disclosed. The city admits by its answer that the piers were not fully completed for the erection of the superstructure until November 12, 1888; hence, by the defendant's neglect the plaintiff was prevented from completing the work within one week and ten months from the time the notice to begin was given. The result is that the provision awarding damages in a given sum should there be delay in completing the contract, was as effectually eliminated from the contract, as if the parties had canceled it by express agreement; and it is wholly immaterial whether we say the provision in question was waived, or that the defendant is estopped from insisting on the provision. In either event, the result is the same. The city, by its own default, having rendered performance impossible within the time limited, has lost its right to claim the deductions specified in the contract. The law to this effect is well settled and fundamental. *Stewart* v. *Keteltas*, 36 N. Y. 388; *Weeks* v. *McCarty*, 89 N. Y. 566; *Starr* v. *Mining Co.*, 13 Pac. Rep. 195; *Mansfield* v. *Railroad Co.*, 6 N. E. Rep. 386; *Navigation Co.* v. *Wilcox*, 7 Jones, (N. C.) 481; *Dumke* v. *Puhlman*, (Wis.) 21 N. W. Rep. 820; *Jones* v. *Railroad Co.*, 14 W. Va. 523.

For an unreasonable delay in erecting the superstructure after the piers were fully completed, whereby the city sustained injury, it might perhaps be entitled to recoup damages on a counter-claim, but it has not framed its answer on that theory, and no decision on that point is necessary. It has planted itself squarely on the contract, and insists upon

the penalty nominated in the bond, which, for reasons above stated, it is not entitled to.

Second. The next question is whether the eighth clause of the contract gave the street commissioner such broad powers as an arbitrator, that his decision on making the final estimate that the plaintiff was in law liable for liquidated damages, is conclusive between the parties, although manifestly erroneous. This question must be answered in the negative. The contract made the decision of the street commissioner conclusive as to all questions concerning the amount of work done, provided he acted in good faith, and with reasonable care and circumspection. With the same reservations that he acted in good faith and with reasonable care, it also made his decisions final as to all questions whether the work was done in accordance with the drawings and specifications, and was fully up to the standard of excellence mentioned therein. These were all questions of fact, depending for their correct solution on professional knowledge and skill; and the parties might reasonably and lawfully submit them to the determination of an arbitrator, and agree to be bound by his decision. *Wood* v. *Railway Co.*, 39 Fed. Rep. 52, and citations.

But the question which the street commissioner undertook to decide was purely a question of law, as to the effect which the failure of the city to have the bridge piers completed within one week and ten months after the notice was served, had upon its right to demand liquidated damages. I am satisfied that the contract, properly construed, did not commit that question to the determination of the street commissioner; it was wholly outside of his jurisdiction.

As the general denial contained in the answer was waived by counsel in open court, and the case was submitted under an agreement that the court, on the hearing of the demurrer to the answer, might enter such judgment as it deemed proper, in view of the allegations of the petition and the admissions contained in the answer, the demurrer to the answer is sustained, and judgment entered on the first count of the petition for $21,627.78, with interest at 6 per cent. per annum from June 17, 1889, to this date. On the second count, in which the plaintiff sues as on a *quantum meruit* for the same sum mentioned in the first count, the finding and judgment will be for the city.

STEPHENS v. OVERSTOLZ.

(Circuit Court, E. D. Missouri, E. D. October 13, 1890.)

1. NATIONAL BANKS—EXCESSIVE LOANS—LIABILITY OF DIRECTORS.
The right to maintain an action under Rev. St. U. S. § 5239, to recover of a bank director the damages sustained by his bank in consequence of excessive loans made by him while serving in the capacity of director, is not affected by the fact that the comptroller has or has not procured a forfeiture of the bank's charter.

2. SAME—REMEDY AT LAW.
An action by a receiver of a bank whose charter has been forfeited under above statute against a director is properly brought at law; there being no necessity for invoking the aid of a court of chancery either because of the nature of the issues involved, or to avoid a multiplicity of actions.

3. SAME—PLEADING.
In such action, plaintiff may state the aggregate amount of the excessive loans made to each party, and the damage resulting therefrom in each case, accompanying each allegation with an exhibit showing the dates and amounts of the several loans that go to make up the aggregate sum stated in the petition, and is not compelled to declare in a separate count for each loan made.

At Law.

This was a suit by a receiver of an insolvent national bank, duly appointed under the provisions of section 5234 of the Revised Statutes of the United States, against the executrix of a deceased president and director of the bank, to recover damages alleged to have been sustained by the bank in consequence of loans knowingly made by the deceased, in his capacity as president and director, to four different customers of the bank, to each in excess of one-tenth of the amount of its capital stock actually paid in. The action was founded on sections 5200 and 5239 of the Revised Statutes of the United States. The declaration, or "petition," as it is termed under the Missouri Code, recited the organization of the insolvent bank, the fact that defendant's testator was its president and one of its directors from its organization until it became insolvent, that plaintiff was duly appointed receiver of its affairs, etc., and then averred, in substance, that the testator in his life-time, and while acting in the capacity of president and director, "participated in and knowingly assented to the making of loans" of the funds of said bank to Nathan Goldsmith & Co., to the amount of $99,591, in excess of one-tenth of the capital stock of the bank, $54,591 whereof was thereby wholly lost, and that the bank was thereby damaged to that extent. Similar allegations, differing only in amounts and dates, were made in separate paragraphs with respect to excessive loans to the John Meyer Lumber Company, the St. Louis Planing Mill Company, and the Elliottville Mills. The petition showed the total amount of the excessive loans made to each of the four concerns above mentioned, and the amount of the loss thereby and in each instance sustained. Attached to the petition were four exhibits, showing the dealings between the bank and said companies for the period of several years, from which it appeared that the excessive loans in question were not made in one sum to either of the several debtors, but that each of them borrowed from time to time, and in different amounts, money in excess of the sum authorized by law to be

loaned. The petition also showed that the insolvent bank was ousted of its charter before this suit was begun, in a proceeding brought by the comptroller of the currency under the provisions of section 5239, *supra*, and that in such proceeding the comptroller counted upon the excessive loans to Nathan Goldsmith & Co., to the John Meyer Lumber Company, and to the St. Louis Planing Mill Company as a violation of law, and that, in consequence of such loans and other violations of law, the court decreed a forfeiture of the bank's charter.

Draffen & Williams, *Lubke & Muench*, and *Geo. D. Reynolds*, U. S. Atty., for plaintiff.

Chester H. Krum, for defendant.

THAYER, J. We have heretofore held in this case that the cause of action did not abate with the death of the director, but survives against his executrix. Since then the petition has been amended, and a demurrer, and also motions to compel an election as between causes of action, have been filed and argued, which present some questions not explicitly decided on the former hearing.

First in order of importance is the demurrer, and it presents two propositions in the alternative.

It is said, in the first place, that the remedy under section 5239 is statutory, in the sense that, before a recovery can be had against a bank director under that section, on account of an excessive loan, it must be averred and proven that the charter of the bank has been forfeited in a proceeding taken by the comptroller, because of the excessive loan in question, and that, inasmuch as the Elliottville Mill's loan was not counted upon in the comptroller's proceeding, there can be no recovery of the damage sustained by that loan. On the hearing of the demurrer, we expressed the opinion, and further consideration of the subject has strengthened the conviction, that the right to recover, under section 5239, of a bank director the damages sustained in consequence of an excessive loan under section 5200, is in no wise affected by the fact that the comptroller has or has not procured a forfeiture of the charter. According to our view of section 5239, two results, in no respect dependent upon each other, may follow the making of an excessive loan; that is to say, the comptroller may, if he thinks proper, proceed to have the charter revoked, alleging the excessive loan as a violation of law; but, whether he does so or not, a director of the bank, who knowingly participates in or assents to the loan, may be compelled to make good whatever damage results to the bank from making the same. This seems to us to be the obvious meaning of the law.

Failing on the proposition last mentioned, that the action is statutory in the sense above indicated, counsel for the executrix next insists that, if the right of action is not statutory in that sense, then the remedy for the alleged wrongful acts is in equity, and not at law, and that the demurrer should be sustained for that reason. This we regard as the most important point presented for consideration.

Under statutes imposing a liability on directors or stockholders of cor-

porations without prescribing the form of remedy, the question has frequently arisen whether the appropriate remedy was at law or in equity; and the decisions on that point have usually turned on the nature of the liability imposed, the difficulties standing in the way of the enforcement of the liability in a strictly legal proceeding, and on other considerations of a similar character. Thus in the case of *Hornor* v. *Henning*, 93 U. S. 228, an act of congress authorizing the organization of savings banks in the District of Columbia provided, among other things, that, "if the indebtedness of any company organized under the act, should at any time exceed the amount of its capital stock, the trustees of such company assenting thereto should be personally and individually liable for such excess to the creditors of the company." A suit at law having been brought under this statute against several trustees of a savings bank by a single creditor, the court held that, notwithstanding the literal reading of the statute, congress did not intend to make the trustees liable beyond the debts of the bank which it failed or refused to pay, that the act was intended for the common benefit of all the creditors of the bank, and that the liability of the trustees for an excessive indebtedness at any time created was in the nature of a trust fund, in which all the creditors were entitled to share in proportion to the amount of their debts, so far as it might be necessary to resort to the fund to pay the same. Viewing the statute in that light, the court further held that the remedy for its enforcement was in equity rather than at law, inasmuch as it was necessary to take an account of all the liabilities and assets of the bank, to determine to what extent it was necessary to resort to the fund in question, and for the further reason that a proceeding in equity would avoid a multiplicity of suits, and prevent one creditor from absorbing a greater portion of the fund than he was entitled to. In the case of *Stone* v. *Chisolm*, 113 U. S. 302, 5 Sup. Ct. Rep. 497, which was a suit brought to enforce the same kind of statutory liability last described, the doctrine announced in *Hornor* v. *Henning* was applied and reaffirmed. It was also held in the case of *Crown* v. *Brainerd*, 57 Vt. 625, under a statute making the directors of a corporation liable to its creditors for any loss resulting from their "incompetency, unfaithfulness, or remissness in the discharge of their official duties," that the remedy for the enforcement of the liability was in equity, because the remedy afforded by that forum would be more "complete, convenient, and comprehensive," and because the machinery of a court of law was not adequate to the enforcement of the liability in an equitable manner. On the other hand, the right to sue at law has been sustained in a class of cases where the liability imposed was of such a nature that it was thought to be conveniently enforceable in a legal proceeding. In New York and Missouri, and perhaps in some other states, it is held that an action at law will lie under a statute declaring, in substance, that if a corporation becomes dissolved leaving debts unpaid, the persons then composing it shall be individually responsible to the extent of their stock. *Bank* v. *Ibbotson*, 24 Wend. 479, (opinion by NELSON, C. J.;) *Perry* v. *Turner*, 55 Mo. 418, (opinion by NAPTON, J.) In Maryland and Illinois it is also held that a suit at

law will lie under a statute making stockholders liable, to the extent of their stock, for all debts contracted prior to the time the whole amount of the capital is paid in. *Culver* v. *Bank*, 64 Ill. 528; *Matthews* v. *Albert*, 24 Md. 527; *Norris* v. *Johnson*, 34 Md. 485.

Our conclusion is that, for the purpose of determining whether an action at law will lie in the case at bar, consideration ought to be given chiefly to the question whether the remedy at law, as compared with the remedy in equity, is as convenient and adequate, and not more burdensome to the party proceeded against. The suit before us is to recover whatever damages the Fifth National Bank may have sustained in consequence of excessive loans knowingly made or assented to by the defendant's testator, while serving in the capacity of director. The suit is by a receiver duly appointed, in whom are now vested all claims of the bank; and, as whatever injury resulted from making the excessive loans in question was a damage primarily done to, and recoverable by, the bank, it is not apparent that any stockholder or creditor of the institution can maintain a suit against the executrix for the alleged excessive loans either during the pendency or after the termination of the present action. There is no necessity, therefore, to resort to equity to avoid a multiplicity of suits.

Furthermore, the issues to be tried appear to be such as can be conveniently disposed of by a court of law. They are simply whether certain specified loans, made to four different parties, were made at a time when the several parties were already indebted to the bank in a sum equal to one-tenth of its capital actually paid in, and whether such loans were knowingly made or assented to by the testator, and what portion of the moneys so loaned were lost. We can foresee no inherent difficulty in trying all of these issues intelligently and fairly in a court of law. The case appears to be one in which there is no necessity for invoking the aid of a court of chancery, either because of the nature of the issues involved, or to avoid a multiplicity of actions. The demurrer will be overruled, in accordance with these views.

The several motions to compel an election between causes of action raise merely a question of pleading. In support of the motions, the contention is that plaintiff should be compelled to declare in a separate count for each excessive loan made to the several parties named in the petition, on the ground that each loan constitutes an independent cause of action. On the other hand, it is contended that plaintiff is entitled to state the aggregate amount of the excessive loans made to each party, and the damage resulting therefrom in each case, accompanying each allegation with an exhibit, showing the dates and amounts of the several loans that go to make up the aggregate sum stated in the petition.

We think the latter view is supported by the better reasons. The rule contended for by the executrix would render the complaint very prolix, without securing even to her any substantial advantage. The exhibits attached to the petition fully advise the defendant of the dates and amounts of the several unlawful loans, and, in any event, the burden will be on the plaintiff to show that the several loans so specified were

each made with the knowledge and assent of the deceased director. The judgment ultimately rendered in the case will also bar any further proceedings on account of any of the loans mentioned in the exhibits. We fail to see, therefore, how the method of pleading that has been adopted will put the defense to any disadvantage. Furthermore, in view of the fact that the statute creates a right of action for making advances beyond a given limit, we think it is sufficient to aver that loans were knowingly made to certain parties by the deceased director to a given amount beyond that limit, which resulted in a loss to the bank, and that no obligation rests on the pleader to count upon each loan as a separate cause of action. The dates and amounts of the several loans are matters of evidence to be established at the trial. In support of this view, we may fairly invoke the rule of pleading under the Missouri Code, which permits a plaintiff in a suit on a bond or a contract to assign any number of breaches, although they occurred at different times, in one and the same count of the declaration. *State* v. *Davis*, 35 Mo. 407.

Upon the whole, we conclude that the motions to compel an election should be overruled, and it is so ordered.

MILLER, Justice. I fully concur in the foregoing opinion.

CAMPION *v.* CANADIAN PAC. RY. CO.

(Circuit Court, N. D. Illinois. September 29, 1890.)

CARRIER OF GOODS—LIABILITY FOR LOSS.

Where a carrier, after informing the owner of goods delivered to it for transportation that they will be held at place of receipt till the freight charges are prepaid, ships the goods without payment, and without notice to the owner, it is liable for damages resulting from such premature shipment.

At Law.

John S. Cooper, for plaintiff.

Walker & Eddy, for defendant.

GRESHAM, J. Having determined to remove from Chicago to Seattle with her family, (two daughters,) the plaintiff, on May 14, 1888, visited the office of the defendant to arrange for the shipment of her furniture, books, pictures, clothing, and other household goods. The defendant's agent agreed to receive and forward the goods, and informed the plaintiff that from Chicago to St. Paul they would be carried over the Chicago, St. Paul & Kansas City road, thence to Vancouver over the defendant's road, and thence to their destination by the Northern Pacific Navigation Company. The defendant knew that the plaintiff desired to receive and care for her goods when they reached their destination, and that she expected to start on her journey that day. After delivering her

property at the freight depot of the Kansas City Company at Chicago, and receiving a memorandum receipt for it, the plaintiff went to the defendant's office, showed her receipt, and was informed that an agent of the defendant was at the freight office of the other company, expecting to meet her there. The plaintiff went to the latter office, and met an agent of the defendant in company with an agent of the other company, and was informed by them that her goods would not be forwarded until the freight charges, $105, were paid, the regulations of the defendant requiring payment in advance for carrying such property. Having but $75 with her, the plaintiff left, saying she would return in a day or two with money enough to pay the freight bill; but before leaving she handed the receipt to the defendant's agent, who promised to have a bill of lading ready for her. Two days later the plaintiff again called at the defendant's office, and informed a clerk or employe, he being the only person present, that she was detained by the illness of one of her daughters, and some business matter, and that her goods would have to remain in the freight house for the present. The employe said he supposed that would be satisfactory, and that he would inform the defendant's freight agent of her situation, which he did. The plaintiff then went to the freight office of the Kansas City Company, and informed its agent of the cause of her detention, who told her that, under the circumstances, her goods could remain where they were without storage charges. The following week the plaintiff again visited the defendant's office, and informed its agent that she was still detained at Chicago by the illness of her daughter; and some days later the plaintiff had an opportunity to ship her goods to Seattle over another line, at a lower rate, in a car which had been obtained by a friend, his goods not filling the car. The plaintiff accordingly went to the Kansas City Company's freight depot for her goods, and was for the first time informed by an agent that they had been forwarded the evening of the day she delivered them, and that he had not notified her of the fact when she called before, because he did not then know of the shipment. The plaintiff immediately went to the defendant's office and asked its agent if her goods had been forwarded, and, if so, why she had not been notified of the fact. The agent replied that it was true her goods had been shipped the day she delivered them at the other company's freight warehouse; that one of the defendant's agents in charge of such matters, on his own responsibility, had ordered the shipment; and that the defendant had not notified her of the fact because her address could not be found. The plaintiff then saw the latter agent, and told him she had given him her address, and had seen him put it on his file, and he replied that her address had been lost, and for that reason she could not be notified. The goods arrived at Seattle on May 30, and, no one appearing to receive them, they were stored in a warehouse, and six days later were destroyed by fire. The plaintiff testified that if she had known her goods had been forwarded she would have reached Seattle in time to receive them, and that when they were destroyed she believed they were still in Chicago.

If there had been no agreement or understanding that the goods should be held until the defendant's demand was complied with, the defendant would have been bound to forward them at once, or without unreasonable delay; but, having agreed to hold the goods until the charges were paid, it was a breach of the contract to forward them without notice to the plaintiff. She believed, as she well might, that her goods would not be forwarded until she complied with the defendant's demand, and that she could and would reach Seattle in time to care for them on their arrival. She was prevented from doing this by the neglect of the defendant to discharge a plain duty that it owed her. Her goods were destroyed 2,000 miles away, when, owing to the misleading conduct of the defendant, she supposed they were still at Chicago. If a carrier receives goods for transportation, agreeing to hold them until a future date, or until the happening of an event, and forwards them at once, damages resulting from a breach of the agreement may be recovered.

It was clearly the defendant's duty to hold the goods, or notify the plaintiff that it was willing to forward them, waiving prepayment of the carrying charges.

Finding and judgment for the plaintiff for $1,650.

MINIS *et al.* v. NELSON *et al.*

(*Circuit Court, S. D. Georgia.* April Term, 1890.)

1. CUSTOM—REASONABLENESS—PRINCIPAL AND AGENT—SHIPPING.
   A custom that an agency to act for a ship in distress is irrevocable is invalid, as being unreasonable.
2. SAME—COMPENSATION OF AGENT.
   A custom that the agent of a ship in distress shall receive in all cases a custody commission of 2½ per cent. upon the value of the cargo discharged, and an attendance fee in the discretion of the agent, is void as to the attendance fee for want of uniformity, but valid as to the commission.
3. VERDICT—ATTORNEYS' FEES.
   Where a defendant has acted in bad faith, and has been stubbornly litigious, the jury may allow plaintiff an attorney's fee as an element of damage.

At Law.

This was an action by A. Minis & Sons to recover for services as ship agents. The jury found for plaintiff in the sum of $4,316.78.

Chisholm Erwin and *Wm. Bignon*, for plaintiffs.

George A. Mercer, for defendants.

SPEER, J., (*orally charging the jury.*) This suit is brought by A. Minis & Sons, for $5,573.45, besides interest from the 16th day of December, 1887. This sum is made up of several charges, to which the court will presently refer you. The plaintiffs are commission and shipping merchants and brokers in Savannah. The defendants are owners of the British steam-ship Naples. The plaintiffs were the agents or consignees

of the Naples for the general and ordinary purposes of its voyage to this port. They were charged with the usual duties incumbent upon ship-agents in reference to a steam-ship like the Naples, to be loaded at the port of Savannah with a cargo for a foreign port. For that agency they were paid a stipulated sum, which is in no sense a matter of controversy here. Pending the lading of the Naples, at 6 o'clock in the evening of the 6th day of October, 1887, a fire broke out in the cargo. From that moment the Naples was a ship in distress, and the plaintiffs insist that they were employed to act as the agents for the Naples with reference to her distressed condition; that there was a new contract, entirely distinct and different from the ordinary contract of agency which they had been performing; and that as such agents for the ship in distress they are entitled, under the facts of the case, to the sums for which they bring this suit under the declaration setting out these facts. The defendants file the plea of general issue. Under this plea they deny that the plaintiffs were their agents in the sense which the agents can charge commission for the custody of a vessel, or in this case for the custody of a cargo of a ship in distress. They insist that if Minis & Sons began, under any kind of authority, to act as such agents, that authority was revoked. They say that there is no provision of law or custom for the charges of the plaintiffs, which they insist are exorbitant. This denial extends to all the charges in the declaration, to all the demands of the plaintiffs,—the demand for custody commission, for attendance fees, and attorney's fees. The defendants admit that for any actual services A. Minis & Sons may have rendered they may be entitled to recover a small amount, which the counsel for the defendants, in his argument, said should not exceed $750. They are not entitled, the defendants insist, to recover the sum sued for, or anything like it. The items of the plaintiffs' demand are as follows: To attendance as ship-agents for the vessel in distress at and after the fire, October 6, 1887, $750; to commissions for the care and custody of cargo of the steam-ship Naples, 2½ per cent. on the value of the cargo,—$172,671.12,—$4,316.78; which aggregate, $5,066.78. They then insist that they are entitled to recovery attorneys' fees for the unwarrantable and litigious spirit which they say the defendants have shown in this case, which attorneys' fees they prove to be, in case they are recoverable, $506.67, or 10 per cent. upon the amount which they insist they should recover. They insist, further, that if they are not entitled to recover these precise sums they are entitled to recover what the proof shows their services are worth,—*quantum meruit*, or as much as they merited.

The prominent feature in the case of the plaintiffs is their averment that there is in the port of Savannah a usage or custom which is of sufficient authority in a court of justice to justify their demands. Their definition of that custom is as follows: They insist, and offer proof to show, that if the agent or ship-broker proffers his services to the master or other person in control of a ship in distress, or if, upon the request of the master or other person in control, the agent agrees to act, in either case the agency is complete; that it is not only complete, but that it is

continuous until the matter is ended, and is not revocable. They further define the custom to authorize a charge for attendance in proportion to the services rendered, which charge is testified to be discretionary with the ship-agent; that the custom authorizes these charges,—the attendance fee, which is discretionary; the custody commission for the custody of the cargo, which is 2½ per cent. upon its value, and 2½ per cent. upon all disbursements for the ship. It is well, however, to consider at this point that there are no charges for disbursements here, and therefore we are not to consider disbursements in this case. These are the features the plaintiffs insist appertain to the custom. Now, what is a custom? A custom is an unwritten law, established by long usage and the consent of our ancestors. Usage is the legal evidence of the custom. It may be further defined to be usage which has obtained the force of law, and is, in truth, the binding law within a particular district or at a particular place as to the persons and things which it concerns. Now, it is for you, under the rules of law which I shall give you, to determine whether there has been shown in this case such usage,—that is, the use and practice of the trade, the shipping merchants' trade,—which usage has obtained the force of law, and is binding law within a particular district or at a particular place, to-wit, the port of Savannah, as to the persons and things which it concerns; that is, as to the ship-agents and the owners of ships which ply to and from this port. Now, before a custom or usage can be of the binding force of law, it must be shown to exist by proof, and this proof must be made by the person seeking an advantage under the custom or usage in this case. Of course, you understand that the plaintiffs are seeking an advantage under the alleged custom here, and therefore they must show by proof the existence of the custom. Now, what else must the proof show? First, it must show that the custom is certain. If the proof leaves the custom uncertain, either as to the fact or as to its effect on the matter with which it is related, it is void as a custom; it is a nullity, and nothing can be taken under it. Because the court advises you, however, that the custom must be shown by the proof to be certain, you must not understand that it must be used by everybody, and at all times; it must be certainly shown, however, to be the custom,—the general usage of the trade at this port. Again, the custom must not only be certain, but it must be reasonable in itself; and whether reasonable or not, is not a question for the jury, but that is for the court to decide, and instruct the jury. The custom must have existed from time immemorial. If any one can show its beginning it is no good custom. Again, the custom must be continued, without any interruption, for an interruption will cause a temporary cessation of the custom, and the beginning would be remembered, and therefore it would not be from time immemorial. Any interruption of the right is meant, and not its actual practice in exceptional cases. If there was a distinct and general abandonment of the right, under the facts of such a custom by the trade at this port, it would cease to exist. Now, what is the main object and use of a custom of this character? It is, gentlemen, to interpret and make plain the intentions

of the parties which may otherwise be undetermined,—that is, uncertain; and to ascertain the nature and extent of their contracts,—contracts arising not from express stipulations, that is, express contracts, but from acts of a doubtful character, or from implications and presumptions. The use of a custom, I may illustrate to you by the facts of this case: If, when Mr. Minis went aboard the steam-ship, there was a distinct express contract between him and the master to pay a certain sum, that would end the matter; but if he went to report to the master, and the master accepted his services and took his advice, and he went forward and rendered the services of a ship-agent to a ship in distress, and there was no precise, definite, express contract between him and the master, then the nature of the contract between the agents and the ship-owners must be determined by the custom, if there be such custom. To enable you to ascertain what really was their contract, under the circumstances, you must consider the custom of the trade at this port. If the custom is otherwise shown to be definite, certain, uniform, reasonable, immemorial, and to possess the other requisites to which I have called your attention, the entering into the contract would be a part of it, and the jury would be justified in holding that the parties acted in view of the custom, whether they both had the custom in mind at the time or not.

Now, do the facts show such a custom? Upon this subject you must remember the testimony of several gentlemen who testified here as witnesses. You remember what it was. The testimony which the court, however, has in hand was offered by the defendant, and it is the testimony of a witness who seems to be an expert upon this general subject; and the court, as is the practice in our court, will read you what he testifies. This is Mr. Gourlie, who testified as follows:

"I am a member of the firm of Johnson & Higgins, average adjusters and insurance brokers. That firm has been engaged in such business, I believe, some forty years; and I have pursued the business of average adjusting some twenty years. I have a familiarity with the manner in which general average adjustments are made up, and the charges allowed in them; and if a custody commission is one of the charges in the accounts submitted to us as adjusters it is the custom in this port to allow such custody commission in general average. According to the usage of this port the percentage of such custody commission varies, running from two and one-half per cent. upon the value of the cargo discharged, which is the rate fixed by the regulations of the chamber of commerce as one of the charges of this port, down in some cases to one per cent. upon the value of the cargo discharged. The custody commission depends upon whether a cargo has been discharged from the vessel in distress. If no discharge has occurred, there is no custody commission chargeable; consequently in the adjustment of such cases we do not have to deal with such an item. A custody commission, or charge for the care of cargo discharged in distress, is, I believe, customary in this port. We have adjusted averages in our office wherein appeared an allowance of custody commission to the consignee of a vessel in Savannah. I recall several such cases, in each case of which the custody commission was two and one-half per cent. upon the value of the cargo discharged in distress. I can remember at least five cases within the past five years where a custody commission of two and one-half per cent. has been allowed to the consignees in the port of Savannah.

A custody commission prevails in all the ports of the United States, so far as I know. The percentage of commission varies. Two and one-half per cent. is the prevalent rate in Philadelphia, and this rate prevails, to the best of my knowledge, in more of the ports of the United States than does any other rate of commission. It is a more general commission than is any other rate of percentage. In Charleston, also, the usual commission for custody is two and one-half per cent. I can also recall cases at Norfolk, Va., Halifax, N. S., Nassau, N. P., St. Thomas, W. I., and Fayal, in each of which a custody commission of two and one-half per cent. was charged."

This gentleman was a witness for the defendants, and as it is not contradicted the defendants are bound by his evidence. The court reads it, as it shortens the matter. The court states to you that if you believe the testimony of that gentleman, Mr. Gourlie, you may well conclude that there is a custody commission of 2½ per cent. on the value of the cargo of vessels in distress, when the cargo has been discharged, which custom exists at the port of Savannah. While there is some little variation in particular cases in reference to the charge of 2½ per cent. as custody commission, there does not seem to be any difference of opinion among the witnesses at all about the existence of the custom.

The court charges you further that if the custom is of that character that it would prevent a ship-owner from revoking the agency, then it is an unreasonable custom, in that respect, and in violation of the several principles of the law of agency. The power of an agent may be revoked at any time by the principal, without notice; but if the agent in the prosecution of business of his principal has fairly and in good faith, before notice of the revocation of his power, entered into any engagements, or has incurred any liabilities, the principal will be bound to indemnify him. Now, you understand that announcement of the court. If it be true, as testified by the witnesses here, that the custom prevents a ship-owner from revoking the agency of his agent, that custom in that respect is unreasonable, and has no legal force. It is true, however, that where the agency is revoked it would not deprive the agent of a fair compensation for the services which he had rendered before it was revoked. If you find from the evidence in this case that the agency was revoked, the plaintiffs would not be entitled to recover the full amount of their demand, but they would be entitled to recover a fair compensation for the services they had rendered; and, if they suffered loss because of any engagements which they had entered, or upon any liabilities they had assumed, the principal would be bound to indemnify them for the losses. The important question here is to determine whether the agency was in fact entered upon, and, if entered upon, was it in fact revoked? Had Minis & Sons entered fairly upon the agency of the Naples in distress? That you will determine from all the evidence. You will remember the testimony of Mr. Minis upon that subject. It is not necessary that the court should go over that matter again with you. The testimony of the defendants' witness, Capt. Rulffs, is as follows:

"When I stood amid-ships, the captain of the Resolute asked me if I made any agreement with the tug-boat. Same time Mr. Minis came up. The next tug-boat came then, and I asked Mr. Minis what we were going to pay them,

and he said $20 per hour. Mr. Minis made the agreement with the second tug-boat at $20 per hour. We asked the first tug-boat, but it would not make any agreement. Mr. Minis said he would try and get it for $20 per hour. Mr. Minis told me to cut holes in the deck on the port side. There were five holes cut. Engines were at fire all night. Holes were cut in the morning to put the hose down through the deck. Fire hottest between the main and fore hatches. At the time of the fire I knew ship was consigned to Minis & Sons. Mr. Minis was agent of the ship at that time. I consulted him as adviser, knowing he was agent at the time. I did not take agency away until Saturday morning, on a cable from my owners. The stevedores commenced discharging Friday about 11 A. M. The stevedores were Reilly & Marmelstein. On Friday afternoon Mr. Putnam could not see that stevedores were working right. The discharging was too slow," etc.

[He testified further, as I remember, a survey was called by Mr. Minis at his request.]

"When I got first cable from my owners, protesting against Chubbs' sanction—

[Chubbs, as you will remember, represented the indemnity club, which club is responsible, in part, at least, for the losses of the ship.]

protesting against Chubbs' sanction of Minis & Sons' unjust charge, I told Mr. J. F. Minis that he was no longer my agent, and that is what I meant when I said I revoked the agency in the direct examination. It was on Saturday, October 8th, that I met Mr. J. F. Minis in front of the Cotton Exchange, and he asked me why I called a survey without letting him know; and then I told him he was no longer my agent, and I would keep the ship in my own hands. On Friday, October 7th, went to Minis' office with Putnam, and he wanted to give the agency to them for $3,000."

That, gentlemen, is the material testimony of the captain upon the facts as to whether or not Minis & Sons entered upon a contract. Mr. Minis testified he did. He testified, further, that the only matter in dispute between him and the captain or the owners was the amount of his compensation; that he always insisted that he was to have the usual charges of the port as justified by the custom; that, by way of compromise, at one time he agreed to receive $3,000. That proposition was not carried out, and therefore is no guide for the jury in this case. He denies the statement of the captain that he was ever discharged from the agency, but that the captain threatened to discharge him if he did not come to his terms. The following is a letter from the captain to Minis & Sons on the subject of the price, which is in evidence before you:

"In regard to your price for agency of S. S. Naples, I consider same far to high; and, as it is protested both by my owners and by insurance club, you will have to come considerable down in the figures if you intend to have the business. At all events, I will see you on Monday; if not, you might favor me with a reply. Perhaps other instructions will turn up. Until then, I remain, gentlemen, yours, respectfully, CLEMENS RULFFS, Master."

Again, on the 10th October, 1887, he writes:

"*Messrs. Minis & Co.*—GENTLEMEN: Confirming my letter of the 8th inst., I beg to express surprise at having no reply to it, which common courtesy alone would seem to dictate. Since the fire I have had no agent to consult with, and I feel the time is coming when I shall need some one. Unless I receive an early reply that would prove reasonable and acceptable, I shall feel

compelled to look elsewhere in the event of my requiring an agent to confer with and to act for my ship. Until then, I remain, gentlemen, yours, respectfully, CLEMENS RULFFS, Master."

To this Messrs. Minis & Sons replied as follows:

"Your note of this date is at hand. We did not understand that your communication of the 8th inst. called for any reply, inasmuch as you asked for one only in the event of your not seeing us to-day. Besides no inquiries are made therein. We beg to say that our experience and advice are open to you, and we are ready now, as we always have been, to continue to fulfill our duties as agents in rendering you as well as the ship and cargo any services in our power. If you desire to confer with us as is customary for a master to do with his agents, our time and judgment are at your disposal.

Yours, respectfully, A. MINIS & SONS."

That, gentlemen, is the correspondence upon the subject. You must take that correspondence, and all the other facts in the case, and determine from it whether or not the agency was revoked. If the correspondence stood alone, and unsupported by any other evidence, it would show that the agency was revoked, as a matter of law, notwithstanding Messrs. Minis & Sons' opinion that they were still the agents of the ship. They rely for that opinion upon that feature of the custom which has been testified to by the witnesses here, which feature is invalid. But the letters did not stand alone. They must be considered in connection with all the other facts of the case. You must bear in mind the testimony of Mr. Minis that the captain was constantly going to his office to consult him in reference to the business of the ship, and, in view of the conflict between the captain and Mr. Minis, you must determine whether or not Mr. Minis' testimony is credible, and, if credible, how far it will help you in your decision as to whether or not the agency was revoked.

A very important matter depends upon the telegram of the 17th of October, from the owners of the vessel to the captain, the master of the vessel, who are the defendants in this case. The fire, you will remember, took place on the 6th, and all of this correspondence and negotiations were pending and carried on in the period between the 6th and the date of this cable, which is the 17th. It is in evidence that the defendants were advised of the condition of affairs here by the master. They understood that Minis & Sons were standing out for the custody commission. They had instructed the master to refuse to agree to the custody commission. With that knowledge, on the 17th of October, they send this cable to Minis & Sons:

"Private; confidential. Consider ship's interests. End voyage at Savannah, forwarding sound and partially damaged cotton to destination, claiming freight in general average adjusted America. Wire your opinion."

Now, it is the duty of the court to construe this cable to the jury. It was received after, as I have said, the controversy was fully understood, or after they had the opportunity of fully understanding the controversy and its features as it existed here. They send this cable: "Private; confidential." Is that addressed, gentlemen, to one who is not the agent of the ship? What right would they have to send a private and confidential cable to one who was not an agent of the ship? "Consider ship's

interest." Who is to consider the ship's interest? The agent, of course. "End voyage at Savannah." What voyage? Why, the voyage on which the Naples was then engaged,—the voyage to Savannah for the cargo of cotton, and the voyage from Savannah to destination, where that cotton was to be delivered. "End voyage Savannah, forwarding sound and partially damaged cotton to destination." That manifestly refers to the cotton of the Naples,—that portion which had been left intact and sound, and that portion which had been damaged. "Claiming freight in general average adjusted America." That means they must go on and adjust the general average, just as a ship-agent would do if his agency had never been terminated, according to the American rule fixing average. "Wire your opinion." It is impossible for the court to have any other opinion, or to give you further instruction, on this point, save that this cablegram ratifies, fully and completely, Messrs. Minis & Sons as the agents for the ship in distress; and, if that be true, and if it further be true that a custom existed at this port by which they were entitled to charge 2½ per cent. custody commission, they would be entitled to make that charge. The court charges you further in reference to this custom, that the charge for attendance fee is not shown to be universal; the testimony of the witnesses varies upon that point. Sometimes it is charged, where the general custom is employed, some of the witnesses say, sometimes it is not charged. This, therefore, does not possess the feature of uniformity and universality which makes an attendance fee a custom. No custom, also, can be good where all the discretion is on one side. In any event, the plaintiffs are not entitled to an attendance fee in this case. The court charges you further that if you believe from the evidence, and in view of all the directions which the court has given you upon the subject, that no such custom existed in Savannah, in that event Minis & Sons would be entitled to recover what they merited in this case; but, if you find your verdict upon the custom, you pay no attention to the count in the declaration, which makes a demand for a sum in proportion to the merit of the services which they have performed. If you find under the custom you should find 2½ per cent. upon the fixed value of the cargo, which the court understands from the counsel is $4,316.78. There is one further feature to which I wish to call your attention, and I charge you at the request of the counsel for defendant; the expenses of litigation are not generally allowed as a part of the damages, but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow the expenses of litigation. The jury are not obliged to allow attorney's fees; it is optional with them. Before the jury can allow attorney's fees, they must *first* find that the defendant has acted in bad faith; *second*, that he has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. If you find, therefore, gentlemen, that the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, you may consider attorney's fees as an element of your finding, and, if you do, it is agreed that 10 per cent. of

the amount of your verdict, which you will otherwise assess, would be a fair and proper recovery for attorneys' fees. If you find that the defendants have acted in good faith, and have not been stubbornly litigious, or have not caused the plaintiffs unnecessary trouble and expense, the plaintiffs cannot recover attorney's fees. If you find for the plaintiffs, your verdict will be: "We, the jury, find for the plaintiffs the sum of ———, with costs of suit." If you find for the defendants, your verdict will be: "We, the jury, find for the defendants."

UNITED STATES *v.* LEOPOLD *et al.*

(District Court, D. Colorado. October 20, 1890.*)*

CRIMINAL LAW—COSTS.

A defendant who has been discharged by the commissioner on preliminary examination, and is afterwards indicted and convicted on the same charge, should not be taxed with the costs of the examination before the commissioner.

At Law.

John D. Fleming, U. S. Atty.

Robt. J. Pitkin, for defendants.

HALLETT, J., (*orally.*) There is a case pending in the district court in which I stated to counsel that I would express an opinion, which perhaps cannot be entered of record until the district court convenes. The case is *U. S.* v. *Leopold*, in which there was a conviction for using the mail in sending lottery circulars. The parties were arrested several times before a commissioner, and upon some of the charges they were discharged, and upon others they were held to appear in the district court. When the cases came before the grand jury, they found bills in the cases in which the prisoners were discharged by the commissioner and in the cases in which the prisoners were held by the commissioner, and upon arraignment they entered a plea of guilty upon all such charges. Thereupon the clerk taxed the costs accruing before the commissioner in the matters in which they were discharged by him, and also in the other cases. There is a motion to retax as to the costs made in cases in which they were discharged, and I believe that motion to be well founded. It seems to me that as to the costs accruing during an examination before a commissioner, if the party be discharged, he cannot afterwards be held for those costs, although on the same charge the jury may subsequently find a true bill. The costs will be retaxed, when judgment can be entered in that behalf, so as to exclude those which were made in the charges upon which the prisoners were acquitted on examination before the commissioner.

HEINE SAFETY BOILER CO. *v.* ANHEUSER-BUSCH BREWING ASS'N.

SAME *v.* SMITH FEED WATER HEATER & PURIFIER CO.

(*Circuit Court, E. D. Missouri, E. D.* September 19, 1890.)

PATENTS FOR INVENTIONS—MUD-DRUMS—INFRINGEMENT.

The second claim of letters patent No. 304,195, issued August 26, 1884, to Adolphus Meier & Co., assignees of Herman Heine, for the combination, with the upper shell of a water-tube steam-generator, of a mud-drum, mounted below the normal water-line, with its feed and outlet passages at the same end of the drum, is not infringed by the device described in letters patent No. 349,187, which consists of a tubular vessel, divided from end to end into two separate compartments, with its feed and outlet passages at the same end; since, in view of the prior state of the art, the former patent must be restricted to a mud-drum having but one chamber, as shown in its drawings and specifications.

In Equity.

Paul Bakewell, for complainant.

Lee & Ellis and *Fowler & Fowler*, for defendants.

THAYER, J. This is a suit for the alleged infringement of the second claim of United States letters patent No. 304,195, issued August 26, 1884, to Adolphus Meier & Co., assignees of Herman Heine. The patent, as a whole, is for "a new and useful steam-generator," first patented by Heine in Germany on May 18, 1881. The second claim, however, concerning which the controversy arises, is for a "mud-drum" in combination with the shell of the steam-generator, and is in the following language:

"I claim * * * (2) The combination, with the upper shell or circulating drum of a water-tube steam-generator of a mud-drum, mounted within said circulating drum below the normal water-line, the feed and outlet passages being at the same end of the drum, so that the current is opposed to the feed current, and is deflected backward by the upper current in the water-leg."

Complainant's counsel contends that much of the language of the claim may be ignored as immaterial, and as not imposing any limitations on the claim. For instance, it is said that the word "water-tube," as used in the claim, is unimportant, and does not limit the patentee to the use of a boiler having a water-leg; also, that the concluding clause of the claim—"so that the current is opposed to the feed current, and is deflected backward by the upward current in the water-leg"—is merely descriptive matter, and does not narrow the claim; in other words, complainant's counsel construes the claim precisely as if the inventor had said:

"I claim the combination, with the upper shell or circulating drum of any steam-generator, of a mud-drum, mounted within said circulating drum below the normal water-line, the feed and outlet passages whereof are at the same end of the mud-drum."

Furthermore, as the claim contains no description of the mud-drum forming a part of the combination, other than that it is located within

the boiler below the normal water-line, and has its feed and outlet passages at the same end, it is contended by complainant that it is immaterial what the form or construction of the mud-drum in other respects may be; that the second claim of the Heine patent is infringed whenever a mud-drum with feed and outlet passages at the same end is placed within the shell of a steam generator or boiler, below the normal water-line.

If these contentions are tenable, undoubtedly defendants are severally guilty of an infringement; hence the first step towards a decision is to settle the construction of Heine's second claim, and this involves a preliminary consideration of the state of the art at the date of Heine's alleged invention, as well as an examination of his specification and drawings.

The evidence shows that mud-drums have long been in use in connection with steam-generators, for the purpose of clarifying and heating feed-water before it comes in contact with the shell of a boiler, and thus preventing incrustations to some extent, and the too sudden contraction of the hot boiler plates. Heine was not the first man who constructed a mud-drum, or who located such a device within the shell of a boiler below the normal water-line, and hence is not to be treated as a pioneer inventor. On the contrary, this particular field of invention seems to have been well tilled before he entered it. In 1866, Trotman, an English inventor, devised a mud-drum, or "feed-box," as he termed it, for use in the interior of steam generators or boilers. Trotman's device consisted of a box, divided by a horizontal diaphragm into two compartments,—an upper and lower,—which box was placed within the boiler below the normal water-line. The lower compartment was subdivided into a middle and two end compartments, the latter of which were connected by pipes. The feed-pipe passed through the top or cover of the box, and through the diaphragm into the lower middle compartment, where it discharged feed-water, which flowed, first, through holes provided for that purpose into one of the lower end compartments, thence through pipes into the other lower end compartment, thence through holes in the diaphragm into the upper compartment, and thence through holes in the top or cover of the box, immediately contiguous to the feed-pipe, into the main cavity or circulating drum of the boiler. The feed-box in question was so arranged that it might be taken out of the boiler and readily cleaned by removing the cover and the interior diaphragm and pipes. *Vide* English Letters Patent No. 1890. Trotman appears to have utilized whatever advantage is gained by placing the mud-drum of a boiler below the normal water-line, instead of locating it in the steam space or chamber. In 1872 John W. Youman invented an apparatus for heating and purifying feed-water before it comes in contact with the shell of the boiler. His device consists of a feed-pipe, bent very much into the shape of an ox-bow, and suspended within the shell of a boiler above the water-line, both ends of which pipe pass through the head-plate of the boiler, and are provided on the outside with stop-cocks, so that one can be used to admit feed-water and the other as a blow-off. One leg of the pipe within the boiler (that to which the blow-

off is attached) has a greater diameter than the other leg of the pipe, and is perforated near the end or head-plate with numerous small holes, through which feed-water is introduced into the boiler in small jets, after it has twice traversed the steam space through the bent pipe, and become heated and partially clarified. By opening the blow-off valve, the sediment which collects in the feed-pipe is discharged at intervals. *Vide* U. S. Letters Patent No. 132,888. In 1878 J. A. McCormick invented and obtained a patent on a mud-drum located within a boiler above the water-line, which consists merely of a trough-shaped vessel, open at the top, and suspended by bolts from the upper shell of the boiler in such manner that one end is lower than the other. This permits sediment to collect at that end, and be blown off at intervals through a blow-off pipe entering the trough at that point. The feed-pipe passes through the shell of the boiler, and discharges water into the upper or higher end of the trough, and, after the latter has become full, the water either overflows into the boiler, or runs into the same through a series of holes along the upper edges of the trough. *Vide* U. S. Letters Patent No. 208,479. In 1881, Andrew J. Stevens also obtained a patent on a feed-water purifier and heater. His device consists of a water tube or cylinder suspended within the steam-generator above the water-line. The inner or rear end of the tube is closed by a cap, and the forward end by the head-plate of the boiler, against which it abuts and is firmly secured. The feed-water is discharged into the front end of the tube by a pipe, and, after flowing the entire length of the tube, which is of nearly the same length as the boiler, passes into the boiler through a series of holes in the upper shell of the tube, near the rear end. *Vide* U. S. Letters Patent No. 240,197. Another patent, granted to Lee and Bell on August 12, 1884, (U. S. Letters Patent No. 303,523,) shows a device for heating and purifying feed-water very similar to the Stevens' device last mentioned, and need not be particularly described. The Heine mud-drum, involved in this case, as the specification and drawings show, is simply a box-like vessel, placed within a boiler below the water-line, and has but one chamber or compartment. The drawings further show that the mud-drum in question is set on a slight incline, corresponding with the incline on which Heine sets his boiler, the rear end of the mud-drum being somewhat lower than the front end. The feed-pipe enters the forward end of the drum near the bottom. A blow-off pipe leads from the drum at its rear end, where the sediment is supposed to settle. An inclined plate is set within the drum a short distance in front of the mouth of the feed-pipe, to partially break the force of the feed-current, and, as the inventor says, "to prevent the feed-water from stirring up the deposit of mud, etc., which collects in the rear portion of the mud-catcher." A portion of the top and end shell of the mud-drum above the mouth of the feed-pipe is cut away to some extent, to form an aperture through which the feed-water may escape from the drum into the boiler, and mingle with the water therein, after it is heated and clarified.

Heine's specification does not contain a very full description of the operation of his mud-drum, but enough is said, I think, to show the ob-

ject he had in view, and the result that he intended to accomplish. Thus he says in his specification that "in the rear portion of the mud-catcher the motion of the water will be very slack, at the same time its temperature being above the boiling point; hence said two conditions insure the deposit of nearly the entire sediment * * * of the water, which is thus deposited in a convenient receptacle for blowing off," etc.; and in the concluding paragraph of his claim he says of the current issuing from the drum that "the current is opposed to the feed-current," etc.

From what is thus said the court must infer that the inventor intended to create two currents within the drum, which should flow in opposite directions, and oppose each other with some force immediately above the inclined plate; the result of such opposition being to create a body of very slack water, and thus induce sedimentation behind the inclined plate, to which point the incoming current of cold water would naturally settle by reason of its greater specific gravity, after its motion was in part arrested by the outflowing current of hot water. That such is the practical operation of Heine's mud-catcher, and that such was his theory of its operation and effect at the time he devised it, is further illustrated by the evidence of certain experts who have testified in complainant's favor. They say, in substance, that the cold feed current is deflected upward by the inclined plate, there meets with some resistance from the returning hot current, falls behind the plate to the bottom of the drum, where it displaces, and forces upward and outward, water that has become heated, and, eventually becoming heated, is itself in like manner forced upward and outward along the upper shell of the drum, to the outlet passage at its front end.

Now, in view of the prior patents above described, the court is of the opinion that plaintiff cannot be allowed the broad construction of the second claim of its patent, for which its counsel contends, but should be limited, if not to the precise kind of mud-drum shown by the drawings and specification, at least to a mud-drum having only one chamber or compartment. All of the prior patents show a mud-drum mounted within the shell or circulating drum of a boiler, and thus exhibit the general features or elements of the combination covered by Heine's second claim. The idea also of discharging feed-water into a receptacle of some kind located within a boiler, and suffering it to remain therein until it is heated and partially purified, before it flows into the boiler, is an idea that underlies the construction of all the mud-drums heretofore described, including Heine's mud-catcher. That which distinguishes the several combinations shown by the various patents from each other is the peculiar form of receptacle employed in each case to receive and retain the feed-water long enough for it to become heated and partially clarified; and it seems obvious that, after the idea of placing such a receptacle within the boiler was conceived, it became possible to construct such a receptacle in a variety of ways, by the exercise of ordinary mechanical skill, without materially impairing the efficiency of the device as a water heater and purifier.

An inventor like Heine, who has merely changed the form of the receptacle hitherto in use for receiving and heating feed-water, is not entitled to a broad construction of his claims, but should be limited to that form of receptacle which his specifications and drawings disclose. *Bragg* v. *Fitch*, 121 U. S. 483, 7 Sup. Ct. Rep. 978; *Sargent* v. *Lock Co.*, 114 U. S. 85, 86, 5 Sup. Ct. Rep. 1021; *Eaton* v. *Thompson*, 114 U. S. 1, 14, 5 Sup. Ct. Rep. 1042; *Brown* v. *Davis*, 116 U. S. 250, 251, 6 Sup. Ct. Rep. 379; *Wollensak* v. *Reiher*, 115 U. S. 94, 5 Sup. Ct. Rep. 1132; *Clark* v. *Manufacturing Co.*, 115 U. S. 79, 5 Sup. Ct. Rep. 1190. By so limiting his claim,—that is to say, to a mud-drum having a single chamber,—it is evident, I think, that he will realize the full benefit of whatever advantage his special form of construction has over other forms previously in use, and that is all he is legitimately entitled to. If Heine's mud-catcher operates to heat and clarify feed-water any more perfectly than other devices previously in use, it is evidently due, in a great measure, to the fact that the incoming current of cold feed-water is opposed within the drum, and just above the inclined plate, by an outgoing current of hot water, thus creating a body of comparatively quiet water back of the inclined plate, and inducing a more perfect precipitation of sediment. In other words, it is due to the fact that the feed-water does not flow from the inlet to the outlet passage at a uniform rate of speed, and with a continuous current, as in most other devices, but is arrested, and held in suspension as it were, by an opposing current. This result—that is to say, the creation of opposing currents within the drum, whereby a greater deposit of sediment is induced—is evidently brought about by the use of a receptacle for feed-water having but a single chamber. Hence the use of a single chamber appears to be material and important in producing the particular result that Heine had in view, and for that reason it is proper to read such a limitation into his claims.

As before shown, the complainant attempts to bring all mud-drums within the second claim of its patent that are located below the normal water-line, and have the feed and outlet passages at the same end of the drum, regardless of all other peculiarities of structure. It thus makes the location of the drum and the location of the feed and outlet passages the sole limiting features of its second claim, utterly ignoring other features of construction that Heine's specification and drawings exhibit, that are essential to produce the effect that he had in view. Now, inasmuch as the combination of the shell of a boiler with a mud-drum located in the interior of the same was old, it occurs to the court that the patentee was not entitled to make the features aforesaid the sole limiting features of his claim, unless they were at the time substantially new and useful structural features. In view of the prior state of the art, the invention is made to consist substantially in the new location of the drum, and the feed and outlet passages, if the complainant's contention is sustained. But, whatever may be said of the importance of locating the drum below the normal water-line instead of above it, it certainly cannot be pretended that Heine was the first one to discover such advantage, or to utilize it, because Trotman, as is above shown, placed his feed-box

or mud-catcher in the very bottom of the boiler, and Youman's specification also suggests the idea of locating the mud-drum below the water-line. Neither does it appear to the court that there was anything substantially new in the idea of locating the feed and outlet passages at the same end of the drum. The sole object of that method of construction was to compel the feed-water to traverse a sufficient space to become heated and drop its sediment before it was discharged into the boiler. With the same object in view, Youman, in the feed-water heater and purifier by him invented and above described, placed the outlet passage near the front end of the boiler, not far from the inlet passage, so as to compel the feed-water to make the circuit of the boiler before it was discharged into the same. The same idea is also involved in Trotman's feed-box. The feed-water makes the circuit of the box and its several compartments, and is discharged into the boiler at about the same point where it enters the box.

My conclusion is that the second claim of the Heine patent cannot be sustained, unless the mud-drum that he brings into combination with the upper shell of a steam-generator, be understood to be a mud-catcher embodying substantially all of the structural features which his drawings disclose.

In view of what has been said, and the limitations imposed by the court on Heine's second claim, it follows, that the "Smith Feed-Water Heater & Purifier," the alleged infringing device, does not interfere with complainant's patent, and its use is not an infringement, as charged in the bill. Smith's heater and purifier, or "mud-drum," as it may be termed, is also patented. *Vide* U. S. letters patent, No. 349,181. It consists of a tubular vessel, nearly as long as the boiler, which is suspended within the boiler, and is divided from end to end by a diaphragm into two separate chambers or compartments. The feed-water is introduced into the lower chamber at one end. It then flows through the lower compartment to the far end, rises through holes in the diaphragm to the upper chamber, flows back through that chamber to the entering end, and passes through holes in the top shell of the chamber into the boiler. It is also provided with a blow-off, by which the sediment that collects in the two chambers can be removed. As the complainant, in the opinion of the court, must be limited to a mud-drum such as his specification and drawings disclose,—that is, to a drum having but one chamber,—it follows that Smith's device with its two chambers is not an infringement.

The bill will be dismissed.

STEARNS *et al.* *v.* PHILLIPS *et al.*

(*Circuit Court, E. D. Michigan.* July 7, 1890.)

1. PATENTS FOR INVENTIONS—WINDOW SCREENS—INVENTION.
Letters patent No. 328,080, issued October 13, 1885, to John E. Stuart for a window-frame screen consisting of a combination of four bars, each having a longitudinal tongue on one side, and a slot at one end to receive the tongue of the contiguous bar, so that the frame may be adjusted to fit windows of different sizes, is not void for want of invention, though the bars alone are not patentable.

2. SAME—INFRINGEMENT.
While the making of such bars is not in itself an infringement of the patent, making them with intent to combine them as in the patented device is an infringement.

3. SAME.
Said patent is infringed by a device consisting of four bars, each having a tongue on the inside, and a groove at the end for the reception of the tongue of the contiguous bar, though the groove is made square, so that the tongue fits in it loosely, and the union of the bars is secured by corner pieces.

4. SAME—PATENTABILITY—EVIDENCE.
Where the inventive character of a patented device is questionable, the large and increasing sales of the device may be taken into consideration in determining its patentability.

In Equity. On pleadings and proofs.

This was a bill to recover damages for the infringement of patent No. 328,080, issued October 13, 1885, to John E. Stuart, for a window-frame screen. The object of the invention was stated to be "to produce a frame for a window or door screen in which each of the four sides of the same is made of a single stick or strip of wood, and so formed and joined as to be capable of being moved or adjusted upon each other, so as to fit any rectangular opening, as the interior of a window or door frame of a building, whether large or small, within certain limits, and also without regard to the proportion between the length and width of the same; that is to say, the four sticks constituting the frame are shaped and joined so they may be adjusted to correspond to any possible rectangular parallelogram within certain limits as to size." The claims alleged to be infringed are the first and second, which read as follows:

"(1) A frame made up of side pieces or bars, D, joined as shown, each bar being formed with a longitudinal tongue, *a*, at one side thereof, and a slot, *c*, at one end of the bar in line with the tongue; the slots of each bar being of a size to receive and be filled by the tongue of the contiguous bar, substantially as described, and for the purpose set forth.

"(2) A screen-frame composed of side pieces or bars, D, joined as shown, each chamber being formed with longitudinal depressions or rabbets, *d*, *d*, and tongue, *a*, at one side thereof, and the slot, *c*, at the end of the bar in line with the tongue, the slots of each bar being of a size to receive and be filled by the tongue of the contiguous bar, having an inner depression, *g*, in which to receive the wire cloth or screen, substantially as shown."

The defenses were: *First*, that the patent was void for want of invention; *second*, non-infringement.

C. W. Smith, for complainants.

George H. Lothrop, for defendants.

BROWN, J. This is a very simple invention, so simple indeed as to suggest a doubt whether it involves any more than the mechanical adjustability of four bars made exactly alike, and each of which, individually and standing alone, is admitted not to be patentable. The popularity of this device, however, as attested by the large and rapidly increasing sales made every year since the patent was issued, induces us to lean towards a construction of the patent favorable to the inventor. The first claim when analyzed is found to consist of a frame constructed of four bars, each of which is formed with a longitudinal tongue upon one side, and a slot at the end, fitted to receive the tongue of the contiguous bar. The second claim is practically the same as the first, the longitudinal depression or rabbet being essential to the production of the tongue, the purpose of which tongue is stated to be to receive the wire cloth or screen. Without the rabbets, there would be no tongue. Hence the first and second claims are practically identical.

It is true the complainants' first original claim was for the bars alone, and that it was rejected upon reference to the Munn patent, and that such rejection was acquiesced in; but it does not follow that, if these bars were made with the intent that they should be joined together in a window-screen or combined, it would not be patentable. A combination may be patentable though each element of the combination may be old; and we do not see that it makes any difference in principle whether the separate elements are similar to each other or dissimilar, if in combination they produce a novel result. In this case the new product is not a window-screen, but a window-screen which may be made to fit a window of any size. No other window-screen possessing this interadjustability has been shown us. Although this feature is found in one or two other devices, it is accomplished by means so different from those adopted by Stuart that we are loth to deprive him of his claim to the title of inventor.

For instance, the Bacon drawing exhibits a square of parquetry formed of four bars, grooved along both edges, and provided with tenons on both ends; and the drawing shows them put together so that they form a rectangle, the tenons fitting into the groove of each adjoining bar, and the groove also receiving the tenons on the sides or edges of the blocks inclosed within the bars. The bars differ from those of the Stuart patent in having tenons at both ends, instead of a slot at one end, and a long groove upon both sides, instead of a tongue upon one side. While a capability of adjustment follows from the construction of the bars, they are not made with reference to this, but are constructed of a predetermined length, for the purpose of inclosing panels of a given size, and forming a design which is capable of indefinite repetition. The purpose of this construction is to produce an ornamental effect, and a firm interlocking of the numerous panels and bars which constitute the flooring. An essential feature of the Stuart patent,—viz., the longitudinal tongue to which the wire screen is fastened,—is conspicuously absent in the Bacon drawing.

The Prindle patent shows a quilt frame, consisting of four bars, constructed upon an opposite principle to those used by Stuart, in having longitudinal grooves instead of tongues, and terminal tongues or tenons, instead of grooves, being similar in this respect to the bars of the Bacon parquetry. The result is a frame adjustable longitudinally only. A lateral adjustment is obtained only by using pairs of end bars of different lengths.

The Munn patent exhibits a window-screen composed of three kinds of bars, viz.: (1) Side bars having tongues on one of their longitudinal sides; (2) end bars which have tongues on one of their longitudinal sides, and grooves in both ends; (3) an intermediate cross-bar, which has tongues on both of its sides, and grooves in both ends.

This structure resembles the Prindle device in permitting a longitudinal adjustment, but there is no provision for a lateral adjustment, except by changing the end bars. Not only are the bars differently constructed from those of the Stuart patent, but the matter of adjustability is not mentioned either in the specifications or claim.

The Blanchard patent for a printer's case undoubtedly contains the element of adjustability, and in this respect it resembles the Stuart patent more closely than any to which our attention has been called; but the means by which this is reached are so different from those employed by Stuart that it can hardly be supposed that he could receive the suggestion of his own method by an examination of the Blanchard patent. The device shows four bars, each provided with a transverse recess for the insertion of another bar, and the outer side of each bar is grooved to receive a key which is driven into the recess for securing them together. These bars do not show a tongue on one of their sides, or a corresponding slot in the end, as required by the Stuart patent. The Blanchard frame is not provided with the means for interlocking the bars which are claimed in the Stuart patent, nor with the depression or rabbet which is one of the elements of the Stuart construction.

The Linscott patent shows a frame in which the bars are joined by mitered joints, and are held together by corner pieces applied to each inner corner of the frame; each corner piece having curved edges, which embrace the moulded portion of the frame bars, and thus secure them together. There is no adjustment of tongue and groove as in the Stuart patent. In the Brent patent the bars are also held together by metallic corner pieces. While they have the longitudinal tongue, they have no end groove, and therefore cannot be put together in the manner shown in the Stuart patent. Upon the whole, we think there is a patentable novelty in the Stuart device, although the scope of the invention is undoubtedly a narrow one.

The bars used by the defendants are also alike, all having a long T-shaped tongue upon the inside, and a groove at the end, for the reception of the tongue of the contiguous bar. In the earlier device, known as the "1888 Pattern," the end grooves are also made T-shaped, to hold the tongue firmly; but in the later device, known as the "1889 Pattern," this groove is made square, so that the tongue fits loosely. In both cases

the union of the bars is secured by corner pieces having T-shaped grooves, in which the tongue slides, and the bars are thus held firmly together without the aid of the end grooves. The longitudinal tongues form a depression or rabbet around the inner edge of the frame in which the wire cloth is secured as in the Stuart patent, and is thus countersunk into the frame, so that its edgings and fastenings are not exposed. Both of the defendants' devices contain the elements of the Stuart patent, with the addition of the corner pieces, which are unnecessary in the heavier and more accurately fitting construction of the Stuart device. The loose action of the tongue and groove in the 1889 pattern is obviously intended as an evasion of the requirement of the complainants' claims that the slot of each bar be of a size to receive and be filled by the tongue of the contiguous bar, and is evidently relied upon to relieve defendants in case the 1888 pattern be held an infringement.

The only real deviation in either of these devices from the Stuart pattern is in the transfer of the strain of the connection from the groove in the end of the bars to the grooves in the corner pieces. This introduction of corner pieces may enable the defendants to give their bars a somewhat lighter construction, but it is rather an addition to than a deviation from the complainants' patent. Indeed, as defendants' expert argues, "the bars are just as firmly joined together if the slots upon the end of the bar were entirely wanting," and, further, "that the bars depend entirely upon the corner pieces, as a necessary element to join them." In these devices the defendants have unquestionably seized upon the two leading features of the Stuart patent, viz., the longitudinal tongue, to which the wire cloth is attached, and the grooves at the end of the bars, through which the longitudinal tongue is allowed to run, and which secures the important feature of adjustability. While defendants may have the right to make these bars, if they manufacture them with the intent that they shall be put together in the form of window-screens, they are liable as infringers. Walk. Pat. § 407.

Should the defendants omit this groove altogether, as they appear to have done in some cases, a much more serious question would arise, but one we do not feel called upon to consider here. We think complainants are entitled to a decree for an injunction, and for the usual reference to a master to compute damages.

DELVIN *v.* HEISE *et al.*

(Circuit Court, D. Maryland. July 10, 1890.)

PATENTS FOR INVENTIONS—PRIOR STATE OF THE ART—INFRINGEMENT.

Sash cord guides having been made prior to 1879 without side flanges, and with rounded end flanges, there is no patentable invention in the improvement described by letters patent No. 216,767, issued June 24, 1879, to Sloan and Clarkson, consisting of a sash cord guide having semi-circular end flanges and semi-cylindrical casing ends, all of uniform diameter with the casing, and sides that meet the face of the casing at right angles, and without a flange, whereby the device is adapted for insertion in a mortise formed by a latterally cutting bit.

In Equity. For infringement of letters patent.
Price & Stewart, for complainant.
W. B. H. Dowse and *John R. Bennett*, for defendants.
Before BOND and MORRIS, JJ.

MORRIS, J. This is a suit in equity for alleged infringement of letters patent No. 216,767, issued June 24, 1879, upon application filed April 29, 1879, to Frank B. Sloan and Frank S. Clarkson, for improvement in sash cord guides. The patent has been consigned to the complainant. The specifications and claim are as follows:

"Be it known that we, Frank B. Sloan and Frank S. Clarkson, of Baltimore city, state of Maryland, have invented certain new and useful improvements in sash cord guides; and we hereby declare the same to be fully, clearly, and exactly described as follows, reference being had to the accompanying drawing, in which the device is illustrated in perspective view: Our invention relates to what are known as 'sash cord guides,' consisting, as a rule, of suitable casings containing sheaves for the sash cords, and adapted to be inserted in mortises in the window frames. These mortises have heretofore been cut by bit, mallet, and chisel in the usual way of forming mortises, the shape of the casing being previously scribed on the face of the window frame. A fair, but rarely accurate, fit was thus attained. Our present invention consists in certain improvements on the sash cord guide, described in reissued letters patent No. 8,586, granted to us as assignees of Edward H. N. Clarkson and Wm. H. H. Kesler, February 18, 1879, and is especially designed for insertion in a mortise formed by a laterally cutting bit, which is caused to enter the window frame, and cut laterally to a distance measured by the length of the casing of the sash cord guide. This method of insertion possesses many advantages. As the bit is of a diameter exactly equal to that of the casing, and as it is readily made to traverse the exact distance required, a perfect fit of the casing in the mortise is insured, and much time is saved. In the accompanying drawing, A is a cast metal casing of uniform diameter, the sides thereof meeting the face at right angles, and without a flange. The ends, *b*, are rounded in the arc of a circle having the same diameter as the casing, A, and the end flanges, *a*, are similarly formed, being perforated at *c* for the securing screws. B is the sheave, suitably mounted in the casing. In forming the mortise in the window frame, the bit is caused to enter the wood at a point corresponding to the center of the circle of which the end flange, *a*, is the half, and is allowed to enter to a distance exactly equal to the thickness of the flange. It is then moved, or the window frame is moved relatively to it, until the axis of the bit registers with the axis of the semi-cylindrical end, *b*, when the bit is projected forward, perforating the frame. It is next moved laterally a distance exactly equal to that between the ends, *b*, *b*, when it is withdrawn until its point is below the face of the frame by the thickness of the flange, *a*, when it is again moved laterally to a distance from its original point of entrance equal to the length of the casing, A, over all, and is finally withdrawn entirely. It is obvious that the slot or mortise so formed is of the exact size and shape of the casing, A, and absolute accuracy of fit necessarily follows. From the foregoing description of the construction of the device, and the method of forming the mortise, it will be seen that the essential features of the said sash cord guide are—*First*, that it shall be devoid of lateral flanges; and, *second*, that its ends, *b*, and end flanges shall be, respectively, truly semi-cylindrical and semi-circular. We are aware that sash cord guides having unflanged rounded ends, and others having flanged square ends, are not new, and such we do

not claim. We claim the sash cord guide herein described, consisting of a sheave, B, mounted in a casing, A, having semi-circular end flanges, *a*, semi-cylindrical ends, *b*, of uniform diameter, and sides that meet the face at right angles, and without a flange, whereby the device is adapted for insertion in a mortise formed by a laterally cutting bit, substantially as described."

The oldest form of sash cord guides or pulleys were made substantially as the one described in this patent, except that the end flanges, being intended to fit into a seat to be cut out with a chisel, were made square instead of round, and, economy in fitting the pulley to the frame not being so much sought for as strength and finish, the flanges were continued along the sides, forming a fitting strip of metal, for which an accurately measured seat was chiseled into the frame along the deep mortise made to receive the pulley casing. The old sash cord guide being thus fitted into the frame, it was held in place, just as the complainant's is, by a screw in each of the end flanges. So long as the mortise for the pulley casing and the seating for the end and side flanges were made by hand, with auger and chisel, this old form of sash cord guide answered; but, when it was attempted to cheapen the cost of the complete window frame made by machinery, it was found desirable to be able to do all the wood-cutting required to insert the sash cord guide with a single revolving bit driven by machinery, and to have the sash cord guide made so shaped as to readily fit into such a cutting, and so contrived as to require the least possible labor and time to fit and secure it in its place. Many attempts were also made by inventors to cheapen the cost of the device, and to dispense altogether with screws or nails to retain it in its place. Among this class of patented improvements was: (1) The pulley patented to J. W. Bliss, No. 1,054, February 21, 1854, which was designed to be retained in place by a wedge-shaped tooth, dispensing with screws, and of which device the specification states: "The ends of the face piece of the shell [in this case called the flanges of the casing] are likewise rounded instead of square," to facilitate letting them into the window frame by boring their recesses with a brace, instead of cutting them with a chisel. (2) The sash pulley device, patented to Simon Drum, No. 64,957, May 21, 1867, which had no flanges at all, either at the ends or sides. (3) The device patented to J. O. Price, No. 95,138, September 21, 1869, which shows a sash cord guide with its casing rounded at each end, but without flanges, and having only a slightly projecting bevel, intended to be forced into the mortise, and to hold its place without screws. (4) The patent to A. Halladay, No. 147,322, February 10, 1871, for an improvement in the face plate of sash pulleys. The face plate or flange is composed of a series of conjoined disks, the end ones being perforated for screws, and the middle ones having a slot for the pulley wheel. (5) The patent to S. E. Maxon, No. 151,303, May 26, 1874, for a sash pulley having a very small beveled flange, "the upper end made oval to fit the oval end of a mortise formed by boring with a bit as wide as the thickness of the case." (6) The patent to J. Vetterlein, No. 185,536, December 12, 1876, for a sash pulley similar to Halladay's, but with the pulley case also adapted to fit closely in a mortise formed of holes bored by an or-

dinary bit. (7) The patent to O. S. Garretson, No. 205,184, June 25, 1878, which shows a pulley without side flanges, of which in the specification it is said: "These pulleys may be made with square ends, as shown, or rounded to fit a rounded mortise."

Of the above-mentioned patents the one to Halladay, February 10, 1874, shows that when Sloan and Clarkson made their application in 1879 there was nothing new in the idea that in fitting a sash cord pulley the end flanges might be made round, so as to fit into a seating which had been made by boring to a slight depth with the same tool with which the deep mortise was cut to receive the wheel and casing. Halladay says of his invention that it "consists in a peculiar shape of the sash pulley plate, whereby a single auger will be all that is necessary in putting the plate and pulley in the window frame." He says:

"The outer edges of the plate [the side flanges] present a series of arcs of circles, while the ends of the plate [the end flanges] are nearly entire circles. It will be seen that with this formation the entire sash pulley may be inserted in the window frame with a simple boring bit and brace, a hole being bored for each of the disks, the end holes being simply deep enough to admit the thickness of the plate and leave the face flush with the surface of the frame. The other holes are bored through, or sufficiently deep to admit the flanges and cord wheel. No chisel or cutting with any other tool than the bit is required."

The laterally cutting bit had not apparently at the time of Halladay's patent come into use or been known to him, but every idea required to shape the old-fashioned pulley to adapt it for use in a mortise made by a laterally cutting bit is here suggested in his patent. Also in the patent to Vetterlein, December 12, 1876, which is for an attempted improvement upon the Halladay device, he says:

"It is usual in the manufacture of sash pulleys * * * to employ a case with a flange all around the outer edge, and this flange is let into the surface of the wood, * * * so that the flange is flush. In some instances the ends of the sheave case have been the segment of a cylinder, but the sides were flat, and in others the flange that is let into the surface of the wood has been composed of segments of circles, but the case itself had flat sides."

An inspection of the drawings annexed to the patents above cited, and a reading of their specifications, shows clearly that prior to 1879 it was in common use to make sash pulleys without side flanges, so that they could be put into mortises cut by revolving bits, without any side seating, and these patents are convincing proof, also, that it was not a new idea in 1879 to round the flange ends, so as to make them fit into a seating in the wood cut just deep enough for the purpose by the same revolving tool. And as to dispensing with the side flanges, it appears not only from the prior patents above cited, but from others put in proof, that it was an idea commonly used in most of the attempts to cheapen the cost of sash pulleys, and to lessen the time required to fit them in the frames, and that for the very reason they are dispensed with in complainant's device and method.

Although the specifications and claim in complainant's patent are drawn upon the theory that in order to perform its functions the complainant's device must be made in exact compliance with what is there

stated to be its essential features, in actual practice this does not appear to be true. The patentees claim it to be essential that the device shall be devoid of lateral flanges, and that the semi-circular end flanges and the semi-cylindrical ends of the pulley case shall be of uniform diameter, and also that the sides of the case shall meet the face at right angles. In the defendants' device there is a small flange or fitting strip or projecting face along its sides. The semi-cylindrical ends of the case are less in diameter than the semi-circular flange ends, and yet the testimony shows that, for all practical commercial purposes, these differences do not interfere with its use. It seems that, provided the width of the face including the side flanges is not greater than the width of the mortise cut by the boring and laterally cutting bit, and provided the rounded flange ends properly fit into the seating made by the bit, the essentials of the device are obtained; and there is no doubt that any one of the oldest fashioned pulleys would give the same results, provided its flange ends were rounded, and provided the mortise made by the bit was wide enough to receive the side flanges, or provided the side flanges were reduced sufficiently to go into the mortise made by a given bit. Whether the side flanges should be reduced or altogether omitted in order not to require too much wood to be cut away from the frame, or to allow a larger wheel and casing to be used without increasing the width of the mortise, are surely mere matters of mechanical adaptation. In all of the prior patents for sash cord pulleys filed in this case the end and side flanges were varied in size and shape, or altogether omitted, or reduced to a mere beveled edge, as the inventors thought best suited their purposes. Great as may have been the commercial success of contriving a mortising machine with a side-cutting bit capable of cutting a mortise by moving in right lines, and of shaping a pulley case and flanges which would fit into the mortise and seating cut by such a bit, we cannot bring ourselves to think, considering the state of the art in 1879, that it required invention on the part of these patentees to round the flange ends of the old-fashioned pulley and to omit the side flanges.

It is noticeable that the testimony with regard to the manner in which Sloan and Clarkson arrived at the form of pulley or sash and guide which they have patented does not in any way suggest invention, and certainly not joint invention. It points rather to the simplest form of reasoning, inference, or deduction applied to an old and well-known device, to fit it for a new machine-made cutting. Simply as a sash cord pulley, complainant's pulley is no improvement on the old pulley. It is no cheaper and no better, and the fact of its utility in connection with the machine-made mortise cannot be held to change what would otherwise be mere mechanical adaptation into patentable invention, and to confer on the complainant the right to a monopoly of its manufacture for all purposes, if, considering what had already been done by others, it required no exercise of invention to arrive at the result embodied in complainant's pulley. The bill must be dismissed.

BOND, J., concurs.

PUTNAM NAIL CO. *v.* BENNETT *et al.*

(Circuit Court, E. D. Pennsylvania. October 6, 1890.)

TRADE-MARK—INFRINGEMENT—FRAUD—PLEADING.

A bill alleging that defendants have imitated complainant's method of bronzing horseshoe nails, which plaintiff used as a trade-mark, with the intention of deceiving the public into buying their goods instead of complainant's, states a charge of fraud, which should not be decided on demurrer, whether the method of bronzing is or is not a technical trade-mark.

In Equity.

Demurrer to complainant's bill, which averred that the defendants had imitated their method of bronzing horseshoe nails with the intention of deceiving the public into buying their goods instead of the complainants'.

A. B. Weimer and *F. M. Leonard*, in support of demurrer.

Francis Rawle, *Owen Wister*, and *Sydney G. Fisher*, for complainants.

BRADLEY, J., (*orally.*) We are of opinion that sufficient averments are made to make it necessary for the defendants to answer the bill. It is averred that—

"The defendants, well knowing the premises, and that your orator alone possessed the right to bronze horseshoe nails as a trade-mark, and to sell the same under the trade name, as above set forth, have willfully disregarded the same, and, intending to deceive purchasers and defraud the public and to injure your orator, have for some time past been engaged, and are still engaged, in the sale of horseshoe nails, not manufactured by your orator, but similar in appearance to those manufactured by your orator, which they have had bronzed and sold as bronzed horseshoe nails, under the name of 'Imperial Bronze,' or other names, all containing the word 'Bronze;' and the said nails, so bronzed and sold by the defendants under the said name, have been and are of inferior quality to the nails bronzed and sold by your orator under their lawful trade-mark; and purchasers and consumers have been and are deceived and misled into buying the articles so bronzed and sold by the defendants in the belief that they were and are of the manufacture of your orator."

There is here a substantial fact stated,—that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nails for the complainant's. That averment is amplified in paragraph 4 of the bill. Now a trade-mark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainants which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainants. This is fraud. We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegation that the complainant's peculiar style of goods is a trade-

mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge, which we think the defendants should be required to answer.

JOHNSON v. OCEAN S. S. CO.[1]

(*District Court, E. D. New York.* September 30, 1890.)

DEMURRAGE—CARGO STORED ON LIGHTERS—EVIDENCE.

The Ocean Steam-Ship Company brought cotton to New York under through bills of lading, by which the company undertook to convey the cotton to New York, and deliver it along-side certain designated foreign steam-ship lines. At one time the docks of the company became clogged with cotton, and the company shipped it on lighters, to be transported to the foreign lines, and held in the lighters until these steamers were ready to receive it. The lighters being in consequence delayed, their owner brought this suit for demurrage, alleging a special agreement by the Ocean Steam-Ship Company to pay demurrage for the time the cotton remained on the lighters. The answer alleged an agreement that the Ocean Steam-Ship Company was in no case to be responsible for the demurrage of the libelant's lighters, but that the same was to be collected from the foreign steam-ships. *Held*, that the steam-ship company was liable for demurrage.

In Admiralty. Suit for demurrage.

Alexander & Ash, for libelant.

Hoadly, Lauterbach & Johnson, for respondent.

BENEDICT, J. This is an action brought by the owner and charterer of certain lighters to recover of the Ocean Steam-Ship Company the sum of $1,490, alleged to be due the libelant for the detention of his lighters under the following circumstances: The Ocean Steam-Ship Company was a large carrier of cotton shipped in Savannah for New York under through bills of lading, by which the Ocean Steam-Ship Company undertook to convey the cotton to New York, and there to deliver it along-side the steam-ships of certain designated foreign lines for transportation abroad. In October, 1888, the docks of the Ocean Steam-Ship Company in New York became clogged with cotton owing to the fact that cotton arrived from Savannah faster than the foreign steamers were able to receive it. To relieve their docks, the Ocean Steam-Ship Company shipped quantities of this cotton on lighters, to be taken in the lighters to the piers of the proper foreign steam-ships and there to be held in the lighters until steamers were able to take it. The result was a detention of the lighters at the piers of the foreign steam-ships, extending from three to ten days each. Among the lighters so used were lighters belonging to the libelant, and for this detention of some of these lighters the libelant in this action seeks to hold the Ocean Steam-Ship Company liable. The libel sets forth a special agreement between the libelant and the Ocean Steam-Ship Company, as follows:

"To carry and transport for the Ocean Steam-Ship Company this cotton to and along-side certain steam-ships in said port, and to deliver the same to the

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

said steam-ships, and further to store and keep said cargoes on board of said lighters for the Ocean Steam-Ship Company until the steam-ships were ready to receive the cargoes, and to pay demurrage according to the custom of the port for the time such cargoes, respectively, were kept and stored on such lighters until said steam-ships were ready and did receive the same."

The answer denies the contract set forth in the libel, and sets up by way of defense an agreement between the libelant and the company that the Ocean Steam-Ship Company was in no case to be responsible for the demurrage of the libelant's lighters.

The testimony presents a conflict of testimony in regard to the agreement set up in the libel, as well as in regard to the agreement set up in the answer. The libelant testifies to the making of the agreement set forth in the libel with Mr. Walker, the agent of the steam-ship company. Mr. Walker denies having made any such agreement, and asserts that the agreement was that the libelant was to look to the foreign steam-ship lines for the detention of his lighters, and not to the Ocean Steam-Ship Company. The testimony of the libelant in regard to the contract set up in the libel is, however, corroborated by the testimony of another witness, and the probabilities of the case seem to me to favor the position of the libelant. It will be noticed that the libelant had no contract with the foreign steam-ship lines. The cotton delivered from the libelant's lighters to the foreign steamers was received by such steamers from the Ocean Steam-Ship Company in pursuance of contracts made with the Ocean Steam-Ship Company, by which that company contracted to deliver the cotton to them. It is not seen, therefore, how the foreign steam-ships could be held liable to the libelant for the demurrage in question. This being so, such an agreement as the defendant sets up would be equivalent to an abandonment by the libelant of any claim to demurrage. Inasmuch as the detention amounted to between $5,000 and $8,000, and was anticipated by the libelant when he took the cotton on board his lighters, it seems highly improbable that he would make an agreement which would deprive him of any compensation for such detention. Furthermore, the evidence shows that bills for this demurrage, made out in each case against the Ocean Steam-Ship Company, were regularly delivered to that company by the libelant, and the same were not questioned by the Ocean Steam-Ship Company, nor any point made at the time in regard to their liability therefor. It is true that the agent of the steam-ship company testifies that these bills were made out in this form for the accommodation of the libelant, and in order to facilitate the collection of the demurrage from the foreign steam-ship lines by the Ocean Steam-Ship Company, as agent of the libelant; but this is also denied by the libelant's witnesses. An arrangement so anomalous requires a clear preponderance of testimony to justify a finding that it existed. Still further, it appears that the Ocean Steam-Ship Company collected of the foreign steam-ships demurrage for some of the lighters herein sued for, which sums were not paid to the libelant by the Ocean Steam-Ship Company, nor was he informed of the fact of such collection until after this suit was brought. This circumstance does not accord with the statement

that the defendant was to collect the demurrage from the foreign steam-ship lines as the agent of the libelant. Had such been the case, the moneys would have been at once paid over to the libelant. Still further, the agent of the steam-ship company, as I understand his testimony, urged the foreign steam-ship lines to pay the Ocean Steam-Ship Company for the detention of the lighters, upon the ground that the Ocean Steam-Ship Company was liable therefor to the libelant. I have not overlooked the evidence which shows that, with regard to some similar bills not here sued for, the Ocean Steam-Ship Company accepted of the foreign lines 50 per cent. of the amount of the libelant's bill after having obtained the libelant's consent to receive that amount for them in full of the bill. But this fact does not seem to me to be inconsistent with the testimony of the libelant.

Looking at all the circumstances, my opinion is that the weight of the testimony is with the libelant, and that he is entitled to a decree. The parties can no doubt agree upon the amount. If not, let a reference be had.

CRENSHAW *et al.* *v.* PEARCE.

(Circuit Court, S. D. New York. September 29, 1890.)

SHIPPING—MISTAKE IN BILL OF LADING—AGENTS' OPTION—LIABILITY OF SHIP-OWNER.

U., the common agent of several different steam-ships, owned by different owners, and running independently on stated days, forming the "Guion Line," agreed with libelants to transport 800 bales of cotton per steamer A. and/or W., agent's option. A part were sent by the A., the rest by the W., a week later. U. only had authority to determine by which vessel goods should go. Without his knowledge or consent, shipping receipts were delivered to libelants, through some mistake of the subemployes, apparently induced in part by the libelants' ships. The receipts stated that the goods were to go by the A. only; upon the faith of which, without U.'s knowledge, bills of lading were issued at his office, for all the cotton per steamer A. The cotton shipped by the W. arrived about 10 days later than that by the A., and, the price falling in the mean time, the libelants sued the owner of the A. for the loss. *Held*, that there was no liability on the part of the owner to libelants, except for the amount of insurance paid by the latter on cotton on the A., which was not carried by that vessel.

In Admiralty. On appeal from district court. See 37 Fed. Rep. 432.

Evarts, Choate & Beaman, for libelants.

Wilcox, Adams & Macklin, for respondent.

LACOMBE, Circuit Judge.

FINDINGS OF FACT.

First. During the months of August and September, 1887, the libelants were, and have since continued to be, partners in business in the city of New York, doing business under the firm name of Crenshaw & Wisner.

Second. During such times the respondent was, and is now, the owner of the steam-ship Arizona.

Third. In said months of August and September, 1887, the said steam-ship Arizona, and the steam-ship Wisconsin, with other steam-ships, constituted what is known as the "Guion Line," sailing weekly from New York to Liverpool, the pier at which the steam-ships belonging to the said line lay in New York being known as the "Guion Line Pier."

Fourth. During said period, the steam-ship Wisconsin was owned by the Liverpool & Great Western Steam-Ship Company, and was one of the steam-ships of the said Guion Line, the name "Guion Line" being a trade name or designation to sail under, the vessels of the line being owned by different persons. Separate and distinct accounts were kept for each vessel; and the owners of one vessel were not interested in the business of the other vessels. During all of the said period, the firm of A. M. Underhill & Co. were the agents of the owners of all the steamers running in the Guion Line, including the Arizona and Wisconsin.

Fifth. On or about the 24th and 26th days of August, 1887, libelants made two contracts with said Underhill & Co. as such agents for the carriage, respectively, of 500 and 300 bales of cotton from New York to Liverpool. The contracts were negotiated through Carey, Yale & Lambert, freight brokers in the city of New York, acting as libelants' brokers in engaging the freight, and as the brokers of Underhill & Co. in letting the freight. The contracts read as follows:

"NEW YORK, August 26th, 1887.

"Engaged for acct. of Crenshaw & Wisner, on board steam-ship of 'Guion Line' expected sailing 6th $\frac{\text{and}}{\text{or}}$ 13th September (agents' option) for Liverpool, A. M. Underhill & Co., Agents, abt. 300 bales cotton, at 5/32d and 5 per cent. primage per lb. for comp'd, and 7/32d and 5% primage per lb. for uncomp'd. This contract is made subject to the terms and conditions of the form of bill of lading approved by the New York Produce Exchange for this line.

"CAREY, YALE & LAMBERT, Brokers,
"Per FRED. O. HOLMES.

"NEW YORK, Aug. 24th, 1887.

"Engaged for acct. of Crenshaw & Wisner on board steam-ship of "Guion Line" 6th $\frac{\text{and}}{\text{or}}$ 13th Sept. (agents' option) for Liverpool, A. M. Underhill & Co., Agents, 500 bales cotton at 5/32d and 5% primage per lb. for comp'd and 732d and 5% primage for uncomp'd. This contract is made subject to the terms and conditions of the form of bill of lading approved by the New York Produce Exchange for this line.

"CAREY, YALE & LAMBERT, Brokers,
"Per FRED. O. HOLMES."

Sixth. During August, 1887, the said A. M. Underhill & Co. had advertised that the said steam-ship Arizona would sail from New York bound for Liverpool on the 6th of September, and the steam-ship Wisconsin upon the 13th of September.

Seventh. Freight contracts in the form of those set out in the fifth finding, giving the agents the right to select either or both of two steamers, are common in the shipping business. The option reserved is a valuable one for the agents, since it enables them to load their vessels with perishable cargo, such as food and fruit, which is delivered at the pier shortly before the vessels sail, and for which a high rate of freight is

charged; and then, if any space remains, it is filled up with such merchandise as cotton, which is carried at a lower rate of freight. The custom benefits the shipper of the cotton, because, by reserving to themselves the option of selecting the steamer, the vessels' agents are able to reduce the rates of freight therefor. The exclusive charge of allotting cargo received by A. M. Underhill & Co. to be shipped by the vessels of the Guion Line was, at the time, with Harvey I. Underhill, one of said firm.

Eighth. On or about August 26, 1887, the libelants received in due course of business from the said A. M. Underhill & Co., as agents of the steamers running in the said Guion Line, a paper called, in the export cotton trade, "a permit," reading as follows:

"NEW YORK, Aug. 25th, 1887.
"S. S. ARIZONA and or WISCONSIN.
"Pier, Guion Pier.

"Received from Crenshaw & Wisner abt. 800 bales cotton; uncomp'd to Empire press. To be delivered on and after Aug. 30th.

"All risk of fire or flood while goods are on the dock to be borne by shippers.
"A. M. UNDERHILL & Co., Agents.
"F. O. H."

Ninth. Pursuant to such contracts and permit the libelants on August 30, August 31, September 1, and September 2, 1887, sent by their truckmen 629 bales of cotton to the Guion pier, where the said steam-ship Arizona then lay bound for Liverpool, and 219 bales of cotton uncompressed to the Empire press. At the time of such delivery the Wisconsin had not arrived at the port of New York.

Tenth. As each load was delivered, the truckman presented a "ticket" specifying the number of bales which he delivered. The person receiving the load at the press, or at the pier, as the case might be, counted the bales, and, if the number was found to be correct, initialed and returned the ticket. When each truckman had delivered the entire quantity which he was to carry, he received a "general receipt" embracing all the lots which he had delivered. Such shipping receipts were delivered to libelants, and specified the number of bales received for shipment. This was all in accordance with the course of business pursued by A. M. Underhill & Co.

Eleventh. There were in all seven of these receipts given to libelants. Three were for the 219 bales delivered to the press, were signed by the agent of the press, and were substantially in the following form:

"Received from Empire cotton-press in good order from Crenshaw & Wisner, for steam-ship Arizona, * * * bales of cotton, marked as per margin.
"Per Empire cotton-press. [Signature.]"

Four of said seven receipts were for the 629 bales delivered at the pier, and were substantially in the following form:

"GUION LINE PIER, Aug. 31, 1887.
"WILLIAMS & GUION, No. 29 Broadway.

"Received for steam-ship Arizona on account of Crenshaw & Wisner, subject to terms and conditions of company's bills lading, for which it is agreed

this receipt shall be exchanged on or before date of sailing, * * * bales cotton."

And were signed by the receiving clerk of said Guion Steam-Ship Company, or his assistant.

Twelfth. It was the custom of the said A. M. Underhill & Co., as agents for all the steam-ships in the Guion Line, including the Arizona, to consider a delivery by the shipper to the Empire press a delivery to the steam-ship.

Thirteenth. By said A. M. Underhill & Co.'s course of business, when the contract made with a shipper provided for an option as to the steamer by which goods were to be carried, it was required that the shipping receipts given at the dock, or at the press, should be in the same form as the permit, and should specify both steamers, and no employe of Underhill & Co. had any authority to depart from such rule without express instructions from Mr. Underhill. The omission of the option from the seven receipts described in the eleventh finding was without authority from Harvey T. Underhill or from A. M. Underhill & Co., and without his or their knowledge, and arose from a mistake on the part of their employes at the pier, and of the agent of the Empire press. This mistake was caused partly by the form of the tickets brought by the truckmen when they delivered their loads. These tickets were prepared by the libelants and in many cases specified the Arizona as the vessel by which the cotton was to be carried, instead of expressing the option which the contracts and permit provided for. In preparing the general receipts, the tickets were followed by the shipping clerk at the pier and the agent of the press, who assumed that such tickets were correctly drawn, the Arizona being the next steamer of the Guion Line advertised to sail.

Fourteenth. Pursuant to the usual course of business the said receipts were presented at the office of A. M. Underhill & Co., by libelants, and in exchange for them the three bills of lading annexed to the libel herein were given. In preparing the bills of lading, the clerks employed by Underhill & Co. followed the shipping receipts, and specified the Arizona as the vessel by which said cotton was to be carried.

Fifteenth. The steam-ship Arizona sailed from the port of New York on the 6th day of September, and arrived in Liverpool about September 14th, carrying all the 219 bales of cotton which were delivered at the Empire press, as aforesaid, and 70 of those delivered at the pier as aforesaid, and the rest of the said cotton, namely, 559 bales, were transported to Liverpool by the steam-ship Wisconsin, which left New York on September 13th, and arrived in Liverpool on the 24th day of September, 1887.

Sixteenth. The respondent kept in his possession the said shipping receipts so given as aforesaid by him, but failed to notify the libelants that any of the cotton was not shipped in the Arizona, and the first knowledge that the libelants had that all the cotton was not carried in the Arizona was acquired on or about October 2, 1887.

Seventeenth. On August 27, 1887, the libelants applied to the sub-

scribers at United States Lloyds for insurance under their open policy with said subscribers in the sum of $46,000 on about 900 bales of cotton, valued at sum insured on board the steam-ship Arizona, and or other steamer same line at and from New York to Liverpool. This application was accepted by such insurers. Subsequently, being misled by the designation of the Arizona in the bills of lading, the libelants notified the underwriters that all cotton except 185 bales was going by the Arizona. Thereupon such application was changed to read only "Arizona," and certificates of insurance were issued in accordance with such notification, and the libelants attached drafts to the said certificate and bills of lading, and sold such drafts to bankers in the city of New York. Libelants paid the premium upon said risk.

Eighteenth. Otherwise than as specified in the seventeenth finding, the libelants did not do anything, or refrain from doing anything, which they would have done, or refrained from doing, had they not been misled as to identity of the vessel which in fact carried the 559 bales.

Nineteenth. The price of cotton of the class in question fell in Liverpool between the date of the arrival of the Arizona and the date of the arrival of the Wisconsin three-eighths of a penny per pound.

Twentieth. The allotment of said shipment, namely, 219 bales to the Arizona and 559 bales to the Wisconsin, was made by Harvey T. Underhill.

CONCLUSIONS OF LAW.

First. The libelants are entitled to recover from the respondent the amount of the premium of insurance which the libelants paid for insurance on cotton on the Arizona, which was not carried by that vessel.

Second. There is no other liability on the part of the respondent to the libelants.

Third. The decree of the district court should be reversed, with costs of this court only, and an order of reference made to a commissioner for the purpose of ascertaining the said damages of the libelants.

THE NORTH STAR.

(District Court, E. D. Michigan. January 25, 1890.)

COLLISION BETWEEN STEAM-SHIPS—FOG.

When two steamers are approaching each other in a fog, and repeated signals from each of them indicate that they are drawing together upon opposite or crossing courses, it is the duty of each to stop until they come to a clear understanding with regard to their respective positions and courses, and, if there be any confusion of signals, or any other apparent risk of collision, it is their duty not only to stop but to reverse their engines.

(Syllabus by the Court.)

In Admiralty.

This was a suit for a collision between the steam-ships Sheffield and North Star, which occurred about 5 o'clock in the afternoon of June 14,

1889, during a dense fog, to the northward and westward of Whitefish point, in Lake Superior, resulting in the sinking and total loss of the Sheffield. The libel of the Sheffield averred that, while upon a trip from Chicago to Two Harbors, Minnesota, and after passing Whitefish point, and being put upon a W. N. W. course, she encountered a fog, which gradually became denser and steadier. While upon this course, with a smooth sea and a light wind, and with her fog-signals regularly blowing, she heard the distant sound of a steamer's whistle, nearly ahead. Her engines were at once checked, when the signal was heard again a little upon her starboard bow. She was again checked, and a signal of two blasts blown, to which no answer was received. The signal was repeated, and the Sheffield starboarded half a point. The approaching steamer, which proved to be the North Star, replied with one blast still a long distance away. To make certain whether this was blown as a fog-signal or a passing signal, the Sheffield blew a signal of two blasts two or three times, to each of which the Star answered with a signal of one blast. Thereupon the Sheffield, acquiescing in the demand of the Star to pass port to port, blew one blast and ported. The vessels were then from one and a half to two miles apart, the Star bearing less than a point upon the Sheffield's starboard bow. The Sheffield was steadied under her port wheel N. W. by N. This threw the Star upon the port bow of the Sheffield. The steamers approached, exchanging signals of one blast, until the Star was apparently well off upon the port side of the Sheffield, and all risk of collision seemed to be past. While in this situation, a signal of two blasts was heard from the Star, apparently four points off the Sheffield's bow, the vessels being now too close to change sides by starboarding. The Sheffield answered with one blast, and ported hard. Again the Star blew two blasts, which were answered again by one, and the Star appeared through the fog heading for the Sheffield, two lengths or more distant, on the port side, and coming at great speed. The master of the Sheffield at once signaled to the engine for full speed, and ordered the wheel amid-ships, but too late to be of service. The North Star struck the Sheffield at about right angles, and near her port mizzen rigging, cutting into her six or eight feet and sinking her within five minutes.

The answer averred that the North Star, being on a voyage from West Superior, Wis., to Buffalo, N. Y., upon a course S. E. by E. half E., and running under check, heard a signal of two blasts of a steam-whistle about three-quarters of a point over her starboard bow. Knowing this to be a passing signal of a steamer bound up the lake, it was promptly answered by two blasts from the North Star. In less than a minute afterwards, a second signal of two blasts was heard, still upon the starboard bow, which was again answered by a similar signal from the Star. This was again repeated. After the last signal was given and answered, the approaching steamer, which proved to be the Sheffield, suddenly blew a signal of one blast, still off the Star's starboard bow. As soon as this was blown, danger of collision was apprehended, and the Star promptly answered this signal by adhering to her own signal of two blasts, and

her speed was still further checked down. Again the Sheffield blew a signal of one blast, still upon the starboard bow, but closer. The engine of the Star was then immediately stopped, and, while this order was being obeyed, the Sheffield hove in sight near to, and heading across the bow of the North Star from starboard to port. Notwithstanding that a collision seemed inevitable, the master of the Star immediately ordered her wheel to port, so that she might swing under the stern of the Sheffield, and possibly pass her, and ordered the engine to back, and immediately followed this order by an order to back strong, in response to which every available pound of steam was given the engine. The steamer was backing with full power. Notwithstanding these precautions, the collision occurred practically as stated in the libel.

The case was argued before the district judge, assisted by Capts. Joseph Nicholson and James W. Millen, nautical assessors.

H. H. Swan & H. D. Goulder, for the libelant.

C. E. Kremer and *Robert Rae*, for the claimants.

BROWN, J., (*orally.*) We are entirely agreed in our opinion of this case, and feel so clear as to its proper disposition that we have not deemed it necessary to confer at any length, or to prepare a written opinion. Indeed, speaking for myself, I can say that I was prepared to decide the case upon the pleadings; but, out of deference to counsel and the probability of appeal, I deemed it my duty to listen to the testimony, and, although without any doubts in my own mind, to obtain the advice of the gentlemen who have kindly consented to sit with me. I may say that in a practice of nearly 30 years in collision suits, I can hardly recall a case where the negligence seemed so gross and inexcusable, and none where the consequences were so disastrous. Indeed, judging from the frequent collisions which take place in thick weather, the hardest lesson which the masters of steam-vessels can learn seems to be the proper method of passing each other in a fog. As was remarked by Mr. Justice BUTT, in one of the last cases reported, (*The Resolution*, 6 Asp. 363,) decided only a year ago:

"Masters can always carry out the maneuvers in that way, (that is, by stopping;) and I will not yield to what I know is the strong disinclination of the masters of these large vessels to stop their engines. They hate and abhor the very idea, but it is to my mind their duty to do so, if they cannot otherwise reduce their speed sufficiently."

As illustrating the duty of masters under such circumstances, we will take *The John McIntyre*, 51 Law T. (N. S.) 185, 9 Prob. Div. 135, one of the earlier cases upon that subject, in which the master of the rolls said:

"If a steamer in a thick fog, so thick she can hardly see before her, hears another vessel in her neighborhood on either bow, not being able to see her, and she herself not going at her slowest pace, the question is whether, under those circumstances, the officer in charge of the steamer ought not to conclude that it is necessary, in order to avoid risk of collision, that he should stop and reverse. I do not hesitate to lay down the rule, not strictly as a matter of law, but as a matter of conduct, that the moment such circumstances as these happen, it is necessary, under the article, to stop and reverse."

Probably the rule here announced, that it is the duty of the steamer not only to stop, but to reverse, is somewhat too stringent, and later cases have tended in some degree to qualify it. In the subsequent case of *The Dordogne*, 51 Law T. (N. S.) 650, 10 Prob. Div. 9, the same judge lays down the rule in the following language:

"Therefore, if a ship at sea in such a fog hears a whistle which would indicate that another vessel is a mile or a mile and a half off, she ought at once to reduce her speed to a more moderate speed, though moderate speed under these circumstances would be very different to moderate speed when the vessels came closer together. This case is not to be determined by what was done at the time the first whistle was heard. Here we have three, and perhaps more, successive whistles, all coming closer. What can be the conclusion to be derived from those whistles? We know that in fact these vessels were coming closer and closer to each other. We, however, have to judge of what ought to be the conclusion or suspicion of the officer in charge of the Dordogne. What would that succession of whistles tell him? For myself, I should have had no doubt, when you have a succession of whistles, each one coming closer, that each whistle would show him that the other vessel is coming nearer. * * * I do not think it signifies whether the signals get broader on the bow or not, if they show that the vessel is coming closer. If it is coming nearer and nearer in a dense fog, (and every one knows that in a dense fog you cannot tell where exactly a vessel is from the sound of her whistle,) and you cannot tell the direction in which it is coming, are not those such circumstances as should lead a prudent officer to suppose that if he went on as he was there would be danger? * * * That which is moderate speed when the vessels are two or three miles apart, is not moderate speed when the vessels are within half a mile of each other. As the vessels get nearer and nearer, he must bring his ship to as complete a standstill as possible, without putting himself out of command. If his vessel is a steamer, he must go at least dead slow. If the other is coming anything like near to him, he ought to obey article eighteen, and stop and reverse."

And here Mr. Justice COTTON adds:

"We have not to consider what was the conduct of the Dordogne when the first whistle was heard. It is clear that there was a succession of whistles; that the vessels were coming nearer and nearer, and were, in fact, getting very near one another. Now it was the duty of the Dordogne to stop and reverse her engine if there was risk of collision. But it is said that, inasmuch as these whistles were getting broader and broader on the bow, the officer of the Dordogne might reasonably conclude there was no danger. However, that will not, in my opinion, excuse the Dordogne for disobedience to article 18. In a fog in which a man can see nothing, he cannot form any safe opinion as to the direction of another vessel, and he should, in such circumstances, follow the course stated by the master of the rolls."

But without quoting further from the language of the opinions, it is sufficient to say that the same rules have been since applied by the English courts in *The Ebor*, 11 Prob. Div. 25; *The Resolution*, 6 Asp. 363; and *The Ceto*, L. R. 14 App. Cas. 670. The American courts have also practically affirmed and reaffirmed this rule. I had occasion myself to do so in the case of *The Alberta*, 23 Fed. Rep. 807, where I held that the Osborne, which was proceeding at the rate of about five miles an hour, ought to have stopped when she heard the Alberta's whistles, which indicated that she was approaching and crossing her bow, or at least drawing nearer to her.

In that case both were held in fault; the Alberta for excessive speed, and the Osborne for not stopping when she heard the whistles approaching. That there is no relaxation of the rule demanding extraordinary care in cases of vessels approaching each other in a fog is evident from the remarks of Judge BROWN of the southern district of New York in the case of *The Lepanto*, 21 Fed. Rep. 651. It is not necessary, however, to read further authorities upon this subject. The question is considered, and with practically the same results, in the cases of *The Britannic*, 39 Fed. Rep. 395; *The Wyanoke*, 40 Fed. Rep. 702; and *The Iberia*, Id. 893. The courts are all agreed as to the necessity for strict caution in these cases; and so critical have they been of the conduct of masters of steamers in fogs of this kind, that it is very rare that their action has met with the full approval of the courts,—so rare, that in the case of *The Alberta*, in this court, *The City of Atlanta*, 26 Fed. Rep. 456, *The Britannic*, and *The Wyanoke*, in the courts of New York, and in the English cases of *The John McIntyre*, *The Dordogne*, *The Ebor*, *The Resolution*, and *The Frankland*, L. R. 4 P. C. 529, the masters of both vessels were found to be in fault.

Now, let us measure the conduct of these vessels by those rules, and within moderate limits I propose to enforce them in this court. I think it is the duty of a vessel hearing the signal of a steam-ship ahead in a fog (and by ahead I do not mean dead ahead necessarily, but within one or two points upon either bow) to reduce her speed; and, if she hears a second and third whistle nearer in the same direction, it is her duty to stop and wait until signals have passed between the two vessels which shall determine upon which side each shall go, and that both vessels should proceed at the most moderate speed, keeping themselves well in command, until they bring themselves off each other's bow to such a distance as to make it absolutely certain that by continuing under check they will pass each other in safety. I do not think that they have any right to resume their full speed until they are directly or nearly abeam. There are certain disputed questions of fact in this case which we cannot settle, and we do not propose to discuss them. The best that counsel can ask of us is to take the facts as each side has sworn to them, and examine the case in the light of this testimony. I have tried too many collision cases to attempt to reconcile the testimony of the crews of different vessels where it is so conflicting as it is in this case. Nor are we at all embarrassed by that difficulty. We do not think it necessary to pay much regard to mere numerical superiority in the witnesses upon one side or the other. We shall take the salient and uncontradicted facts as they are sworn to by each side,—the course of the vessels, (in regard to which there is little temptation to deflect from the truth,) their respective signals as testified by those who made them, the angle at which the vessels came together, and the extent of the injury,—and determine, to the satisfaction of our own minds, the probabilities of the case.

Let us take the case of the Sheffield. She was proceeding up the lake, bound from Whitefish point to Keweenaw point on a course W. N. W. She was blowing her usual fog-signals, her whistle being operated by an

automatic device, which blew a fog-signal once in 58 seconds. At 4:42 P. M., Cleveland time, she was checked to half speed. So far I see no criticism to be made of her conduct. While upon this course, she heard very faintly, at a great apparent distance, and a little upon her starboard bow, a single blast from the Star, in answer to which she blew two blasts and checked. She received no answer. Her master then came on deck, and, hearing whistles on her starboard bow, he blew two blasts and starboarded half a point. The other vessel answered by a single blast. Now, whether that was intended as a fog-signal or a passing signal is uncertain, but at any rate it was a circumstance which called for immediate caution. He blew two blasts again, and that was answered by one, and the signal was then repeated with the same response. There was evidently a confusion of signals, and the first criticism I make in regard to his conduct is that, as those vessels were getting nearer, he should have stopped until he located the signals and the course of the approaching vessel. Instead of that, he assumed that the North Star was blowing passing signals, though he had no assurance that they were not fog-signals; a fog-signal and a port signal being practically the same, though it is said the port signal is longer. Instead of stopping, however, he ported, and ported very decidedly; and, while going W. by N., half N., he ported and steadied at N. W. by N. At the same time he ordered on more steam, as he says. In the first place, he ported upon the assumption that the Star was blowing a passing signal instead of a fog-signal, which may have been untrue. It is quite evident that, if it had been a passing signal, the sound would have crossed from his starboard to his port bow, or at least it would have closed in; but there is no testimony to indicate that. He swears that the whistles continued upon his starboard bow until after he ported. Now the very fact that the signal did not close in or pass from his starboard to his port bow should have indicated to him, as it seems to me, that the Star had not changed her course down the lake, but was blowing a fog-signal, and that his porting would ultimately throw him directly across the bow of the Star. That was his second fault. The third fault was in not stopping. He had arrived at a point where he should have unquestionably stopped, because he was laying out a new departure. He was acquiescing in the signals of the North Star if her single blasts were intended as port signals, and was throwing himself across her bow in case she should keep her course, as the indications were she was doing. Now he says that he exchanged six or eight signals of one blast with the North Star. I doubt this, but, assume it to be true, (and I wish to dispose of the case, as far as possible, upon the assumption that each side is telling the truth,) he exchanged six or eight signals of one blast, and then, very much to his surprise, as he says, after he had gotten the North Star away over on his port bow, the Star blew two blasts, which he answered by one, and ported hard. He did not stop then, and the signal was repeated. He should not only have stopped, but he should have stopped and reversed, and backed strong. That was the only possible safety to him in that emergency. But after the second signal of two whistles, to

which he answered with one, the vessels came in sight of each other. I pass no criticism upon what occurred then upon either side. The vessels were *in extremis*, a collision was inevitable, and he had a right to go ahead at full speed, or do anything else that offered a possible escape. I do not criticise his conduct at that time, but, prior to the vessels coming in sight of one another, we think he was guilty of three or four manifest faults.

Let us now examine the case of the North Star. Her course, and by this I mean her direction, is certainly open to much less criticism than that of the Sheffield. Indeed, I do not know that I have any fault to find with it, even though she may have starboarded a little when she heard the signal of the Sheffield on her port bow. She claims to have been running under a check from the time the fog set in; but we think that, comparing the time she left Manitou light with the time and locality of this collision, her speed could not have been greatly reduced. Bearing in mind that she covered 66 miles in six hours and a half, her check could not have been a very slow one. Her speed must have been about 10 miles an hour. But let us assume that she was running under a check of 5 miles an hour. How does the case stand then? Did she hear the fog-signal from the Sheffield? She claims she did not, and all the witnesses produced here by the respondent claim that she did not hear the single blast of the Sheffield, and that the first signal that she heard was a blast of two whistles, which did not exceed four and five minutes before the collision. Now, gentlemen, we do not believe that. We think she must have heard the single blast of the Sheffield for some considerable time. It is true the wind was blowing over her stern, but it was a light breeze, and not such a one as would prevent an ordinary fog-signal being heard for more than a mile. We think that she must have heard this fog-signal—*First*, because the mate says that he heard it; and, *second*, because the protest indicates that he heard it. The protest says: "Heard steamer blowing fog-signal on starboard bow about 5:10 P. M. Few minutes after, heard this steamer giving two blasts on the starboard bow." Now, undoubtedly the whistle she heard on her starboard bow was the fog-signal of the Sheffield. These protests are, I think, very cogent evidence. They are made when the memory of the witnesses is fresh, and nothing is present in their minds but the facts of the collision. They are unadulterated by legal advice, and are made at a time when no temptation to deviate from the letter of truth has presented itself to them. But, in addition to the testimony of the mate and of the protest, the witness King, who acted as porter, and who was lying in his berth, says that he heard the single blast of this vessel three or four times, and all of a sudden they changed to two blasts, and he jumped out of his berth and ran ahead, evidently thinking there was danger of a collision. We have no indication that the Star moderated her speed up to that time beyond the check at which she had been going since the fog set in. In fact, it was about that time that the master sent the mate to the engineer to tell him to hurry up a little,—to put on a little more steam,—while signals of two blasts were being blown at a dis-

tance not exceeding a mile. A point upon which there is a good deal of testimony and a great deal of doubt is from which steamer did the first signal of two blasts come? We cannot answer that question. We can only say that we are inclined to think the signal came first from the Star, and this because the Sheffield was under a port-wheel at that time, and to have blown two blasts of a whistle while the steamer was porting would indicate a degree of recklessness inconsistent with good sense. Indeed, it seems to us incredible that a steamer should be blowing a signal of two blasts while under a port-wheel. As to what took place at that time, we refer to the allegations of the answer, although it is qualified to some extent by the oral testimony:

"As soon as this was blown, danger of collision was apprehended, and the North Star promptly answered this signal last blown by the Sheffield by adhering to her passing signal of two blasts, and her master immediately took the precaution to check down still further the speed of the North Star, which was then moderate. The Sheffield, however, again blew a signal of one blast of her whistle, still on the North Star's starboard bow, but closer. The engine of the North Star was then immediately stopped, and, while this order was being obeyed, the Sheffield hove in sight, near to and heading across the North Star's bow and course, from starboard to port. The vessels were then so close to each other that a collision seemed inevitable, but, notwithstanding this, the master of the North Star immediately ordered her wheel to port, so that she might swing under the stern of the Sheffield, and possibly pass her, and ordered the engine to back, and immediately followed this order by an order to back strong, and, in response to this order, every available pound of steam was given the engine."

Now it is manifest that at the time this signal of two blasts was heard on the North Star the signals of the two steamers were conflicting, and the circumstances all indicate that they could not have been more than a mile apart. The vessels were approaching each other at a speed which would bring them together in five minutes, and it was the instant duty of the North Star to stop and back. It is claimed that she did this, but it is also uncontradicted that she checked. Now, why did she check? There was no reason for it. Her duty was to stop, and her counsel have recognized this as her duty by saying that a cluster of signals to check, to stop, to back, and to back strong were all given substantially at once, and as one order. In view of the allegations of the answer, we cannot believe that. The protest does not indicate that any such celerity of movement was manifested. The mate went down to the engine room, and when he came back these orders were given, and they all say they were given successively, and not as if one order had been given. But there was at that time hanging up in the engine room a direction to this effect: "Where a vessel is going ahead, and a signal of two bells is given, that is an order to back and back strong." That is the signal that should have been given beyond all possible question. My own view is, and in this the nautical assessors concur with me, that the first order given was to check; that they waited until they got another blast from the Sheffield, and then they stopped; that the Sheffield immediately hove in sight, when they reversed their engines, but too late to be of any

service. Now we have no doubt that if, when the signal to check was given, an order had been given to back strong, this collision would have been avoided. The consequence was that she ran into the Sheffield four or five feet. What speed does that indicate? Upon the one hand, it is said by a witness for the Star, who has made a mathematical calculation, based upon the weight of the Star and the strength of the Sheffield's hull, that her speed could not have exceeded a mile an hour. But we do not think this witness sufficiently estimates the resisting power of the Sheffield, and our opinions rather coincide with that of the equally intelligent witnesses produced by the Sheffield,—Capt. Kirby and Mr. Angstrom,—who testified that in their opinion she must have been going at from five to seven miles an hour. The experienced seamen who sit with me in this case giv it as their opinion that she must have been going, considering the depth of the cut and all the facts, at a speed of about five miles an hour, and I concur in that opinion.

In further corroboration of this, we have the testimony of a large number of witnesses upon the Sheffield, who were looking for the Star as she hove in sight, and say that she came at them with "a large bone in her teeth." Upon the other hand, the witnesses upon the Star seem to have taken the precaution to look over her stem and say there was no bone there. We deem it extremely improbable, however, that the witnesses upon the Star should have been looking at her cut-water. They had undoubtedly taken the alarm, and were on the lookout for the appearance of the Sheffield. We are clearly of the opinion that the Star was at fault for not taking prompter measures to stop and reverse her engine.

There must be a decree dividing the damages, and referring the case to a commissioner to compute and report the same.

THE SCHMIDT *v.* THE READING.[1]

THE READING *v.* THE SCHMIDT.

(*Circuit Court, E. D. Pennsylvania.* October 11, 1890.)

1. COLLISION—FAILURE TO KEEP VIGILANT LOOKOUT.
   The lookout of a steamer, which was crossing the course of a schooner that had her lights properly set and burning, failed to see the schooner on a dark, but clear and moonless, night until within four lengths of her, although the steamer's light had been seen by those on the schooner at the distance of two miles. *Held*, the steamer was in fault for not keeping a vigilant lookout.
2. SAME—STEAM AND SAIL—DUTY OF STEAMER TO REVERSE.
   A steamer which, finding herself crossing the course of a schooner on the port tack, and about four lengths from her, attempts to avoid her by merely porting hard, is in fault for not also reversing.
3. SAME—CHANGING COURSE IN EXTREMIS.
   A steamer was crossing the course of a schooner. The vessels had approached to within about four lengths of each other. The schooner was on her port tack,

[1] Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

and heading about north. The steamer was heading east south-east. When about four lengths apart, the schooner starboarded. *Held*, this change of course was *in extremis*.

Appeal from district court. See *ante*, 398, for the opinion there delivered, and the facts other than as set out in the present opinion.

John G. Lamb and *Thos. Hart, Jr.*, for appellant, Reading.

Henry R. Edmunds and *Curtis Tilton*, for appellee, Schmidt.

BRADLEY, Justice. *The Facts:* (1) On the morning of September 23, 1889, about 1 o'clock, the schooner Charles E. Schmidt came into collision with the steamer Reading off the coast of Massachusetts, about two miles to the westward of the Cross Rip light-ship. (2) The night was clear. There was no moon. The lights of the vessels could be seen two miles distant. There was no unusual sea. The wind was from the north-west, blowing a brisk breeze. (3) The schooner was bound down the coast, with a cargo of ice from Gardiner, Maine, to Philadelphia. The steamer was bound up the coast on a voyage from Philadelphia to Salem, Mass., with a cargo of coal. (4) The schooner was beating through the channel marked by the Cross Rip light-ship and was on her port tack, close hauled by the wind, with all her lower sails set, and heading about north, and nearly across the channel. The steamer was coming down the channel on a course east south-east, crossing the course of the schooner. (5) The schooner's lights were properly set in the rigging, and were burning brightly. The master was in charge, and the watch on duty. A lookout was properly stationed at the bow, and two other men were upon the deck, one of whom had the wheel. (6) While the schooner was upon her port tack, heading about north, the green light of the steamer was reported by the lookout, and seen by all of the men on the schooner, distant about two miles, and bearing about three points on the schooner's port bow. The light was carefully observed by the men on the schooner, and the steamer was seen to approach without changing her light or making any change of course until she was within four lengths of the schooner, and there was imminent danger of collision. The schooner then starboarded, and the steamer had ported, and struck the schooner on her starboard side, breaking it in and damaging the cargo. (7) The lookout of the steamer and others in charge of her navigation did not see the schooner's lights until they were three or four lengths from her, and immediately hard ported, the mate helping the wheelsman to put it over, and when it was hard a-port, it was immediately ordered hard a-starboard, and the vessels struck before the last order could be fully executed.

Conclusions of Law: The steamer is responsible for the collision; (1) for not maintaining a vigilant lockout; and (2) for not changing her course seasonably, and preventing the vessels getting into a dangerous proximity; and (3) for not reversing her engines in time to prevent the vessels from getting into a dangerous situation and proximity; (4) the change of course by the schooner was *in extremis;* (5) and the steamer is responsible for the damages caused by the collision.

HARMON v. UNITED STATES.

(Circuit Court, D. Colorado. October 27, 1890.)

FEDERAL COURTS—JURISDICTION OF DISTRICT JUDGE—WRIT OF ERROR.

Rev. St. U. S. §§ 591, 592, 596, provide that a circuit judge may appoint a district judge to hold court in another district than his own, with the same powers as the judge of that district; "but no such judge shall hear appeals from the district court." Section 614, Id., provides that a district judge, when holding circuit court alone, may, by consent of parties, hear an appeal or writ of error from his own decision in the district court. *Held*, that a district judge, when holding circuit court in another district by appointment of the circuit judge, could, by consent of the parties, hear and determine a writ of error in a criminal case from the district court.

On Writ of Error from District Court.

This case was submitted on the record and the following agreed statement of facts:

"It is hereby stipulated by and between Lawrence Harmon, plaintiff in error, by Patterson and Thomas, his attorneys, and the United States of America, by John D. Fleming, United States attorney for the district of Colorado, as follows in the above-entitled cause:

"*First.* That a writ of error was duly sued out of the circuit court of the United States for the district of Colorado to the district court of the United States in and for said district in the above-entitled cause, and that upon the presentation of the record of said cause to the Honorable DAVID J. BREWER, then judge of the circuit court of the United States in and for the eighth judicial circuit, the said the Honorable DAVID J. BREWER, as judge, did order that the said writ of error issued in said cause should be made to operate as a *supersedeas* therein.

"*Second.* That the said cause was duly docketed in the said circuit court for the district of Colorado, and was entered upon the docket of said circuit court as case 'No. 2,493.'

"*Third.* That thereafter the said, the Honorable DAVID J. BREWER, as judge of the circuit court, did make the following order and appointment, which was duly entered of record in the office of the clerk of the said circuit court for the district of Colorado, as follows:

"'UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

"'In my judgment, the public interests so requiring, I do hereby designate and appoint Hon. JOHN F. PHILLIPS, United States district judge for the western district of Missouri, to hold the circuit court of the United States for the district of Colorado for the present term, in aid of the Hon. MOSES HALLETT, district judge of said district.

"'Witness my hand, this, the 6th day of December, A. D. 1889.

"'DAVID J. BREWER, Circuit Judge.'

"*Fourth.* That thereafter, and by virtue of said order and appointment, the said Hon. JOHN F. PHILLIPS, district judge aforesaid, did hold this present term of the said circuit court at Denver, in the district of Colorado.

"*Fifth.* That upon, to-wit, the 20th day of December, 1889, it being one of the judicial days of the term for which the said Hon. JOHN F. PHILLIPS was appointed to hold the said term of the circuit court, as aforesaid, on motion of the plaintiff in error, and with the consent of the United States of America, through John D. Fleming, United States attorney for said district, the said cause and the errors alleged were submitted to the said circuit court, presided over by the said Hon. JOHN F. PHILLIPS alone, under and by virtue of said

appointment, for determination and decision, and the plaintiff in error, by his attorneys, and the United States of America, by the said John D. Fleming, United States attorney for the district of Colorado, did appear before the said circuit court, presided over by the said Hon. JOHN F. PHILLIPS, as aforesaid, and did fully present by argument the said cause and errors alleged therein, both in behalf of the said plaintiff in error, and in behalf of the said defendant in error, and did then and there submit the same to the said court for its decision.

"*Sixth.* That afterwards, and upon, to-wit, the 5th day of March, A. D. 1890, the same being one of the judicial days of the term of the said circuit court over which the said Hon. JOHN F. PHILLIPS had been appointed, the said Hon. JOHN F. PHILLIPS, as said judge, and under and by virtue of his said appointment, did file in the clerk's office of the said circuit court in and for said district his opinion in writing in said cause. in and by which said opinion the judgment of the said district court in said cause was reversed; and for the cause set forth in the said opinion the said defendant was ordered to be discharged without day from any further prosecution by reason of the facts alleged against him in the indictment, and reference is hereby made to the said opinion, and to the said order reversing the said judgment, and ordering the discharge of the said plaintiff in error, for greater particularity."

Patterson & Thomas, for plaintiff in error.
John D. Fleming, Dist. Atty., for the United States.

CALDWELL, J. The motions in this case raise the question whether a district judge of one district, designated and appointed by the circuit judge, under section 596 of the Revised Statutes of the United States, to hold the circuit court in another district, in aid of the judge of that district, can, while holding the circuit court under such designation, with or without the consent of the parties, hear and dispose of a criminal case on error from the district court. The district judge assigned to the duty of holding the circuit court did, in fact, hear and decide this case on error. His opinion concludes in this language:

"My conclusion is that under the law the indictment was insufficient, and the conviction thereunder should be set aside, and the defendant discharged. It is so ordered, as any further prosecution would be barred by the statute of limitations."

Neither this order, nor its equivalent, has been entered of record; and the plaintiff in error moves that such an entry be now made as of the date of the judge's order. This motion is resisted by the district attorney, who moves that the case be set down for hearing before the circuit judge the same as if it had not been heard and decided by the district judge who held the circuit court under the designation and appointment of the circuit judge. The section under which the district judge was designated reads as follows:

"Sec. 596. It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section five hundred and ninety-one, the district judge of any judicial district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit."

It will be observed that the circuit judge is to designate and appoint the district judge "in the manner and with the powers provided in section five hundred and ninety-one." Section 591 provides that, when a district judge is prevented by any disability from holding a district or circuit court in his district, a district judge of another district may be designated and appointed "to hold said courts, and to discharge all the judicial duties of the judge so disabled." Section 592 provides that, where there is an accumulation or urgency of business in any district, the circuit justice or circuit judge—

"May designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof; and each of the said district judges may, in case of such appointment, hold separately, at the same time, a district or circuit court in such district, and discharge all the judicial duties of a district judge therein; but no such judge shall hear appeals from the district court."

Section 614 of the Revised Statutes provides that—

"A district judge sitting in a circuit court shall not give a vote in any case of appeal or error from his own decision, but may assign the reasons for such decision: provided, that such a cause may, by consent of parties, be heard and disposed of by him when holding a circuit court sitting alone. When he holds a circuit court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge."

It is believed these are all the statutory provisions bearing directly on this question. These sections are to be taken together, and construed as if they were one law. So construed, the law is that the district judge of one district, appointed to hold, and holding, a circuit court in another district, is invested with the same powers that are vested by law in the judge of the district in which the court is held, and may discharge all the judicial duties of such judge in the circuit court. In holding the circuit court, he sits as a district, and not as a circuit, judge. The statute clothes him with the jurisdiction "to discharge all the judicial duties of the judge" of the district in which the court is held, and not all the judicial duties of a circuit judge. Embarrassment may sometimes result from the present state of the law on this subject. For instance, if the district judge of the district where the court is held and the district judge assigned to his aid sit together in the trial of a cause in the circuit court, and there is a difference of opinion between them as to any question arising in the trial of the cause, or as to what judgment shall be rendered, there is no statute declaring whose opinion shall prevail. There is, indeed, no statute saying in terms that they shall or may sit together. Section 592 authorizes them to "hold separately, at the same time, a district or a circuit court;" and, by section 596, the assigned judge is authorized "to hold a district or circuit court in the place or in aid" of the judge of the district. The statute declares whose opinion shall prevail when the court is "held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge;" but no provision is made for a difference of opinion between two district judges.

Section 650, Rev. St. U. S. Nor is there any provision for a certificate of division of opinion between two district judges, as there is in a case of a difference of opinion between "a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge." Sections 652 and 693, Rev. St. U. S.

It was early decided that a district judge could not sit in the circuit court on a writ of error from his own decision, (*U. S.* v. *Lancaster*, 5 Wheat. 434;) and by chapter 20 of the act of the 2d of April, 1852, (10 U. S. St. 5,) embodied in section 592 of the Revised Statutes, it was enacted, in reference to judges assigned to hold court in districts other than their own, under that statute, that "no such district judge shall hear appeals from the district court." But by the later act of March 2, 1867, (chapter 185, § 2, 14 U. S. 545,) it was provided that a cause appealed from the district to the circuit court might, by consent of parties, "be heard and disposed of by the circuit court held by the district judge," in the absence of the associate justice allotted to the district. This act, with some others, is incorporated in section 614 of the Revised Statutes. This act, the supreme court say, was enacted "in order to prevent failure or delay of justice." *U. S.* v. *Emholt*, 105 U. S. 414. Under the provisions of section 614, a district judge holding the circuit court, sitting alone, may, by consent of parties, hear and decide an appeal or writ of error from his own decision. If the district judge of the district, when holding the circuit court, may hear and decide an appeal or writ of error from the district court by the consent of the parties, undoubtedly the district judge assigned to hold the circuit court in that district may do the same. The assigned judge is, as we have seen, invested with all the powers and jurisdiction of the judge of the district. This includes the power to hear and decide, by consent of parties, any cause pending in the circuit court on appeal or writ of error from the district court. It would be a singularly anomalous condition in the law if the district judge of the district, holding a circuit court, could, by consent of the parties, hear an appeal or writ of error from his own decision in the district court, and a district judge of another district, appointed to hold the same circuit court, could not, by consent of the parties, hear appeals and writs of error from the decisions of the judge of that district. There would seem to be more reason for denying the exercise of this appellate jurisdiction to the judge who decided the case in the court below than to one who had no previous knowledge of the same. The parties have a right to have their appeal or writ of error heard by the circuit justice or the circuit judge, and to have their cause continued until such a hearing can be had; but it is competent for them by consent to submit to a hearing before the district judge who tried the cause in the district court, or before a district judge assigned to hold the court "in the place or in aid of" such judge. The statute is silent as to how such consent shall be given or proved, but there can be but little doubt as to the proper rule. Where the record shows that the parties appeared and argued and submitted their case, it will be presumed that they did so voluntarily, and by consent. Whether that presumption is conclusive, it is not necessary in this

case to decide. See *The Alaska*, 35 Fed. Rep. 555, 557. In this case the consent is not denied but admitted.

It is expressly stated in the agreed statement of facts that the "cause and the errors alleged were submitted" to Judge PHILLIPS "on motion of plaintiff in error, and with the consent of the United States of America." Let the judgment of Judge PHILLIPS in the case be entered of record as of the date it was made.

FOSTER *et al.* v. BALLENBERG *et al.*

(*Circuit Court, S. D. Ohio, W. D.* October 29, 1890.)

INJUNCTION—WHEN GRANTED.

A preliminary injunction will not be granted to compel the lessees of an opera-house to allow the complainants to use the house in accordance with a contract therefor, where such injunction would compel the lessees to break a similar contract made by them with an innocent third party, and the complainants cannot use the house with profit to themselves.

In Equity. On motion for preliminary injunction.

Ramsey, Maxwell & Ramsey, for complainants.

Rankin D. Jones, for defendants.

SAGE, J., (*orally.*) The bill was filed yesterday, and a motion for a preliminary injunction argued. The complainants aver that on the 25th day of August, 1890, they entered into a contract in writing with the defendant Louis Ballenberg, who signed it by the hand of Paul F. Nicholson, agent, and who, although contracting in his own name, was acting for himself and his co-defendant, Powell Crosley, whereby it was agreed that the complainants, being proprietors and managers of an opera company known as the "Boston Ideal Opera Company," should, on November 3, 1890, begin the rendition of the opera of "Fauvette" in the hall of the opera-house in Cincinnati known as "Pike's Opera-House," of which the defendants Crosley and Ballenberg were in possession as lessees or otherwise, having full control thereof, and power to let the same for the purposes contemplated by the said contract. The bill avers that by the terms of the contract said performances should begin on the 3d day of November, 1890, and continue until Saturday, November 8, inclusive; there being one performance each day, and one matinee. After setting forth the details of the contract, which provided, among other things, that the complainants should receive 70 per centum and the defendants 30 per centum of the gross proceeds of said performances, the complainants aver that said opera-house has not for several years been used as an opera-house or theater, that it was being remodeled and refitted, and that it was to be reopened as an opera-house on the date aforesaid of said first performance, and that it was stipulated in the contract that the rendition of the opera of "Fauvette" by the complainants, with their company, should be the first performance to be given

in said opera-house upon its reopening. It is further averred that an important advantage attaches to the company enjoying the privilege of opening a new house, for the reason that public attention is much attracted to an event of that character, and the houses are better filled upon such occasions than at other times; and that, in view of this advantage, the complainants consented to a smaller proportion of the gross proceeds than they otherwise would have been willing to accept. It is further averred that, notwithstanding the premises, the defendants have announced their purpose to break the said engagement, and have already advertised a performance to be given by another company, beginning on the 3d of November, and to continue throughout that week, and that defendants now refuse to allow the complainants to perform their said contract, and have so notified complainants, and threaten to exclude them and their company from said opera-house at the dates named. It is further averred that the Boston Ideal Company enjoys a high reputation, and that the refusal of the defendants to allow the said performance will be an irreparable injury to the complainants and to said company. The prayer of the bill is that the defendants may be enjoined from permitting the use of said opera-house during the period aforesaid by any other person or persons, and from permitting any other performance to be given therein, and that they be enjoined from refusing to allow complainants to give said performance of said opera, in pursuance of the terms of said contract, and that they be required to do and perform all things required of them under said agreement, as therein set forth. As an alternative prayer, the complainants pray that, if the court shall be of opinion that it is not able, according to the course of equity proceedings, to order the defendants to comply specifically with the details of said contract, the court shall order that the complainants may take possession of the opera-house, and furnish all things which, under said contract, the defendants were to furnish, and that upon final hearing the court shall decree that the defendants shall pay the expenses thereof, and for all other necessary and proper relief.

I have given to the examination of this case such care and attention as has been possible in the short time afforded me. It appears from the affidavits upon file that the defendant Ballenberg was, at the date of the contract set forth in the bill, in the employ of the defendant Crosley, but that he had no interest whatever in the lease of the opera-house. It appears from the affidavits of Ballenberg and of Crosley that Ballenberg had in fact no authority to make contracts for the services of theatrical or operatic troupes. He was authorized to receive propositions, and communicate them to Crosley; but no contract was to be made without the express approval of Crosley. It is not claimed that the contract in this case was so approved, and it is claimed that it must fall, so far as Mr. Crosley is concerned, because not within the authority conferred upon Ballenberg. Upon this point, it seems to me that the manager of a theater or opera-house occupies the position of a general agent, and therefore that a special limitation of his authority not communicated to or known by the manager of a troupe with which he in fact makes a contract in the

name and on behalf of his principal, or as manager, would not render the contract invalid, it being within the general scope of his authority as manager. But the contract in this case, which is attached to the affidavit of the complainant Foster, is, in terms, with Louis Ballenberg individually. Moreover, the bill makes Ballenberg a defendant as a principal, in joint possession of the opera-house with Crosley, as co-lessee, or otherwise. It is signed, "Louis Ballenberg, per Paul F. Nicholson, Agent." It appears affirmatively by the affidavit of Crosley that he never consented to or recognized the contract, nor did he even know of it until after the controversy upon which this litigation is founded arose. Now, while it is true that an undisclosed principal may be held to the performance of a contract made by his agent in his own name, I am strongly inclined to the opinion that that can only be done by showing that the execution of the contract was within the actual authority of the agent, inasmuch as in such case the contract was made with the agent as principal, and must be presumed to have been made relying on him alone, and not upon the authority implied from the scope of a general agency.

But I am not disposed to put the decision of this case upon that ground, nor am I disposed to enter upon the consideration of the controverted questions of fact respecting the condition of the Boston Ideal Opera Company, and its qualifications to render the opera in style requisite for successful performances. It is claimed on behalf of the defendants that, by reason of a change of conductors, and the retirement from the troupe of certain leading singers and of members of the chorus, the troupe was so weakened as not to be in condition to give performances that would draw paying houses. It is true that it is not claimed that these deficiencies are anything more than temporary, but it is insisted that they are of so recent date that the troupe could not be restored to its own proper standard in time for these performances. On the other hand, it is insisted that the defendants are bound by the contract to accept the services of the troupe, even if the complaints made were well founded in fact, which they deny. I do not agree to this proposition. I think such a contract calls for a full troupe, up to its ordinary standard, just as the contract for the services of a physician is a contract for the exercise, not only of the ordinary skill of the profession, but of the skill which he possesses, although he may be far above the average. But if the contract is for the services of a troupe, it cannot be avoided by averring that the performances of the troupe are not up to the standard of excellence recognized as necessary at the theater where the services were to be rendered. The person engaging the troupe is bound, in the absence of misrepresentation or fraud, to accept its performances if they are up to its own standard. The affidavits as to the condition of the complainants' troupe are conflicting. It is denied on their behalf that any changes have been made excepting for the better, and it is claimed that, as to the conductor, the leading singers, and the chorus, the troupe is as good as it ever has been, if not better. I shall not undertake to settle the dispute upon this feature of the case. It seems to me that other considerations, to which I shall now advert, are decisive.

It appears as an undisputed fact that the defendant Crosley has engaged another troupe for the time covered by the contract under which the complainants make their claim. It is not pretended that that other troupe has had any knowledge or notice of the facts of this controversy. They are advertised, and their bills are posted throughout the city. The theater is to be opened five days from this time. It appears, also, from the affidavits submitted on behalf of the defendants, that no scenery has been prepared suitable for the operas which the complainants desire to produce, and that it cannot be prepared in time for performances next week. The complainants are asking the court to compel the defendants to break off this last engagement, and inflict the same kind of injury upon the other troupe that they complain of in their own case. It seems to me that the result would be almost necessarily disastrous to all parties. The theatrical troupe would be thrown out of a week's engagement too late to make any other engagement, and the complainants would be without the time necessary to so advertise their performances as to secure paying audiences; and inasmuch as by the terms of their contract they are to pay their own expenses, which it is stated are $3,000 per week, it is at least doubtful whether they would not lose money, instead of profiting, by their engagement. The granting of a temporary injunction is within the discretion of the court. It has been held that where it will do the complainants little good and the defendants much harm it will not be granted, and where it will injure the defendants more than it will benefit the complainants it will not be granted. I am satisfied that this is a case which falls within these rulings, and I therefore overrule the motion for a preliminary injunction.

I suppose that this practically disposes of the case, and that the bill might as well be dismissed; but, as counsel for the complainants is not present, I will not now make an order to that effect.

OSBORNE *et al.* *v.* WISCONSIN CENT. R. CO.

(*Circuit Court, W. D. Wisconsin.* September 15, 1890.)

INJUNCTION—MULTIPLICITY OF SUITS.

The plaintiffs, respectively, are in the possession, and claim to be the owners, of tracts of land acquired by them under the homestead and pre-emption laws of the United States. These lands are all claimed by the Wisconsin Central Railroad Company as part of its place lands as defined by an act of congress passed in 1864. The company has heretofore brought separate actions of ejectment against three of the plaintiffs, and was unsuccessful. Nevertheless, it threatened to bring actions of ejectment against each of the other plaintiffs, as well as actions of trespass for injuries in cutting timber, unless they voluntarily surrendered possession of the lands respectively held by them. The dispute between the railroad company and each of the plaintiffs depends upon precisely the same questions of law, and upon the same facts. The plaintiffs have a common source of title, and the claim of the company is good or bad against all, as it may be good or bad against any one of the plaintiffs. *Held* that, in order to avoid multiplicity of actions, the issues may be determined in a single suit, in equity, in which the holders of the different tracts may unite as plaintiffs; the case belonging to the class "where

a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others."

In Equity.

Geo. G. Greene and *A. W. Weisbrod*, for complainants.

Pumey & Sanborn, *W. F. Vilas*, and *George A. Jenks*, for defendant.

Before HARLAN, Justice, and BUNN, J.

HARLAN, Justice. For the purpose of aiding in the construction of certain railroads in Wisconsin, among others, a branch extending from a point north of St. Croix river or lake to Bayfield, congress, by an act approved June 3, 1856, granted to that state every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads, respectively, with indemnity limits of 15 miles from the line of each road. 11 St. 20.

The map of definite location of the road to Bayfield was filed July 17, 1858, and was approved by the secretary of the interior.

By the first section of an act of congress approved May 5, 1864, the place limits of the Bayfield branch were enlarged to 10 sections in width of lands on each side, with indemnity limits of 20 miles; and, by the third section of the same act, a distinct grant of the same number of sections, with like indemnity limits, was made to aid in the construction of another road,—the one now owned and operated by the Wisconsin Central Railroad Company, and whose northern terminus is at Ashland, Wis. The sixth section excluded from the operation of the act, except for purposes of right of way, mineral lands, and "any and all lands reserved to the United States by any act of congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever." 13 St. 66.

When the act of 1864 was passed, there were in force certain orders of the land department, withdrawing from sale or location, for any purpose whatever, all the lands within the original 15-mile indemnity limits of the Bayfield road, as defined by the act of 1856. These orders were made after the map of definite location of that road had been filed and approved, and to the end that deficiencies ascertained in its place limits, as originally defined, might be supplied from such indemnity lands.

What was done by the state, by the land department, and by railroad companies, under or in execution of the acts of 1856 and 1864, is fully stated in the opinion just filed in the case in ejectment of *Railroad Co.* v. *Forsythe*, *post*, 867.

The respective plaintiffs in the present suit claim to own, and are in possession of, tracts of land, each one of which is within the original 15-mile indemnity limits of the Bayfield road, and also within the place limits of the Wisconsin Central road, as defined by the third section of the act of 1864; in other words, the original indemnity limits of the Bayfield road, and the place limits of the Wisconsin Central Railroad, overlap each other as to the lands in dispute. These lands were recently

held by the land department to be open to entry under the homestead and pre-emption laws of the United States, and, with its permission, were entered by the plaintiffs.

The Wisconsin Central Railroad Company construes the act of 1864 as granting all the lands within the place limits of its road. It claims that such part of those lands as fell within the original indemnity limits of the Bayfield road, and were, prior to 1864, withdrawn by the secretary of the interior from sale or location, were not, by reason of such withdrawal, and within the meaning of the sixth section of the act of 1864, "reserved to the United States;" and, having obtained patents from the state, it brought separate actions of ejectment against W. O. Forsythe, L. W. Lentz, and E. A. Bekken, three of the plaintiffs in the present suit. In these three actions, the court has decided that the law was for the defendants, and has set aside the verdicts rendered therein for the company. The bill in the present suit alleges that the company threatens to bring actions of ejectment against each of the other plaintiffs, and also actions of trespass against all the plaintiffs for injuries in cutting timber, unless they voluntarily surrender possession of the lands respectively held by them.

The issues between the railroad company and each of the plaintiffs depend upon precisely the same questions of law and upon the same facts. The relief asked is that these issues may be determined in a single action, and that the railroad company be enjoined from prosecuting the actions of ejectment already brought, or any action of ejectment for the recovery of said lands, or any action of trespass in respect thereto.

The demurrer to the bill presents the question whether the case is one justifying the intervention of a court of equity, or whether the question of title to each tract—all the tracts being within a larger boundary, and the whole being claimed by the railroad company as a part of its place lands under the act of 1864—must be determined in separate actions of ejectment against the respective plaintiffs.

We are of the opinion that the objection to the bill is not well taken. Were the lands held by the plaintiffs granted by the act of congress of 1864 for the benefit of the road named in its third section, or were they, when that act was passed, by reason of their having been previously withdrawn from sale or location, "reserved to the United States," and therefore, within the meaning of the sixth section, excluded from the grant made by the third section? If, when the act of 1864 was passed, they were "reserved to the United States," the law is for each of the plaintiffs. While the plaintiffs have separate and distinct interests because of their respective claims of ownership of separate and distinct tracts of land, they have a community of interest in the subject-matter of the controversy relating to these lands, and a common source of title, namely, the action of the land department opening these lands for entry under the homestead and pre-emption laws of the United States. They have thus a community of interest in the questions of law and fact upon which the issue between the railroad company and each plaintiff depends. The company's claim is good or bad against all the plaintiffs,

as it may be good or bad against any one of them; and yet a judgment in favor of one, in an action of ejectment brought by the company, would not avail the others in separate actions of ejectment against them. The case is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits. It belongs to the class "where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone." 1 Pom. Eq. Jur. §§ 245, 255, 257, 268, 269, 273, and authorities cited in notes to these sections. *Crews* v. *Burcham*, 1 Black, 352, 357. In such cases the plaintiffs are united by a common tie, created by identity of interest in the decision of the same questions of law and of fact, and have a common adversary. The fact that the several tracts of land here in dispute were entered at different dates, and by different persons, is of no consequence, as the validity of each entry, as against the railroad company, depends upon precisely the same questions of law and fact.

Upon the merits, as disclosed by the bill, the case is within the decision just rendered in *Railroad Co.* v. *Forsythe*, *post*, 867.

The demurrer is overruled, and the defendant will answer. Let an injunction issue as prayed for.

BUNN, J., concurring.

ILLINGWORTH v. SPAULDING *et al.*

(*Circuit Court, D. New Jersey.* September 23, 1890.)

1. REFORMATION OF CONTRACTS—PAROL EVIDENCE.
In a suit to rescind or reform a contract of license for the use of "guides" for guiding rods in their passage through surface-polishing machines, it appeared that, at the time the license was granted, plaintiff was the patentee of the guides, and that defendants were using them in a machine then in operation, and that plaintiff threatened suit to enjoin defendants from infringing his patent. This suit was compromised, and plaintiff granted defendants a license "to use my patent guides for disk-rolling machines, * * * the said license to become theirs, their heirs' or assigns', forever." Subsequently defendants erected another machine, and manufactured and used plaintiff's guides on it. *Held*, that the terms of the license were plain, and unambiguous and did not restrict defendants to the privilege of using the guides only on the machine in operation when it was granted, but gave them the right to use them on any machines they might subsequently erect.

2. SAME—EVIDENCE.
The fact that the license was granted upon the compromise of a suit for the infringement of the patent, by the use of only one pair of guides on a single machine, should not restrict the obvious meaning of the terms used in the license, especially when the bill in the suit for infringement alleged "that defendants had made one machine, employing said invention, [plaintiff's guides,] and that they were threatening to make and use the aforesaid machines in large quantities."

3. SAME—FRAUD AND MISTAKE.
Nor will such contract be rescinded on the ground of fraud or mistake, when it appears that plaintiff agreed to the terms of the license 24 hours before he executed it; that it was drawn in accordance with these terms by one of defendants, who read it to plaintiff when he brought it to him for execution; and that plaintiff himself read it and executed it immediately, without expressing any dissatisfaction, and rejected the offer of his counsel to revise it.

4. LICENSE—CONSTRUCTION OF TERMS.
The license to "use" includes the right to make for use, as without such right the license would be nugatory.

In Equity.

J. C. Clayton, for complainant.

R. Byington and *Thomas N. McCarter*, for defendants.

GREEN, J. The primary object of this suit is to obtain the reformation or the rescission of a certain contract of license, entered into by the complainant and the defendants on or about the 22d day of April, 1882, wherein and whereby the complainant granted to the defendants the right to use certain "guides" for guiding rods in their passage through surface-polishing machines, of which the complainant was the first inventor, and for which invention he had obtained letters patent on the 4th day of August, 1874. It appears from the proofs in the cause that, in 1881, the defendants, without the license and against the will of the complainant, and in technical infringement of his letters patent, did construct and use certain guides upon one polishing machine which they were operating, which were in all respects similar to the guides invented by the complainant. Discovering this, the complainant threatened them with a suit in equity to enjoin such use, and to compel the defendants to account for such profits as might have accrued to them from it. Negotiations, however, between the parties, resulted in an amicable arrangement of the matters in dispute. The suit was abandoned, and the defendants accepted a license to use the guides. That license is in the words following:

"For and in consideration of five thousand dollars ($5,000) to be paid as hereinafter specified, I, John Illingworth, of Newark, Essex county, New Jersey, do hereby grant to Spaulding, Jennings & Co., of West Bergen, New Jersey, a perpetual license to use my patent guides for disk-rolling machines, as described in U. S. patent No. 153,677, the said license to become theirs, their heirs' or assigns', forever. The conditions of the payment of the above sum are as follows: One dollar cash down; one-third of the balance, or $1,666.33, in three months from this date; one-third, or $1,666.33, in nine months from this date; and one-third, or $1,666.33, in twelve months from this date. Notes for the sums are this day given said Illingworth by said Spaulding, Jennings & Co. For themselves, Spaulding, Jennings & Co., as members of the pool now controlling the Reese patent disk-rolling machines, hereby agree to withhold all support and encouragement from Jacob Reese, in any or all attempts which he may make to recover damages in the courts from the said John Illingworth, by the alleged infringement of patent."

Under this license, the defendants continued to use the guides which they had previously placed upon their polishing machine, for about five years. At this time the increase of their business compelled the defend-

ants to build a new and a second polishing machine, to which they affixed the complainant's guides, made according to his letters patent, by themselves. To this new use the complainant objects. He claims that the true intent and meaning of the license which he had granted was simply to authorize and make lawful the use of the one pair of guides on that particular machine, upon which, before then, they had been unlawfully used; that the license in no wise authorized them to make the guides; and that this new construction and use constituted a deliberate infringement of his letters patent. And he further insists that the terms of the license are so vague and uncertain, and that it was obtained under such peculiar circumstances, as to require the consideration of parol evidence, for the purpose of construing it, and reforming it, so that its vagueness may be overcome. And, lastly, that the proofs are so strongly evident of mistake or fraud that the license should be rescinded, and a new one be executed, expressing the real intent and meaning of the parties. The prayer of the bill is in accordance with these allegations.

The defendants in their answer, which is under oath, deny, in emphatic terms, any fraud or mistake in the inception of the contract, and claim that the license is in its terms clear, distinct, positive, and general, and amply justifies the act of which the complainant in his bill complains. There is nothing in the nature of a license in writing to place it outside the well-known rules of construction which are applicable to other contracts in writing. The writing itself is considered the ample and conclusive evidence of the final agreement of the parties thereto, and parol testimony to vary its terms is rigidly excluded. It is not the province of the court to make new contracts for parties, at the whim of one or the other. Rather is it the duty of the court to enforce literally the contract as it appears, unless indeed its unconscionable character or conditions, or its fraudulent inception, or its evidence of the mutual mistake of the contracting parties, is so clear as to justify an appeal to the conscience of a court of equity. A critical examination of the license now before the court seems to justify the claim of the defendants that it is general in its character. In terms it grants to the defendants "a perpetual license to use my [the complainant's] patent guides for disk-rolling machines, as described in U. S. patent No. 153,677, the said license to become theirs, their heirs' or assigns', forever." Inartistically as the license may be drafted, its plain, common-sense meaning is too clear to be clouded even by the very acute and able argument of counsel. The grant was the right to use patent guides forever. The guides were intended for, and were to be used upon, or in connection with, disk-rolling machines. Not only was this right to be the defendants', but their heirs or assigns were admitted to a participation in the benefits of the license. How could stronger language be chosen to express the unlimited use? What word or phrase can be singled out, which suggests limitation of the grant? It will not do to ask the court so to construe a writing that doubt may thereby be incorporated between its lines. Words are to be taken in their usual sense and significance. A license to use patent guides generally, for disk-rolling machines generally, cannot, by any

known rules of construction, be limited to the use of a "single pair of guides" upon a single machine.

Upon the argument, it was strenuously insisted that the admitted circumstances which led up to the granting of the license clearly show the object of the complainant and of the defendants to be, to legalize, by the license, the use of one pair of guides only. These circumstances, so relied upon, are the previous infringement by the defendants, by the making and by the use of one pair of guides for one machine only, the threatened suit for that infringement, and the negotiations for the settlement of that suit which resulted in this license. The argument is plausible, but the answer to it is, first, that the words used by the grantor do not harmonize with the theory. Starting with the assumption that all the defendants asked, and all the complainant granted, was the right to use one existing pair of guides, how very easy it would have been to have used words which would have effectually limited the license; and, if such had been the intent of the parties, what language would have been more natural or more readily chosen than that which would legalize, in terms, "the guides now in use" by the licensees? The failure to use such phrases or words, so commonplace, so readily suggesting themselves for such purpose, is strongly combative of the insistment of the complainant as to intent. Nor does the alleged scope and purpose of the threatened suit strengthen the argument. It is not exact to say that the use of one pair of guides by the defendants was the sole moving cause of that suit, which was, admittedly, settled by the negotiations terminating in the license. The distinct and explicit charge in the bill of complaint in that case is "that the defendants had made, constructed, and used one machine for polishing rods, employing said invention, and that they were threatening to make and use the aforesaid machines in large quantities." It was this broad complaint which the defendants compromised, and the reasonable presumption is that the intent of the parties, in making the contract of license, was that it should be broad enough to legalize what had, in the suit being compromised, been asserted and admitted to be illegal. Certainly the language of the license sustains such presumption. It was also contended by the complainant that the license in question was a mere naked right to use the guides in question, and that the right to make the guides was not granted; hence the admitted making of the guides by the defendants for their new machine is not justified or authorized by the license, and, in itself, constitutes an infringement of the complainant's rights. But I cannot assent to so contracted a construction of this writing. The right to use the guides upon disk-rolling machines implies the right to make them so that they may be used. Any other construction would put the defendants at the mercy of the complainant. If they could not rightfully make the guides, how could they exercise the right to use which had been granted them? From what source could they obtain the necessary guides? There is no obligation upon the complainant to supply them. He does not pretend that he made them for sale, or ever offered them to the public. And, if he declined to make them for the defendants, as he lawfully could, the result

would be that the license would be defeated, and practically become null and void. I think the principle applicable to cases like this is well stated in Walker on Patents, § 298:

"An express license to use a limited or an unlimited number of specimens of a patented article, implies a right to make these specimens, and to employ others to make, and will protect those others in making, them for the use of the licensee."

In *Stone-Cutter Co.* v. *Shortsleeves*, 16 Blatchf. 381, the same doctrine is held. In that case the patentee of inventions in steam stone-cutting machines granted to a corporation the right to use said patented machine, or any number of said machines, in its quarry. Held, that the grant conveyed the right to make the machines for said use. In *Woodworth* v. *Curtis*, 2 Woodb. & M. 524, the grant was as follows:

"I do license and impower the said Thomas H. Holland and his assigns to use one machine in Boston aforesaid."

In construing this license the court say:

"The first question is, did this involve the right to make or procure to be made the machine thus permitted to be used? I think it did. Otherwise, the whole license might be defeated, if the grantor refused to make for him at all, or to make at any but an exorbitant price, or demanded another consideration for a right in the grantee to make for himself, under a license like this."

I think, in accordance with these decisions, it must be considered that, by the license which he granted to the defendants, the complainant impowered them to make the guides which he authorized them to use. As to the charge of fraud on the part of the defendants in obtaining this license, I have failed to find any basis for it in the proofs. The charge as made in the bill of complaint is very vague, but, such as it is, it has been fully denied by the answer of the defendants. To overcome the conclusive effect of that answer, it was incumbent upon the complainant to produce the testimony to the contrary of at least two witnesses, or of one witness and clear corroborating circumstances. The only witness on this point produced by the complainant is the complainant himself, and, taking his statement of the circumstances under which the license was executed as uncontradicted, there can be drawn no inference of fraudulent design or conduct on the part of the defendants; certainly no inference sufficiently strong to overcome the positive denials of the answer. The severest criticism to be made is that the license was hastily executed by the complainant, but even that was not due to any urgency of the defendants; and that haste did not prevent the reading of it by the complainant twice before execution. The complainant's testimony shows it was read aloud to him by Mr. Jennings, and again by the complainant himself, the license having been handed to him for inspection and examination. But I am forced to the conclusion that, as to the circumstances surrounding the execution of the grant, the memory of Mr. Illingworth is somewhat defective. He speaks of but one interview with Mr. Jennings, and that was the occasion when the license was signed. His statement substantially is that Mr. Jennings came to

his house, after tea, about 7 o'clock in the evening of the 22d of April, 1882; that almost immediately, without preface, Mr. Jennings offered him $5,000 for the guides, provided he would accept notes in place of cash for the consideration. This proposition the complainant instantly accepted. Mr. Jennings then read over to him the license in question, which he had brought with him already prepared, then handed the paper to Mr. Illingworth to read, who, after reading it, went into his library and executed it; the whole interview not consuming more than 10 minutes. I think Mr. Illingworth is mistaken in his recollection of this transaction and for this reason,—it will be noticed that no additions to, or alterations or changes of, the document are suggested by Illingworth. Understanding it, as he says he did, it was entirely satisfactory to him. Now, there is a very remarkable clause in that license, which certainly would not be looked for in such an instrument. It is contained in that last paragraph, and is the one in which Messrs. Spaulding, Jennings & Co., as members of a certain pool, agree to refuse all support and encouragement to one Jacob Reese, in any attempt which he may make to recover damages from Mr. Illingworth, because of an alleged infringement of Reese's patent. How did such a condition or agreement find its way into this license? According to Mr. Illingworth's testimony, no such thing had been talked about or discussed between Mr. Jennings and himself. Was it a voluntary profert on the part of the licensees, incorporated in the license without request or demand from the person most interested, that they would withdraw assistance, which, as members of a certain pool, they may have owed to Reese? Such is not the usual way in which business is conducted, and the supposition is not reasonable. But, if we turn to Mr. Jennings' testimony, the whole matter is immediately explained. He says that he had two interviews with Mr. Illingworth, the first on April 21st, when the terms of the license were settled, and the other on the next day, when the license was executed; that at the first interview, after the question of money consideration for the license was settled, Mr. Illingworth said he would add a stipulation to the license, which was that the defendants should lend no assistance to Jacob Reese in any suit which he might bring against Illingworth for the use of disk-rolling machines, and to this stipulation Mr. Jennings assented, and therefore it was incorporated in the license, which was executed at the interview on the following day. It was practically a part of the consideration of the grant; hence, when it was read to Mr. Illingworth he expressed no surprise. It was what he expected. The written document so clearly and distinctly set out the agreement which had been entered into the evening before that, after hearing it read over by Mr. Jennings, when it was placed in his hands for examination he contented himself with merely glancing over it, and then he immediately executed it. Could there be stronger evidence that the parol agreement of the evening before was literally and correctly committed to writing, and properly expressed the intent and understanding of the parties? The complainant had 24 hours between the agreement to license, and the execution of the license it-

self, to consider the proposed terms. When the time to execute the license came, upon hearing the terms read over, as they were reduced to writing, he, without a moment's hesitation, executes the contract. To him they are satisfactory. His deliberations have only confirmed him in his intention to grant a license such as the defendants desire, and he acts with a promptness always characterizing the conduct of successful business men. But what becomes of the charge of fraud, and enforced undue haste, in the making of the contract? There is another little incident disclosed by the proofs, which goes very far to disprove this allegation of fraud and undue haste in this transaction. It is in evidence that, shortly after the executing this license, Mr. Illingworth notified his counsel that a settlement of the threatened litigation with the defendants had been effected. He states the terms of the settlement. His counsel very properly suggests, in view of the importance of the transaction, it would be well to submit to counsel for opinion, and revision if necessary, the writing which contained the terms of the agreement between the contracting parties. But Mr. Illingworth refused to do this as wholly unnecessary. He was entirely satisfied with his part in the transaction, and rather congratulated himself that it had been consummated without the assistance of counsel, thereby saving expense. This certainly is strong evidence of his entire satisfaction with the terms of the license. They were fresh in his recollection. The circumstances attendant upon the making of the agreement, and of its execution, were vividly alive in his mind. A copy of the license was in his possession. If he had any doubt of what the license meant, or any awakening suspicions of trickery on the part of the defendants, would he have rejected so brusquely the proffered aid of his counsel? The fair, the necessary inference is that no such thought as "fraud" or "undue haste" arose in his mind in stating to his counsel the circumstances of the settlement. It was an after-thought which gave birth to his suspicions,—suspicions which do not seem to be justified by any fact in the case.

The conclusion, then, is that the license embodied the agreement which was entered into by the parties at their first interview; that it is not tainted in any respect, nor made under such circumstances as would warrant any interference with its plain and unambiguous terms by a court of equity; that it is broad enough to protect the defendants in the manufacture, for their own use, of the guides in question, and warrants the use of such guides upon as many machines as the licensees choose to operate. If the complainant was mistaken as to the legal effect of his grant, it is unfortunate for him; but such mistake affords no ground for rescission or reformation. He may be entitled to sympathy, but he can equitably claim nothing more. The bill of complaint is dismissed, with costs.

EPISCOPAL CITY MISSION *et al v.* BROWN *et al.*

(*Circuit Court, N. D. Illinois.* July 31, 1890.)

1. ASSUMPTION OF MORTGAGE—SUBSTITUTION OF THIRD PERSON.
Plaintiff agreed to sell to defendant property subject to a mortgage which defendant was to assume. Afterwards defendant requested plaintiff to convey to defendant's wife, which he did on defendant's giving a bond guarantying payment of the mortgage by defendant's wife. The mortgage was foreclosed, and the deficiency exceeded the amount of the guaranty bond executed by defendant. On a bill to enforce payment of the deficiency, defendant testified that the bond was given because he had agreed to assume the mortgage, and that, if the property was conveyed to his wife, he (defendant) would not be carrying out his contract. Plaintiff testified that he took a bond because he was "deeding to a straw grantee," and that the amount of the bond was fixed "as a sort of balance between us in our liabilities." There was no evidence of any fraud or false statements by defendant to induce plaintiff to convey to defendant's wife, or of any statement that she would assume the mortgage, or that defendant was acting as agent for his wife. *Held*, that defendant's wife was substituted as grantee by consent, and that defendant could not be held liable for the entire deficiency.

2. SAME—BILL TO ENFORCE—SUFFICIENCY.
The bond was conditioned to indemnify plaintiff against any loss by reason of a failure of his grantee (defendant's wife) to pay the mortgage on the property conveyed to her by plaintiff to an amount equal to the amount of the mortgage assumed by plaintiff. Plaintiff made default in the payment of the mortgage so assumed by him, and it was discharged by defendant. *Held*, that a bill by plaintiff and his mortgagee, to whom he had assigned the bond to enforce payment of a deficiency arising on foreclosure of the mortgage on the property conveyed to defendant's wife, would be dismissed, since there was no proof that plaintiff had paid anything on the mortgage, and defendant's liability on the bond was canceled by his payment of the mortgage assumed by plaintiff.

3. SAME—PAYMENT—STOCKS.
The fact that plaintiff paid with stocks the mortgage which defendant had assumed will not prevent plaintiff from setting off against the bond the full amount of such mortgage, and defendant cannot, in such case, inquire into the actual value of such stocks.

In Equity.
George Burry, for complainants.
Osborne & Lynde, for defendants.

BLODGETT, J. The bill in this case seeks to enforce payment of deficiencies remaining unpaid on two mortgages of $19,500 each, given by George W. Meserve to the Episcopal City Mission of the city of Boston, on March 1, 1877, on certain lots in the city of Boston, the property covered by the mortgages having been conveyed by Meserve to the defendant Lucy T. Brown, wife of the defendant John B. Brown, with a clause in the deed of conveyance by which the grantee assumed and agreed to pay the mortgages in question, and said mortgages having been foreclosed, leaving the deficiencies now in controversy. The facts as they appear from the proofs, are that about the 6th day of January, 1877, Meserve, by a contract in writing, agreed to sell to defendant John B. Brown, lots 2 and 3, on Purchase street, in the city of Boston, subject to a mortgage on each lot to the complainant the Episcopal City Mission, for $19,500, which mortgage Brown was to assume and pay, and Brown was to pay Meserve, in part, by conveying to him certain lots and lands in and about the city of Chicago, upon which there were

incumbrances to the amount of something over $10,000, which Meserve was to assume and pay. In the early part of March, 1877, the parties were ready to exchange deeds, when Brown requested Meserve to make the deed of the Boston property to his wife, the defendant Lucy T. Brown. Meserve hesitated about complying with this request, on the ground that he knew nothing of Mrs. Brown's pecuniary responsibility, and did not know that her agreement to pay the mortgages upon the Boston lots would be a sufficient guaranty to him that they would be paid. To obviate this objection, Brown proposed to give his individual bond to Meserve, by which he should guaranty the performance of Mrs. Brown's assumption of the mortgage indebtedness. This proposition was satisfactory to Meserve, and separate deeds were made to Mrs. Brown for each of the Boston lots, each of which contained an assumption clause, as follows:

"And this conveyance is now made subject to a mortgage on said store, for $19,500, made by me to said Episcopal City Mission, which mortgage, with all interest thereon, said Lucy T. Brown hereby assumes and agrees to pay, and to protect and save harmless the said grantor therefrom."

And in the deed of Brown to Meserve of the Chicago property a similar clause was inserted, by which Meserve assumed and agreed to pay, as his own debt, as a part of the purchase price, the incumbrances on said property, and save and keep Brown harmless therefrom. The bond given by Brown to Meserve was in the following language:

"Know all men by these presents, that I, John B. Brown, am holden and stand firmly bound unto George W. Meserve in the sum of $10,000, to the payment of which to the said Meserve and his executors, administrators, or assigns I hereby bind myself, my heirs, executors, and administrators. The condition of the above obligation is such that, whereas, the said George W. Meserve did by deed dated March 1, 1877, convey to Lucy T. Brown, two separate estates on Purchase street, Boston, Mass., each estate being subject to a mortgage of $19,500, at 6½ per cent. interest, to the Episcopal City Mission, of even date with said deed, which said mortgage, and interest thereon, said Lucy T. Brown assumes and agrees to pay and hold the said Meserve harmless therefrom. Now, therefore, if the said Lucy T. Brown shall perform the obligations of said deed as therein expressed, and save the said Meserve harmless, then this obligation shall be void; otherwise it shall remain in full force and virtue, only to the extent, however, that said Meserve suffers harm."

It is conceded that in the fall of 1877 default was made in the payment of the interest upon the Boston property, and that thereupon the Episcopal City Mission entered into possession thereof, and continued in such possession for several years, collecting and retaining the rents; and in the spring of 1884, they proceeded to foreclose the said mortgages, and sell the mortgaged property, the result of which foreclosure and sale was to leave a deficiency on lot 3 of $10,574.71, and on lot 4 of $10,074.71, which are the deficiencies now sought to be recovered.

It is also conceded that Meserve made default in the payment of the indebtedness secured upon the Chicago property, and that Brown was compelled to pay and settle the same. The proof also shows without dispute that Mrs. Brown was not consulted in regard to having the deed

of the Boston property made to her, and that she never consented to the taking of said deed, nor to the assumption of the said mortgage indebtedness; that in fact, while she was informed, soon after the deeds were made, that they ran to her, instead of her husband, she was not informed that the deeds contained any assumption of the mortgages in question until about the time this suit was commenced, in December, 1886, and upon these facts the counsel for the Episcopal City Mission concedes that no case for a recovery is made against Mrs. Brown,—a view in which I fully concur.

The complainant the Episcopal City Mission, however, claims—*First*, to hold Brown liable for the full amount of this deficiency, because he fraudulently used the name of his wife as grantee in these two deeds without authority, and thereby made himself personally responsible for the amount of the indebtedness which he, without authority, caused Mrs. Brown to assume; *second*, that, if not liable for the full amount of such deficiencies, he is liable to the full amount of the guaranty bond which Meserve has transferred to the complainant the Episcopal City Mission. The proof in the case clearly shows that while, in the inception of the transaction, it was agreed that the conveyance by Meserve of the Boston property was to be made to Brown, yet, when the deeds came to be exchanged between the parties, Brown requested that the deed be made to Mrs. Brown, and Meserve acceded to this request upon Brown's giving him the indemnity bond which I have quoted. The reason for giving this bond is given by Mr. Brown in his testimony, in substance, as follows:

"By the contract, I had agreed to assume the mortgages upon these stores to the amount of $19,500 each, and the objection was made that, if the property was deeded to Mrs. Brown, I should not be carrying out my contract, and therefore he required the bond. I recognized the claim, and agreed to give my bond to meet that responsibility. We agreed upon five thousand dollars at first, but, later, Mr. Meserve raised the question that, as this bond was to stand in lieu of the obligation in the deed, it should be for $10,000. This was agreed to, and a bond for that amount was given. The deeds were delivered at the time I delivered the bond. I delivered Mr. Meserve my deed of the Chicago property and my bond for $10,000, and received from him the two deeds of the Purchase-St. stores at the same time."

And Meserve in his testimony says:

"The reasons or circumstances leading to the making of the bond were to hold me harmless against possible loss on those notes. The facts and circumstances which led to the fixing of the amount of the bond were to make Mr. Brown's liability equal to my own. I had assumed about $10,000 in Chicago. My feeling was that he had assumed $39,000 here, and there could not possibly be a loss to that extent, if any. I did not feel that there would be. I recollect it now as a sort of balance between us in our liabilities. I knew my mortgages to be well-secured mercantile property, that could not depreciate to any great extent; his were secured by vacant lots. I took a bond because I was deeding to a straw grantee,—somebody that I did not know. I did not mean to make the bond the whole amount of the difference, because I knew there could be no possible way of making my security worthless in three years."

This testimony, together with other quotations which might be made from the record, show, I think, conclusively that Meserve consented to the substitution of Mrs. Brown as grantee in his deed of the Boston property, without any regard to her responsibility upon the assumption clauses in the deeds, relying wholly upon the indemnity bond of Mr. Brown to secure him against loss as the mortgagor of the Boston property. I do not mean by this that Mrs. Brown would have been wholly released from liability on these assumption clauses if she had been a consenting party thereto, but that Meserve looked only to Brown's bond for his indemnity, and made no question either as to Mrs. Brown's solvency or as to whether she knew anything about the deed to her and its obligations, or not, and that taking the bond by Meserve shows that he was not imposed upon. There is no proof that there was any fraud or false statement made by Brown to Meserve to induce him to make the deeds to Mrs. Brown. No statement to the effect that Mrs. Brown had consented to take the title and assume the mortgage indebtedness, or that he, as her agent, had authority to bind her in any way in the assumption of the mortgage indebtedness. Meserve only insisted upon the $10,000 individual bond of Brown to protect him against the mortgages he had given the Episcopal City Mission, and which, by the terms of the deeds, Mrs. Brown had assumed. Meserve was not imposed upon by any statement, express or implied, that Mrs. Brown was or was not a consenting party to the transaction; but Meserve, upon Brown's agreeing to give the bond, consented to the substitution of Mrs. Brown as the grantee, relying solely upon Brown's bond, knowing, as he says in his testimony, that he was deeding the property to a "straw grantee." I see no reason why these parties had not an unquestionable right to make this substitution, and, if Meserve consented to it, it is binding on him and all claiming under him. This being, in my estimation, a clear case of substitution by consent, with no question on the part of Meserve of Brown's right to ask such substitution, I do not think that any such case of imposition upon Meserve is made out as entitles the complainant or Meserve to invoke the principle that, where an agent pretends to act for a principal without authority, even without fraud, he is himself liable as principal, as there is no proof that Brown pretended to have any authority to act for Mrs. Brown in the matter.

The proof shows, and it is conceded, that before the commencement of this suit Meserve had transferred the indemnity bond given him by Brown to the Episcopal City Mission, and fully consented that the mission might enforce whatever rights he (Meserve) had as against Brown. No question, therefore, arises in the case as to the right of the Episcopal City Mission to enforce by this suit whatever rights Meserve had under the bond as against Brown. Copious citations of authorities in regard to the right of a mortgagee to enforce an agreement on the part of the grantee of a mortgagor to pay the mortgage debt have been made; but I think all the questions that arise in this case are substantially settled in the late case of *Keller* v. *Ashford*, reported in 133 U. S. 610, 10 Sup. Ct. Rep. 494. It is there decided, in substance, that the mortgagee

may avail himself of any undertakings made with the mortgagor for the payment of the mortgage indebtedness, to the extent that the mortgagor might enforce such undertaking. Applying this rule to this case, then, the question is, what rights could Meserve have enforced against John B. Brown upon this bond? It is admitted that the transaction between Meserve and Brown was, in effect, an exchange of property, in which each party assumed to pay certain debts or obligations of the other. And it is also admitted that Meserve made default in his undertaking, and that Brown was compelled to pay and settle, and has paid and settled, the incumbrances upon the Chicago property which Meserve assumed to pay. It is equally clear that Brown would be entitled, in an action by Meserve against him upon this bond, to set off any payments which he had been compelled to make upon the incumbrances on this Chicago property which Meserve assumed and has failed to pay, and which Brown has since paid or remains liable therefor. The proof shows that Brown's payments in cash, or what was accepted as cash from him, upon the incumbrances on this Chicago property, amount, with interest, to $9,122.63. It is true that Brown testifies that, while some of this indebtedness which Meserve assumed still remains uncanceled, yet he has made such arrangements with the holders, by agreements for the payment of other indebtedness, that he expects these debts so assumed by Meserve will all be canceled, so that Meserve will be relieved from payment. This, in my opinion, fully cancels, by right of recoupment, all claims Meserve would have against Brown on the bond, and hence cancels all claims of the complainant therein.

It is urged that Brown paid some portion of this indebtedness with stocks and bonds, and that the complainant has the right to inquire into the value of those stocks and bonds. I do not think this position in any sense tenable. The defendant John B. Brown had the right to settle with his creditors in any way that he saw fit, and pay them either in property or money, so long as he retired and liquidated his indebtedness. I do not therefore see that Meserve would have any right of recovery against Brown upon this bond, as, by the express terms of the bond, he is only to be liable to the extent that Meserve sustains harm, and, so far as the proof shows, Meserve has sustained no harm, as he has not paid a penny on the mortgage indebtedness which Mrs. Brown assumed, and if he has no right, certainly the Episcopal City Mission, in whose behalf this suit is prosecuted, can have no such right. The bill is therefore dismissed for want of equity.

CASE v. LOFTUS.

(*Circuit Court, D. Oregon.* November 8, 1890.)

CONSTITUTIONAL LAW—TITLE OF ACT.

The clause in section 8 of the act of 1885, purporting to grant the tide-land on Yaquina bay, in front of lot 4, to the town of Newport is void, because the subject is not "expressed" in the title, as required by said section 20.

(*Syllabus by the Court.*)

In Equity.

Mr. James F. Watson, for plaintiff.

Mr. Lewis L. McArthur, for defendant.

DEADY, J. This suit is brought to have the defendant restrained from constructing and maintaining a tramway along the northern shore of Yaquina bay, near its mouth, in front of certain property belonging to the plaintiff, whereby access to the water from said property is hindered and prevented.

The property in question is lot 4 of section 8, in township 11 south, of range 11 west, for which the plaintiff obtained a patent from the United States on November 1, 1875.

The case was before the court on a demurrer to the bill, (39 Fed. Rep. 730,) when it was held, on overruling the same: (1) "On the admission of a new state into the Union, the 'shore' or tide-land therein, not disposed of by the United States, prior thereto, becomes the property of the state;" and (2) "the owner of land abutting on the 'shore' or tide-land in this state, and not disposed of by the United States or the state, has a right of access from his land to the water, and may erect and maintain a private wharf there for his own convenience, so long as he does not materially interfere with the rights of the general public, and subject to the power of the legislature to regulate such use." The defendant then answered, and the plaintiff filed the general replication. Testimony was taken, and the case submitted after a view of the premises by the court.

The material facts, about which there is very little if any dispute, are as follows:

At the time of filing the bill, the United States, through its proper officers, was engaged in improving the mouth of Yaquina bay, by the construction of a jetty, in pursuance of an act of congress, and, for the purpose of transporting stone to said jetty, the defendant constructed the tramway, as alleged, under the direction of the engineer officer in charge of the work; that on February 5, 1885, the tide-land in question was owned by the state of Oregon, and on that day the legislature of the state passed an act, granting the same to the town of Newport "for the common benefit" thereof, with power to lease the same for any period of not more than 30 years; that on July 12, 1887, the common council of Newport passed an ordinance, in pursuance of which the tide-land in front of said lot 4 was, on November 9, 1888, leased to the engineer of-

ficer in charge of the construction of said jetty for the period of three years.

The tramway rests on heavy piles, thoroughly braced, and is about the line of low-water mark. It is about 8 feet wide, and 15 feet high. Owing to the check which the tide receives in passing through the timbers of the tramway, the sand in the water is deposited, and the space thereunder, and back to high-water mark, is being filed up.

The plaintiff's property, on which he maintains a public house for the accommodation of travelers and visitors to the bay, extends 1,100 feet on the shore line, and this tramway extends clear across it, and is altogether impassable by boats; but there are two openings under the same, opposite the plaintiff's property, through which a wagon can be driven. Back of the tramway, about 30 feet, and at the foot of the bluff and stairway leading down from the plaintiff's house to the shore, is a bulkhead or pier at which he was in the habit of landing and fastening his boats coming in from the bay with goods or travelers. This is now inaccessible by boats, both on account of the structure of the tramway, and the deposit of sand caused thereby.

On the law of the case, as laid down in the decision on the demurrer, this structure is clearly a purpresture or obstruction to the plaintiff's right, as a littoral proprietor, to have access to and from the water over this shore, unless the defendant or the United States, under which he is acting, has succeeded, by means of the lease from the town of Newport, to all the rights of the state in the premises; that is, the *jus publicum*, or the right of the public to use the same for the purpose of navigation or fishing, and the *jus privatum*, or the private property in the land.

These rights, it is claimed, were acquired by the town from the state under section 3 of the act of February 5, 1885, (Sess. Laws, 5.) On the other hand, it is contended that so much of this section as purports to grant this tide-land to the town of Newport relates to a subject not "expressed" in the title of the act, and, therefore, under section 20 of article 4 of the constitution, is illegal and void.

By its title, the act purports to be amendatory of an act, October 24, 1874, (Sess. Laws, 51,) providing "for the construction of the Willamette Valley & Coast Railway," as amended by the act of October 14, 1878, (Sess. Laws, 3,) and to confirm the rights of said railway company under the said acts.

There is nothing in the title of this act which in any way expresses or even suggests that it contains a grant of any land to the town of Newport, nor is the subject of such grant provided for or even alluded to in the act of 1874, or that of 1878, amendatory of the same. Section 2 of the act extends the time within which the company may complete its road, and section 3 confirms thereto the grant made in the acts of 1874 and 1878 of certain tide and marsh and other lands, and waives all rights reserved to the state under the same, with a proviso that "the tide and overflowed lands in and adjoining" the town of Newport "are exempted from the operation" of these acts.

In section 3 these lands are described, among others, as lying "in front of lot 4" aforesaid; and the section then further provides that the same "are hereby granted" to said town "for the common benefit" thereof, "with power to lease the same for a period not to exceed thirty years at a time."

The constitution (section 20, art. 4) declares that an act of the legislature shall be void, so far as the subject thereof is not "expressed" in the title, and it is the bounden duty of courts, whenever the occasion arises, to give it effect.

In the nature of things, it is more than likely that this act was passed without the legislature being aware that this clause was in it. To prevent just such exploits this provision was placed in the constitution, and it should not be made naught or frittered away in deference to the acts of ignorant or indolent legislators.

As I have said, there is nothing in the title of the act of 1874, or in that of the prior amendatory one of 1878, that indicates that the subject of a grant of tide-lands to the town of Newport was mentioned or provided for therein, so the case does not come within *State* v. *Phenline*, 16 Or. 109, 17 Pac. Rep. 572, wherein it is held that if the subject of an act is expressed in the title—as pilotage on a certain water—an act amendatory of the same need not express the subject thereof in its title. In other words, an act amendatory of another, which relates to pilotage, purports, *prima facie*, to relate to the same subject, which therefore need not be otherwise expressed in its title. But if such amendatory act also contains a provision relating to any other subject, as a grant of tide-land to the town of Newport, it will be so far void, unless the same is expressed in the title.

It is further suggested on behalf of the defendant that the town of Newport has authority over the tide-land in front of the town, by virtue of sections 4227 and 4228 of the Compilation of 1887, regulating wharves in incorporated towns. These sections are simply intended to give the municipal corporation power to limit the extension of wharves on navigable waters beyond low-water mark, and do not pretend to give the town any interest in or control over the shore between high and low water mark.

The plaintiff is entitled to the relief prayed for in the bill,—an injunction commanding the defendant to remove the tramway, and restraining him from renewing the same or otherwise obstructing the passage of the plaintiff over the shore to and from his property between high and low water mark.

On the argument counsel for the plaintiff conceded that, in view of the public importance of the completion of the jetty, for which the tramway was constructed and is now used, the injunction need not issue until the completion of the jetly, and not exceeding the period of three years from the date of this decree.

Therefore the decree of the court will be that the tramway in front of the plaintiff's property, to-wit, lot 4 aforesaid, is an unlawful obstruction and injury to the right of the plaintiff to have free access to and from

the water over and across the shore in front of said property, and that the town of Newport has no right to lease said shore to any one, nor to maintain or authorize said tramway thereon, and that an injunction may issue as prayed for in the bill, on motion of the plaintiff or his assigns, on the completion of the jetty or the expiration of three years from this date, and that the plaintiff recover from the defendant his costs and expenses herein sustained.

STEPHENS *v.* FOLLETT *et al.*

(Circuit Court, D. Minnesota. October 18, 1890.)

1. NATIONAL BANKS—INDIVIDUAL LIABILITY OF SHAREHOLDERS.
One who subscribes and pays for a specified number of shares of a "proposed increase" of the capital stock of a national bank, which increase is in fact never issued, and to whom the bank officials transfer, instead, old stock of the bank without his knowledge or consent, is not a "shareholder" within the meaning of Rev. St. U. S. § 5151, imposing individual liability on the shareholders for the debts of national banks.

2. SAME—ESTOPPEL.
The fact that the subscriber for the new shares received a dividend on the old shares so transferred to him does not estop him from denying his liability as a shareholder, where such dividend was received in the belief that it was paid to him by virtue of his subscription to the new stock.

At Law.

This suit was tried by the court, a stipulation waiving a jury being filed. The action is brought to recover an assessment made by the comptroller of the currency on the stockholders of the Fifth National Bank of the city of St. Louis, which went into liquidation November 7, 1887, and of which the plaintiff was appointed receiver. The assessment was 100 per cent. of the par value of the shares. The complaint alleges that Stephen A. Gardner held and was the owner of 241 shares of the capital stock of said bank, of the par value of $100 each, amounting to $24,100, and that said Gardner died testate March 11, 1889, and that the defendants are the duly-qualified executors of his last will and testament, and that by reason thereof the plaintiff is entitled to recover $24,100, with interest from June 22, 1889. The defendants admit that Gardner owned 115 shares of the stock, but deny that he owned any more; and further, in substance, set up, that if any other or greater amount than 115 shares stands in his name on the books, the entries thereof are fraudulent and unauthorized, and unknown to said Gardner until after the failure of the bank and the appointment of a receiver. The following facts are stipulated, and the evidence of the receiver and other witnesses introduced do not change them. The receiver testifies that when he took charge of the bank he found Gardner a subscriber for 100 shares of the proposed increase of the capital stock, but he never regarded him as a subscriber to the new stock, and the books of the bank do not show that he received new stock.

The following are the findings of fact and conclusions of law:

"This cause, being regularly on the calendar for trial at the general term of this court sitting at St. Paul, Minnesota, commencing on the 9th day of

December, 1889, and under the stipulation on file herein, waiving a jury, and agreeing to the trial hereof by this court sitting without a jury, having come regularly on for trial before me on the 5th day of May, A. D. 1890, and having been then tried and submitted to this court, sitting without a jury, for its decision, William Ely Bramhall, Esq., then and there appearing for and in behalf of plaintiff, and McNeil V. Seymour, Esq., and John M. Gilman, Esq., having then and there appeared for and on behalf of the defendants: Now, after having fully heard said counsel, and after full and due consideration and deliberation, I find as facts, in addition to those contained in the stipulation and agreement in writing between the parties hereto, dated on the 19th day of February, 1890, and which was filed in the office of the clerk of this court on February 20, 1890, as follows:

"*First.* That at the time said Stephen Gardner subscribed to the proposed increase of the capital stock of the Fifth National Bank of St. Louis, in 1886, he was about 80 years of age, and was, and had been for some time prior thereto, and continued afterwards to be, in very feeble health.

"*Second.* That at the time said officers of said bank, referred to in said stipulation, applied to said Stephen Gardner, and by its circular referred to in the said stipulation, invited him to subscribe to the increase of the capital stock of said bank, as well as for a long time prior thereto, said bank was, and has ever since continued to be, wholly insolvent, and was known to be insolvent by the officers of said bank at the time of sending said circular, and at the time of receiving said Stephen Gardner's written subscription to said proposed increase of stock, and at the time said sum of ten thousand dollars was received by said bank.

"*Third.* That said Stephen Gardner paid said sum of ten thousand dollars to said bank for one hundred shares of the proposed increase or new issue of the capital stock of said bank, which he supposed would be made on the 1st day January, 1887; that said bank, upon receiving said sum of money, paid a portion thereof to the president of said bank, and the balance of said sum to one of the directors, and in return therefor permitted said president and director to surrender to said bank one hundred shares of the original capital stock of said bank, and thereupon, and in lieu thereof, said bank did issue a certificate for one hundred shares of said original stock in the name of Stephen Gardner, and sent said certificate to said Stephen Gardner at Hastings, Minnesota, where he resided; that there was nothing on the face of the certificate so issued and received by said Gardner to show that it was not one hundred shares of the proposed increase of stock for which said Stephen Gardner had subscribed, and for which he had paid his money; that the letter in which said certificate was inclosed, taken in connection with prior correspondence, indicated, and was intended by the officer of the bank who wrote it to indicate, that the said certificate represented the new issue of said stock which was proposed to be made, and said Stephen Gardner believed that such certificate did in fact represent the new issue of the capital stock of said bank for which he had subscribed, and had no knowledge or intimation to the contrary until long after the failure of said bank, and long after the appointment of the plaintiff herein as its receiver.

"*Fourth.* That when the dividend mentioned in the stipulation was received by said Stephen Gardner, he believed it was a dividend upon the stock of the proposed increase which he supposed he had in said bank, and never learned or thought to the contrary until long after the failure of said bank and the appointment of the plaintiff as receiver.

"*Fifth.* That Exhibit B, attached to the deposition taken herein, is the list of shareholders of said bank, certified to the comptroller of the currency on the 1st Monday of July, 1887, by said bank. But in first preparing and entering upon the book kept for that purpose the list of shareholders on the 1st

Monday in July, 1887, Mr. Gardner was entered as the owner of 115 shares only, and at some subsequent date the figures were changed from 115 to 215. As to when this alteration was made, there is no satisfactory direct testimony, but the said number of shares (215) ever afterwards, as changed, continued to stand in his name.

"*Sixth.* That, as soon as said Stephen Gardner learned that he had not received the stock for which he had subscribed, he promptly through his agent, interviewed said receiver, and, though no formal claim was presented, the repayment of said sum of ten thousand dollars was demanded and claimed; that said receiver stated that he could not entertain such claim; that said agent asked said receiver if he would deem said claim presented. Said receiver replied that he would treat said claim as presented, but would reject the same.

"*Seventh.* That in writing the letters signed by Charles Espenschied, and attached to the stipulation, said Charles Espenschied did so at the request of said Stephen Gardner.

"As conclusions of law I find that the plaintiff, as receiver of the said Fifth National Bank, is entitled to recover of the said defendants, as the executors of the last will and testament of Stephen Gardner, deceased, the sum of eleven thousand five hundred (11,500) dollars, with interest thereon at the rate of seven per cent. per annum from June 22, 1889, together with the costs and disbursements herein, to be taxed by the clerk and entered in the judgment herein, to be paid out of the estate of said Stephen Gardner, deceased, and that plaintiff is not entitled to any other or further relief herein. Therefore it is ordered that judgment be entered in favor of said plaintiff, as such receiver, and against the said defendants, as such executors, for $11,500, with interest at seven per cent. per annum from June 22, 1889, and for the costs and disbursements herein, to be paid out of the estate of the said Stephen Gardner, deceased.

Cole, Bramhall & Morris, for plaintiff.

Stringer & Seymour, M. D. Munn, and *J. M. Gilman,* for defendants.

NELSON, J. The defendants do not attempt to escape liability for the reason that Gardner purchased shares of stock through misrepresentation of the vendor or his agents; nor is there any suggestion by the receiver in the pleadings, or any proof, that they are liable because the testator was a subscriber to the increase of the capital stock of the bank, although his name appears on the list of subscribers for 100 shares. The suit is brought to recover an assessment made by the comptroller upon the defendants' testator, as an owner of the original stock issued to subscribers when the bank was first organized, and in order to recover the plaintiff must prove that the testator was the owner of the stock which is entered in the bank-books in his name. The presumption is, on the stipulated facts, as his name is registered in the stock book as a stockholder to the amount of 215 shares, that he was the owner thereof, particularly when he held certificates for such stock, duly issued and signed by the proper bank officers; but these facts are not conclusive of ownership. Such *prima facie* case throws upon the defendants the *onus* of rebutting the presumption.

It is conceded that 115 shares of the capital stock were owned by Gardner, but it is claimed that they are not liable for an assessment upon the 100 shares registered in his name, and for which a certificate was issued January 4, 1887. The manner in which this certificate for 100 shares

issued appears in the stipulated facts, and the question presented is, did the testator purchase this stock, or has he consented to the transfer of the stock registered in his name? A purchase of stock in an organized bank from one who is a stockholder required the mutual assent of the vendor and vendee to the contract. If a lack of mutual consent is shown, and there is an absence of contract between the parties that the testator should purchase the 100 shares of old stock, and thus become liable as a stockholder, he was not a stockholder or owner, within the meaning of the national bank laws,[1] imposing individual liability, although the stock was transferred and registered in his name. The criterion of liability is whether any act has been done by which the corporation was forced to receive the testator as a stockholder. In the face of the entry and transfer of the stock and issue of a certificate, the defendants may introduce evidence to show that the entry is false, and the certificate falsely issued. The testimony shows that the bank was in a sickly condition, and the transfer from the president and one of the directors of their stock was unauthorized. The sale or transfer of stock of a national bank is not governed by different rules from those which apply to other incorporated companies. Proof must be made of the assent of the parties thereto. They must have assented to the transfer, as shown by the bank-books, to make the testator a stockholder, and subject to the onerous liability which the national bank act imposes on stockholders. The proof is clear that the defendants' testator subscribed for and sent his money to the bank to pay for 100 shares of the proposed increase of the capital stock of the bank, and the certificate sent was old stock transferred to him without his knowledge or consent. Such a transaction cannot be upheld. A transfer of stock under such circumstances, without the knowledge of the person to whom it is transferred, does not make him liable as a shareholder. He must be held out to the public as a shareholder, with his knowledge of the fact. It is claimed that this defense cannot be set up on a suit brought by the receiver to recover an assessment made, in order that the creditors of the bank may obtain satisfaction; and it is said that creditors of the bank would suffer by such a rule. Injurious consequences to creditors, which may happen after such an authorized transfer of stock, cannot make the defendants responsible on a contract which their testator never made and had nothing to do with. There can be no estoppel unless defendants' testator assented to the transfer of the stock. He had no knowledge that he was registered on the stock-book as the owner of 100 shares of the original stock of the bank, which had been transferred to him by Overstoltz, the president, and Rosenthal, a director; and there were no circumstances disclosed in the transaction between him and the bank, when he subscribed for 100 shares of the increase to the stock and paid for it, that put him upon an inquiry to ascertain whether the certificate issued represented the stock he subscribed for or old stock fraudulently transferred. He had purchased no stock from any stockholder, but had responded favorably to

[1] Rev. St. U. S. § 5151.

the circular sent him for an increase of the capital stock of the bank, and had paid for 100 shares of the new stock which he was anxious to get. A certificate dated about the time the president of the bank informed him the new increase stock would probably be issued was sent, properly signed, and there was nothing upon its face to indicate it was not the new stock subscribed for. A dividend was declared and paid upon the original stock June 7, 1887, and it is urged that the testator, having received it, is estopped from now asserting that he did not own these shares. While a dividend might, if the person in whose name the stock is registered receive it, tend to establish ownership, still receipt of a dividend is not conclusive proof that he is a stockholder within the law imposing individual liability. The evidence taken, in addition to the facts stipulated, does not change the *status* of the case.

In the case of *Keyser* v. *Hitz*, 133 U. S. 139, 10 Sup. Ct. Rep. 290, the court holds that a transfer of stock in a bank to a person without his knowledge or consent does not, of itself, impose upon the transferee the liability attached by law to the position of shareholder in the association; but if the transferee does any act approving or acquiescing in the transfer, or in any way ratifies it, or accepts any benefit arising from the ownership of such stock, he becomes liable to be treated as a shareholder, with such responsibilities as the law imposes in such cases. Gardner did not know, when a dividend was paid to him upon 215 shares, that such an amount of old stock was entered in his name, for he never had purchased or authorized the transfer of the 100 shares which appear in the books as transferred to him. He therefore never accepted any benefit arising from the ownership of such stock. It is said that Gardner waived his right to complain by not returning the dividend, or offering to return it, and cannot defeat the assessment upon the 100 shares. This failure to tender back the dividend does not, under the circumstances, prevent the defense urged.

After full consideration, I am of the opinion that the defendants must pay the assessment of 100 per cent. of the par value upon 115 shares of stock only, and judgment must be entered for $11,500, with interest at 7 per cent. from June 22, 1889; and it is so ordered.

UNITED STATES *v.* ONE DISTILLERY.

(*District Court, S. D. California.* October 20, 1890.)

INTERNAL REVENUE—FORFEITURE—DOUBLE PUNISHMENT.

After an officer and stockholder of a corporation engaged in distilling is convicted for a violation of the internal revenue law, an action cannot be maintained to enforce the forfeiture of the corporation's property for the same offense, even though the forfeiture is resisted only by the other stockholders. Following *U. S.* v. *McKee*, 4 Dill. 128.

At Law. Information for the forfeiture of certain real and personal property for alleged violation of the internal revenue laws.

Willoughby Cole, U. S. Dist. Atty.
Henry C. McPike and *Brousseau & Hatch*, for claimants.

Ross, J. Sections 3257, 3281, 3305, 3453, and 3456 of the Revised Statutes of the United States are as follows:

"Sec. 3257. Whenever any person engaged in carrying on the business of a distiller defrauds, or attempts to defraud, the United States of the tax on the spirits distilled by him, or any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits, found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

"Sec. 3281. Every person who carries on the business of a distiller without having given bond, as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same, and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

"Sec. 3305. Whenever any false entry is made in, or any entry required to be made is omitted from, either of the said books mentioned in the two preceding sections, with intent to defraud or to conceal from the revenue officers any fact or particular required to be stated and entered in either of said books, or to mislead in reference thereto, or any distiller, as aforesaid, omits or refuses to provide either of said books, or cancels, obliterates, or destroys any part of either of said books, or any entry therein, with intent to defraud, or permits the same to be done, or such books, or either of them, are not produced when required by any revenue officer, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States. And every person who makes such false entry, or omits to make any entry hereinbefore required to be made, with the intent aforesaid, or who causes or procures the same to be done, or fraudulently cancels, obliterates, or destroys any part of said books, or any entry therein, or willfully fails to produce such books, or either of them, shall be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months, nor more than two years."

"Sec. 3453. All goods, wares, merchandise, articles, or objects on which

taxes are imposed, which shall be found in the possession or custody, or within the control, of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the commissioner of internal revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax, and all tools, implements, instruments, and personal property whatsoever in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited, as aforesaid. The proceedings to enforce such forfeiture shall be in the nature of a proceeding *in rem* in the circuit court or district court of the United States for the district where such seizure is made."

"Sec. 3456. If any distiller, rectifier, wholesale liquor dealer, or manufacturer of tobacco or cigars, shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this title prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, or wholesale [liquor] dealer, all distilled spirits or liquors owned by him, or in which he has any interest as owner, and, if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States."

Based on these sections, an information was filed by the district attorney on the 13th of November, 1888, and amended on the 11th of January, 1889, for the forfeiture of certain real and personal property therein specifically described, and which was seized by the collector of internal revenue for this district on the 1st day of November, 1888, consisting of five acres of land, situated about four miles from the city of Fresno, upon which stand the distillery and winery buildings and distillery and winery premises theretofore occupied by the Fruitvale Wine & Fruit Company, a corporation organized and existing pursuant to the laws of the state of California, together with all and singular the buildings standing upon said winery and distillery premises; also, one still, one elevator, one grape stemmer, one lot of belting, one cauldron, one suction pump, one wine-press, one wine-tank, two trucks, one windmill and pump, nine wine-tanks, twelve wine-tanks, sixty-nine puncheons, five barrels, fifty-four fermenting tubs, one lot of hose, one grind-stone, and a lot of tools, one Howe scales, one lot of lumber for tanks, one lot of lumber, three hundred gallons of sweet wine, one lot of hoop iron and pipe, one horse and tread-wheel; also, thirty-nine puncheons, eighteen wine-tanks, two fermenting tanks, seventy-eight barrels, twenty-nine half barrels, nine cords of wood, fifteen tons of grapes, four hundred feet of hose, seventy thousand gallons of claret, thirty-eight thousand gallons of white wine, two thousand gallons of port wine, one thousand gallons of brandy, four hundred and fifty gallons of alcohol, ten thousand gallons of wash for brandy, and all the tools, implements, and

utensils used by said Fruitvale Wine & Fruit Company in the manufacture of distilled spirits. The amended information alleged as grounds for a decree of forfeiture of the property in question in substance as follows:

(1) That on the 1st day of June, 1888, the said Fruitvale Wine & Fruit Company had in its possession, custody, and control certain proof brandy and high proof spirits, for the purpose of selling and removing the same in fraud of the revenue laws, and with the design of avoiding payment of the taxes due the government.

(2) That the said Fruitvale Wine & Fruit Company, being a distiller of distilled spirits, and engaged in carrying on that business at the aforesaid distillery, did defraud the government during the months of July, August, September, October, November, and December, 1887, of the tax on a large quantity of spirits distilled by it, by the fraudulent removal of such spirits from the distillery where the same had been distilled to a place other than a distillery, bonded or designated warehouse, or place of depository, without the tax thereon being paid, and without the packages in which the same was contained being stamped or branded, and without the law in relation to distilled spirits being complied with in any manner, and with the intent to defraud the government of the tax due on said spirits.

(3) That the said Fruitvale Wine & Fruit Company, as such distiller, during the months of July, August, September, October, November, and December, 1887, with intent to defraud the government of the tax due on spirits distilled by it, made, through its secretary, W. Moore Young, false entries in the books required by law to kept by it, and omitted to do other things, and perform other acts in relation thereto, required by law to be performed, and by such means defrauded the government.

(4) That the said Fruitvale Wine & Fruit Company, as such distiller, did, during the months of July, August, September, October, November, and December, 1887, knowingly and willfully omit, neglect, and refuse to do or cause to be done any of the acts required by law in carrying on its business of distilling, and did during the same time, in carrying on its said business, commit acts prohibited by the law.

It is alleged that at all of the times referred to Wolters, Helm, Austin, and Kauffman, who are claimants herein, were holders of stock of the Fruitvale Wine & Fruit Company, and were cognizant of all of the alleged fraudulent acts and omissions on the part of the corporation, and that they subsequently, with full knowledge of such fraudulent acts and omissions, purchased all of the said property. Wolters, Helm, Austin, and Kauffman appeared as claimants and filed an answer to the amended information, in which all of the allegations of fraud on their part are denied, and which sets up that they are the owners of all of the property described in the information, or so much of it as actually existed at the time of seizure; that they acquired certain described portions of it by purchase at a public sale made by the assignee of the Fruitvale Wine & Fruit Company on the 9th of June, 1888, for the sum of $7,700, which sum they paid, and thereupon received possession of the property purchased; that thereupon claimants formed a partnership for the purpose of operating the winery on the premises, and added thereto necessary machinery and buildings to the extent of $5,000 in value; that on or about June 20, 1888, and while claimants were in possession of the

premises, and in good faith making large and expensive additions thereto, the property was seized by the collector of internal revenue for an alleged violation of the revenue laws by the Fruitvale Wine & Fruit Company in the year 1887; that, by reason of negotiations with the revenue officials, the property was, on or about October 27, 1888, released, and claimants restored to its possession, whereupon they proceeded to make further improvements and expenditures, and engaged in the business of operating the winery, adding from their personal funds, in the purchase of stock, material, and machinery, the sum of $25,000, pursued the business, and in all respects complied with the laws of the United States and the rules and regulations of the revenue department; that afterwards, to-wit, on or about the 2d day of November, 1888, on account of the alleged wrongful acts of the Fruitvale Wine & Fruit Company occurring in the year 1887, the said premises and property, with all the additions and improvements, stock and material, made and supplied by claimants, were again seized by the revenue officers, and the possession thereof withheld from claimants until on or about November 30, 1888, when claimants were restored to possession by giving a bond in the sum of $35,000; that afterwards, to-wit, on the 8th of December, 1888, the said premises and property were again seized by the internal revenue collector on account of the alleged wrong-doing of the Fruitvale Wine & Fruit Company during its occupancy thereof, and that, in order to prevent the sale of said property and to recover its possession, and to prevent further loss and damage by the suspension of their business, the claimants were compelled to and did pay under protest to the collector the sum of $3,892, alleged to be due and owing from the Fruitvale Wine & Fruit Company to the government by reason of the failure of that corporation to comply with the laws and the rules and regulations of the revenue department during the year 1887; that between the dates of the first seizure, on or about June 20, 1888, and the second seizure, on or about November 2, 1888, claimants added to the premises certain described property, the aggregate value of which was over $25,000, all of which was included in the seizure of November 2d, and also in that of December 8, 1888, without fault on their part. They deny that the 1,000 gallons of brandy, or the 450 gallons of alcohol, or the barrels containing the same, found in their possession at the time of the seizure in November, constituted any part of the property alleged to have been found in the possession of the Fruitvale Wine & Fruit Company on or about June 1, 1887, or that said brandy or alcohol, or the barrels containing the same, ever were in possession of that company at the distillery or elsewhere. They deny that they, or either of them, ever purchased or received from the Fruitvale Wine & Fruit Company any brandy or alcohol or other high proof spirits knowing that the company had defrauded, or sought to defraud, the government, or had failed to apply or sought to avoid the payment of taxes due thereon, or that the same had for any cause become forfeited to the government.

The claimants, by their answer, admit that they were owners of stock in the Fruitvale Wine & Fruit Company, but deny that they, or either

of them, had any knowledge of the alleged frauds on the part of that corporation or its officers, or ever heard of them until after the seizure of the property by the collector. By an amendment to their answer, filed on the 21st of August, 1890, the claimants set up this defense: That after the last seizure, and on the 20th of December, 1888, W. Moore Young was indicted by the United States grand jury upon five separate counts, charging that he had committed unlawful acts against the revenue laws while secretary of the Fruitvale Wine & Fruit Company, upon which indictment he was tried, and, on the 20th of February, 1889, convicted upon the first count and acquitted as to the other four; the record of his conviction being made a part of the amended answer. The first count of the indictment charged that, as secretary of the Wine & Fruit Company, it became the duty of Young to sign and execute each month a statement in writing showing the date, kind of material used, time of operation and amount of brandy distilled by the company of which he was secretary. That during the month of September, 1887, he signed and executed a report for the previous month, in which he knowingly made false and fraudulent statements concerning the matters and things required of him by the law. The second count made a similar charge respecting his statement for the month of September, the third in respect to October, the fourth in respect to November, and the fifth in respect to December, 1887. The amended answer avers that—

"At all the times mentioned in the indictment said Young was a stockholder in the said company, and that at all the times mentioned in the indictment the said company was the owner of all the real and personal property upon which, and in connection with which, the distillery was situated and operated; that it was by virtue of his position as secretary that he was enabled to sign and execute the documents mentioned in the indictment, and that it was only as such officer that he could have signed the documents; that the whole of the capital and property of the corporation consisted of said distillery and winery premises, with the appurtenances to each, and that the capital stock in said corporation owned by said Secretary Young represented the interest and property which he then had in and owned in said distillery, winery, etc.; that the distillery and distillery premises, winery, and real and personal property mentioned in the libel are the same distillery and distillery premises, winery, and real and personal property mentioned and referred to in said indictment against said Young; that the alleged frauds, concealments, and removals of distilled spirits, and the other fraudulent acts set forth in said libel, are the same frauds, concealments, and removals, and other unlawful acts, inquired of and investigated upon the trial of said Young, and in respect to which he was convicted; that all the evidence which would be necessary to establish the various assignments and charges of fraud set out in the libel was used and introduced upon the trial of said Young; that at the time of the alleged commission of the acts for which a forfeiture is sought to be enforced in this action, said Young was one of the owners of all the property, real and personal, upon which a forfeiture could be decreed by the court."

To this defense, the district attorney, on behalf of the government, demurred, and the question of its sufficiency, accepting as true the facts alleged, is now for decision.

The indictment against Young was based on section 3451 of the Revised Statutes, which is as follows:

"Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years; and the property to which such false or fraudulent instrument relates shall be forfeited."

The case of *U. S.* v. *McKee*, 4 Dill. 128, was a civil action brought by the government to recover the liability, denounced by section 3296 of the Revised Statutes, of double the amount of taxes of which the United States had been defrauded by the unlawful removal of whisky from the distilleries of various persons, in which removals it was charged the defendant aided and abetted. The defendant interposed two defenses: (1) That he had been theretofore indicted, convicted, and punished for the same offenses. (2) That for those offenses he had been pardoned by the president. To that answer the government demurred. Mr. Justice MILLER, with whom concurred Judge DILLON, in overruling the demurrer, held that, if the specific acts of removal on which the civil suit was brought were the same which were proved in the indictment, the former conviction and judgment constituted a bar to the civil suit, on the ground that our laws forbid that any one shall be twice punished for the same crime or misdemeanor. That case was cited with apparent approval by the supreme court in *Coffey* v. *U. S.*, 116 U. S. 445, 6 Sup. Ct. Rep. 437. The circumstance that the civil suit was under one section of the Revised Statutes, and the criminal prosecution under another, was not considered to affect the question, nor is any reason perceived why it should. The decision was based upon the averments that both proceedings were for the same acts or transactions. If the government cannot be permitted to maintain a civil action for the recovery of money denounced as a penalty for a violation of one of the sections of the statute, where the same party had been previously prosecuted and convicted and punished for the same acts or transactions under another section, it would seem, for the same reasons, to follow necessarily that the government cannot be permitted to maintain a civil action for the forfeiture of the property of a person for the acts or transactions for which it has previously prosecuted, convicted, and punished him. It is true that in the present case, Young, the person heretofore indicted, convicted, and punished under section 3451 of the Revised Statutes, is not a claimant, and that the claimants, Wolters, Helm, Austin, and Kauffman, allege in their original answer that they acquired by purchase at a public sale, made by the assignee of the Fruitvale Wine & Fruit Company on the 9th day of June, 1888, all of the property in question then in existence, and have since owned the same, together with that subsequently added. But it must be remembered that the pleadings show that the alleged fraudulent acts of commission and omission upon which the government's right to a decree of forfeiture is based occurred in the year 1887, and that it is the established doctrine of the supreme court that the forfeiture took effect immediately upon the commission of the acts denounced by the statute. *U. S.* v. *Stowell*, 133 U. S. 1, 10 Sup. Ct. Rep.

244. "The right to the property then vests in the United States," said the court, "although their title is not perfected until judicial condemnation. The forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." The purchase made by Wolters, Helm, Austin, and Kauffman at the sale made in June, 1888, by the assignee of the Fruitvale Wine & Fruit Company was therefore void as against the government, even if they could be regarded as purchasers in good faith. But that they cannot be so regarded is plain, for the reason, among others, that each of them was an owner of stock in that corporation, and therefore interested in the property at the time of the perpetration of the frauds. That sale being void as respects the government for one purpose, is void for all purposes, and the rights of the government are to be determined as though it had never occurred.

The right which the government by this suit asks the court to enforce is the right which vested in it in 1887 to take the property as forfeited by the fraudulent acts on the part of the Fruitvale Wine & Fruit Company. *U. S.* v. *Stowell, supra.* When that right accrued, Young, as an owner of stock in that corporation, had an interest in every part and parcel of the property of the company. The government had the right to proceed by civil action to enforce the forfeiture of the property because of the frauds, or to prosecute the parties engaged in it criminally; but for the same acts it could not do both, according to the ruling in the cases to which reference has been made. It does not seem to me to be material that Young does not here appear as a claimant. If the facts be as alleged, and upon the demurrer they are to be taken as true, the government indicted, convicted, and punished him for certain frauds committed in relation to the property in question; and for the same fraudulent acts and omissions that were introduced in proof in support of that indictment it asks the court in the present suit to decree a forfeiture of the property, the right to which accrued to the government, as has been seen, at the time of the commission of the frauds, and when Young, as a stockholder in the corporation, was interested in every part and parcel of the property. To take the property in which he has an interest is to take his property; and, for the same acts and omissions, to punish him criminally and also take his property, is, for the same offenses, to punish him twice.

The circumstance that Wolters, Helm, Austin, and Kauffman have not been prosecuted for the fraudulent acts and omissions that are made the basis of the present action does not relieve the government's case of the difficulty. To take the property from one stockholder is to take it from all, and I can see no valid reason why the plea in bar of the action may not be interposed by any one interested in the property. Indeed, according to the admiralty practice by which this proceeding is governed, the court protects and holds the property for the benefit of the true owner, whoever he may be. 2 Conk. Adm. 54.

Demurrer overruled.

LEWIS *et al.* *v.* BARNHARDT *et al.*

(*Circuit Court, N. D. Illinois, S. D.* October 21, 1890.)

1. WILLS—DEVISE—ESTATE TAIL.
Under Rev. St. Ill. c. 30, § 6, which provides that the grantee of an estate tail shall take an estate for life, and that "the remainder shall pass in fee-simple to the person to whom the estate tail would, on the death of the first grantee in tail, first pass, according to the course of the common law," land devised to the testator's wife and the heirs of her body will, on her death without issue, pass to the heirs of the testator.

2. RECORDS—CONSTRUCTIVE NOTICE.
A book in the county clerk's office, showing the names of purchasers of government land in the county, being kept only for purposes of taxation, is not constructive notice to subsequent purchasers. Following *Betser* v. *Rankin*, 77 Ill. 289.

3. VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE.
After a purchaser of land has taken possession under his contract and made valuable improvements, the recording of a copy of a will affecting his vendor's title is not constructive notice to him, though made before the delivery of his deed, since his title relates back to the execution of his contract.

4. ADVERSE POSSESSION—TAX-TITLE.
Under Rev. St. Ill. c. 88, § 6, which makes seven years' possession and payment of taxes under color of title constitute good title, one who purchases in good faith from the holder of a tax-title, without notice that his vendor owned an estate for life in the land at the time of the tax-sale, can, by seven years' possession, and payment of taxes even during the life of his vendor, obtain good title as against the reversioner.

5. SAME—COLOR OF TITLE.
Where a tax-deed is relied upon only as color of title in support of the statute of limitations, evidence that the deed was not founded upon a proper judgment is immaterial.

At Law.

Ejectment by Romeo Lewis and others, heirs of Romeo Lewis, deceased, against Abraham Barnhardt and Josephus Gish. Rev. St. Ill. c. 30, § 6, provides that, "in cases where by the common law any person or persons might hereafter become seised in fee-tail of any lands, * * * such person or persons * * * shall become seised thereof for his or her natural life only, and the remainder shall pass, in fee-simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee, devisee, or donee in tail, first pass, according to the course of the common law."

Thomas Millikin, *Palmer W. Smith*, and *Puterbaugh & Puterbaugh*, for plaintiffs.

Williams & Capen, *W. T. Gibson*, and *W. G. Randall*, for defendants.

BLODGETT, J. This is an action of ejectment for the recovery of a tract of about 320 acres of land in Woodford county, in this state.

The facts material to the questions involved in the case are all admitted by a written stipulation on file, and are briefly these:

"That in 1838, Romeo Lewis, then of Oxford, Butler county, Ohio, entered at the United States land-office in Springfield, in this state, the lands in question, together with other lands, making altogether about sixteen hundred acres. That said Romeo Lewis died testate at his residence in Oxford, Ohio, on the 24th day of June, 1843. That he left no issue surviving him, but left a widow, Jane N. Lewis. That on the 8th day of January, 1842, said Romeo Lewis executed his last will and testament, which was duly probated in the proper court in Butler county, Ohio, on the 13th day of July, 1843, and un-

der which his widow, Jane N. Lewis, was duly appointed executrix, and she qualified and entered upon her duties as such executrix, and finally settled said estate in April, 1871. That by his said will Romeo Lewis, after making certain specific bequests to relatives, and making provision for the support of his then aged mother, made his wife his residuary legatee, the paragraph being in the following words: 'I further give and devise to my dearly beloved wife, Jane N. Lewis, *and to the heirs of her body*, my houses and lands in the town of Oxford, Butler county, Ohio, and all the residue of my lands in the states of Indiana and Illinois, and all the rest, residue, and remainder of my personal estate, goods, and chattels, of any kind and description whatsoever, to be equally divided between them, share and share alike.' It is further admitted that on the 2d day of September, 1843, Mrs. Lewis, in the court where said will was probated, elected to take under the will, which election was duly entered of record. That she had no living children at the date of the will, but that one was born to her after the date of the will, and that such child died before the death of her husband. That no child was ever after born to her, and that she died at the age of eighty years, without issue, in July, 1888, at Oxford, which had been her home from the death of her husband. It is further admitted that the plaintiffs in this case are heirs at law of said Romeo Lewis, being direct descendants of his brothers and sisters. It is further admitted that the lands in question were assessed for taxes in 1845 in the name of Romeo Lewis, and sold for non-payment of such taxes in October, 1846. That the certificates of purchase at said sale were assigned to Mrs. Lewis, and that on the 16th day of May, 1849, the sheriff of Woodford county executed and delivered to her a deed for said lands in pursuance of said tax-sale, which deed was duly recorded in said Woodford county on the day of its date. It is further admitted that the said Jane N. Lewis, on the 7th day of May, 1856, gave to one Harry Lewis a letter of attorney, authorizing him to sell, and contract to sell, the lands in question; and that on the 21st of June, 1856, he made a contract in writing with one Absalom Dehority, by which he agreed to make, or cause to be made, a good and sufficient warranty deed to said Dehority of the lands involved in this suit, on payment of $5,600, according to the terms of certain promissory notes of said Dehority, of even date with said contract. That said Dehority at once entered upon the possession of said lands, claiming the same under said contract, and began improving the same, and within the next two years had fenced all of said land, built two houses thereon, and had a large part of it under cultivation, and continued to so reside upon it until his death in 1876. That on the 31st day of August, 1866, said Jane N. Lewis made to said Dehority a warranty deed of said lands, in order to carry out the contract of sale made by said Harry Lewis, and that the defendant Josephus Gish now holds said lands by mesne conveyances, making a complete chain of title, duly recorded, from the heirs of said Dehority, defendant Barnhardt being the tenant of said Gish, and that the defendant Josephus Gish, and those under whom he claims by mesne conveyances from said Jane N. Lewis, have been in full and uninterrupted possession of said lands from the time said Dehority took possession of the same, in 1856, and have paid all taxes levied and assessed thereon since that time. It is further admitted that neither the defendants, nor any of the persons from whom they claim title, except said Jane N. Lewis, had any knowledge whatever of the existence of said will, or of the probate thereof, at the time of the contract for the purchase of said lands; but it is also admitted that what purports to be a copy of said will was recorded in the recorder's office of Woodford county on the 15th of August, 1866."

Upon these admitted facts, there can be no doubt that Mrs. Jane N. Lewis, under her husband's will, would have taken at common law only an estate in fee-tail, which is defined to be "an estate which is confined

in its descent to the posterity of some individual, so as to cease upon failure of such posterity." Burt. Real Prop. p. 4. So the same author says, at page 210:

"Upon a devise to a person and his issue or children, the construction varies according to circumstances. If the party have issue or children at the time when the devise is made, they will take estates, it seems, for their lives, jointly with their parent; but if he had no issue at that time, he takes an estate tail."

But by the operation of the sixth section of chapter 30 of the Revised Statutes of Illinois, tit. "Conveyances," which was in force at the time the will in question was made and took effect, Mrs. Lewis took only an estate for her natural life; and at the death of Mrs. Lewis, in default of heirs of her body, the heirs at law of the testator, Romeo Lewis, took the estate in fee.

The question then arises, do the admitted facts in the case furnish a defense to the claim now asserted by the heirs of Romeo Lewis, the plaintiffs? It being conceded that Mrs. Jane N. Lewis obtained a tax-deed from the sheriff of Woodford county on the 16th day of May, 1849, which was duly recorded in Woodford county on that day; that Dehority, under whom defendants claim, entered in 1856 into the actual possession of the lands under a contract of purchase from Harry Lewis, agent and attorney of Jane N. Lewis, for a valuable consideration; and that said purchaser received, on the 31st day of August, 1866, a warranty deed from Jane N. Lewis, in order to carry out the contract of sale so made by said Harry Lewis; and that from the time he took possession under said contract, in 1856, the said purchaser, and those claiming under him by warranty deeds in fee-simple, duly recorded, have continued in actual possession of said premises up to the commencement of this suit, and have paid all taxes assessed against the same. The statute of Illinois (section 6, c. 83, Rev. St.) provides that—

"Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during that time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent, and according to the purport, of his or her paper title."

It is contended on behalf of the plaintiffs that Mrs. Lewis, as tenant for life, was bound to pay the taxes, and could not defeat the title of the entail tenants or reversioners by allowing a tax-title to accrue which should in any way change her title or her relation to the rights of those who were to take the estate after her; and that, as the heirs at law of the testator had no right of entry until the death of Jane N. Lewis in 1888, they are not affected by this tax-title, which she allowed to accrue in fraud of their rights, nor by her deed in fee to Dehority.

While it is contended on behalf of the defendants that, as Mrs. Lewis had a color of title of record at the time the persons under whom they claim purchased the lands for a valuable consideration from Mrs. Lewis, and that, such purchaser having taken actual and visible possession in pursuance of such purchase, which possession has been continued, with payment of taxes, under deeds purporting to convey the fee-simple title

to successive grantees down to the defendant Gish, he has acquired a title in fee under the laws of this state, which cannot now be disturbed by the plaintiffs.

It is urged in behalf of plaintiffs that a certain book, which it is admitted was kept in the office of the county clerk of Woodford county, showing the names of the purchasers from the United States of all lands so purchased in the county, was notice to those who dealt with Mrs. Lewis, or her agent, that Romeo Lewis was the purchaser of the lands in question, and thus put them on inquiry as to the nature of Mrs. Lewis' title; but the supreme court of this state has held that this book is not notice to any person. *Betser* v. *Rankin*, 77 Ill. 289; *Bourland* v. *County of Peoria*, 16 Ill. 538; *Anthony* v. *Wheeler*, 130 Ill. 128, 22 N. E. Rep. 494.

It is also urged that, as a copy of the will was recorded in the office of the recorder of Woodford county on the 15th of August, 1866, which was prior to the execution and delivery of the deed from Mrs. Lewis to Dehority, this was a notice of the character and extent of her title to all who dealt with her. But I think the fact that Dehority had entered under a contract from Mrs. Lewis' agent in 1856, and taken actual and visible possession, and made valuable improvements, long prior to the recording of this copy of the will in Woodford county, and that the deed to him on the 31st of August, 1866, was given "to carry out the contract" of 1856, gives him a title which relates back to the time of his contract and possession under it; and that a mere record of a copy of this will in Woodford county, more than 10 years after this purchase, for a valuable consideration, with actual possession and valuable improvements made, even if it could then operate as notice of the limited nature of Mrs. Lewis' estate in the lands, came too late to affect the title of a purchaser who had bought in good faith without notice. *Snapp* v. *Peirce*, 24 Ill. 156; *Schneider* v. *Botsch*, 90 Ill. 577; *Sutherland* v. *Goodnow*, 108 Ill. 528. I think, also, that the mere record of a copy of this will does not, of itself, identify or connect the testator, Romeo Lewis, with this land. The most it shows is that a man by the name of "Romeo Lewis" assumed to make a will in 1842, by which he bequeathed certain lands in Indiana and Illinois to his wife, Jane N. Lewis, and to the heirs of her body; but it does not seem to me to show enough to connect Mrs. Lewis with these particular lands, or to put a person dealing with her in regard to the lands in question on inquiry as to whether they were affected by this will or not, as there was nothing appearing of record in the county showing that the testator ever owned these lands, or that they came within the operation of this will. Then, too, the document that was put of record August 15, 1866, was not the will, but what "purported to be a copy of the will," with no proof of its execution, or that it had ever been admitted to probate anywhere, and did not, in my opinion, operate as notice to any one that Mrs. Lewis held only a life-estate in these lands under its provisions.

We have, then, this defendant Gish holding as purchaser in good faith under a conveyance in fee-simple, without notice of plaintiffs' rights,

which relates back to June, 1856, from a grantee who had color of title in fee-simple by this tax-deed. It is true that these plaintiffs or their ancestors had, as is insisted in their behalf, no right of entry upon these lands until the termination of Mrs. Lewis' life-estate; but it does not follow that because they had no right of entry, they, or those under whom the present plaintiffs claim, had no right to protect their possible estate in reversion. They could have enjoined Mrs. Lewis, or any one claiming under her, from committing waste; and if Mrs. Lewis neglected or refused to pay the taxes, and suffered the property to be sold for taxes, thereby endangering the title in fee, they might have filed a bill in equity, and had the property placed in the hands of a receiver, with power to redeem from such sale. Story, Eq. Jur. § 913 *et. seq.;* High, Rec. §§ 11, 672. With these rights to interfere for the protection of the property from the consequences of neglect of the life-tenant, it seems self-evident to me that when Mrs. Lewis, having become clothed with color of title in fee by this tax-deed of 1849, assumed to make a conveyance in fee to a person who had no notice that her real interest as against the heirs of her husband was only a life-estate, those heirs were bound to assert their possible interest in apt time; that whoever were the heirs at law in 1856 of Romeo Lewis, when Mrs. Lewis, by her agent, sold the lands in question in this suit in fee to Dehority, and put him in possession, thereby dealing with the property as if she were the owner in fee, it was the duty of those heirs to have interfered, and appealed to the proper court for redress. At the time of Mr. Lewis' death, when his will took effect, Mrs. Lewis had no heirs of her body, and his then heirs at law, under whom these plaintiffs claim, were the reversioners of the fee in expectancy, and in fact ever since the death of Mr. Lewis his heirs at law have at all times been the reversioners in expectancy; and I think it needs no argument to show that the neglect of these heirs to assert their possible interest in the land in time to rescue it from the operation of the limitation laws of Illinois is binding and effective upon the present plaintiffs.

Suppose Mrs. Lewis, after the death of her husband, in view of the fact that these lands were wholly unproductive, and so being only a burden upon her by reason of the annually accruing taxes, had abandoned them and paid no taxes, and this defendant had bought them in at a tax-sale in 1846, and, after obtaining a tax-deed, had entered upon the actual possession, and remained since that time in full possession up to the time of this suit, and had regularly paid all taxes, can there be any doubt that, under the statutes of Illinois, he would have obtained a valid title as against these plaintiffs? But yet it seems to me that the case supposed does not differ in principle from the one made by the facts, as the person to whom Mrs. Lewis conveyed her tax-title without notice stands in precisely the same plight as if he had been the buyer at the tax-sale.

On the trial, proofs were offered on the part of the plaintiffs tending to show that there was no record in Woodford county of any judgment for the taxes for which these lands were sold at the tax-sale of 1846. I

do not consider that this proof defeats or affects the defense, as the tax-deed was sufficient color of title to set the statute running. *McCagg* v. *Heacock*, 34 Ill. 476; *Foster* v. *Letz*, 86 Ill. 412; *Lake Shore & M. S. R. Co.* v. *Pittsburgh & F. W. Ry. Co.*, 71 Ill. 38.

For these reasons, I am of opinion that the defense under the statute of limitations is complete, and do not deem it necessary to pass upon the defense made upon other grounds. An order will be entered finding defendants not guilty.

In re SUPERVISORS OF ELECTION OF EL PASO COUNTY.

(*Circuit Court, W. D. Texas.* October 31, 1890.)

1. ELECTIONS—APPOINTMENT OF SUPERVISORS.
The refusal of the managers of one political party to co-operate in a petition for the appointment of supervisors of election is no reason for denying the petition, where it appears that the petitioning party used due diligence to secure such co-operation.

2. SAME.
In the absence of any showing, either in the petition or by evidence, that the persons named in the petition possess the statutory qualifications of supervisors, the petition should be denied.

At Law.

MAXEY, J. A petition, dated October 20, 1890, signed by 23 citizens of El Paso county, was addressed to the chief supervisor of elections of this judicial district, praying for the appointment of supervisors to guard and scrutinize the election to be held in that county on the 4th day of November. The petition is in the following form:

"We, the undersigned citizens of the county of El Paso and state of Texas, and voters in said county, and men of good standing, hereby make it known to the honorable United States circuit judge, for the fifth circuit, and western district of Texas, that we desire to have the approaching election for a representative in congress from the eleventh (11th) congressional district of Texas, to be held on the fourth day of November, A. D. 1890, supervised, so far as the county of El Paso is concerned, guarded and scrutinized according to the provisions of section 2011, United States Revised Statutes, and other provisions of the law. We have the honor to attach hereto a list of supervisors prayed for, marked 'Exhibit A.'"

The paper marked "Exhibit A" begins with this statement:

"Accompanying our petition this day, the 20th of October, A. D. 1890, presented, we have to report to you that S. H. Buchanan and ———, respectively, chairmen of the Republican and Democratic committees of El Paso county, Texas, have agreed upon and selected the following list of supervisors to supervise the election for a representative in congress for the eleventh congressional district of Texas, to be holden on Tuesday, the fourth day of November, A. D. 1890, at all the voting precincts of El Paso county, Texas."

Subjoined to the above statement appears a list of names recommended for appointment as supervisors for 10 election precincts. For each precinct two persons are recommended; one being designated as a Republican, and the other as a Democrat. Immediately following the list of names

is a certificate of S. H. Buchanan, chairman Republican executive committee of El Paso county, in these words:

"I hereby certify that the chairman of the Democratic executive committee is absent from the county, and that I have presented this memorial to Park Pittman and Joseph Magoffin, committeemen from the 1st and 2nd precincts, respectively, and requested them to act for their said Democratic party; but they decline and refuse to act in the premises. I have therefore suggested the name of a man for each precinct, known to me to be a staunch Democrat, to act for them."

The foregoing petition was filed by the chief supervisor on the 30th of October, and on the same day he made the following indorsement, addressed to the court:

"I respectfully recommend the appointment of the supervisors of election, as prayed for within, for the county of El Paso."

No other papers have been received by the court from the chief supervisor, affecting the application for supervisors for El Paso county, nor has the court received information from that officer in any other form, touching the appointments desired; and it may be added that no evidence is submitted from any source, showing, or tending to show, that the persons suggested for appointment possess the qualifications required by law. At least one of the requisite qualifications is made apparent upon the face of the papers, to-wit, that one of the persons named for each precinct is a Republican and the other a Democrat. But in other essential particulars it will be observed, from an inspection of the statute, neither the papers submitted nor evidence *aliunde* furnish any information whatever to the court.

The question, then, suggesting itself to the court is, should the appointments be made? The chairman of the Republican committee, prior to the date of forwarding the petition to the chief supervisor, used due diligence, as manifested by his certificate, to secure the co-operation of the managers of the Democratic party; and the failure of the latter party to join in a recommendation for the appointments affords no ground for withholding from the petitioning party the protection and benefits of the statute. If the law were otherwise construed, it would be within the power of one political party by passive indifference to absolutely nullify and abrogate its provisions. But laws can only be repealed by that department of the government which enacted them, and it is the duty of the courts to give them a fair, just, sensible, and reasonable construction, remitting to the legislative department the duty of declaring when they shall cease to exist. Hence, when, in proper cases, a petition which complies with the statute is presented to the court, it then becomes the duty of the court to act upon it, and to make or decline the appointments as the persons recommended possess, or do not possess, the requisite qualifications.

The remaining question is whether appointments should be made, in the absence of all evidence showing that the persons recommended have the qualifications prescribed by the statute. By section 2012, Rev. St., the appointing power is conferred upon the court, and by that section

and section 2028 the qualifications of supervisors are prescribed. The first section referred to reads as follows:

"The court, when so opened by the judge, shall proceed to appoint and commission, from day to day and from time to time, and under the hand of the judge, and under the seal of the court, for each election district or voting precinct in such city or town, or for such election district or voting precinct in the congressional district, as may have applied in the manner hereinbefore prescribed, and to revoke, change, or renew such appointment from time to time, two citizens, residents of the city or town, or of the election district or voting precinct in the county or parish, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as Supervisors of Election."

"Sec. 2028. No person shall be appointed a supervisor of election or a deputy-marshal, under the preceding provisions, who is not at the time of his appointment a qualified voter of the city, town, county, parish, election district, or voting precinct in which his duties are to be performed."

By express direction of the statute, the appointment must be made by the court, and, by the same authority, the commission must be issued "under the hand of the judge and under the seal of the court." Who, then, but the appointing power should judge of the qualifications of the applicant? Certainly the law does not vest such power exclusively in the chief supervisor, for the duties of that officer in relation to the appointment are of a limited nature. They are defined as follows:

"He shall receive the applications of all parties for appointment to such positions; upon the opening, as contemplated in section two thousand and twelve, of the circuit court for the judicial circuit in which the commissioner so designated acts, he shall present such applications to the judge thereof, and furnish information to him in respect to the appointment by the court of such supervisors of election." Section 2026.

The action of the chief supervisor is not conclusive upon the court. He acts in an advisory capacity, to aid and assist the court in passing upon the qualifications of applicants. The information furnished by the chief supervisor would doubtless be regarded by the court as sufficient to authorize the appointment, and the court would not be inclined to seek information elsewhere, in the absence of evidence showing that the chief supervisor had been misled or deceived by interested parties. When the necessary information is furnished, the court then acts, and either makes the appointment, or declines to make it, as the facts may warrant. Giving this statute a liberal construction, the court would not look to the chief supervisor as the sole source of information affecting the qualifications of applicants, but reliable evidence otherwise submitted should be considered and acted upon. But in all cases there should be evidence, whether obtained from one source or the other, showing that applicants or persons recommended possess the statutory qualifications as supervisors. In the case now before the court, evidence of qualifications is wholly wanting. The petition is silent upon the point, and the court is not informed by evidence *aliunde* that the persons whose appointments are sought possess the qualifications required by law. The appointments are therefore declined, and an order will be entered accordingly.

SALDANA *v.* GALVESTON, H. & S. A. RY. CO.

(Circuit Court, W. D. Texas, El Paso Division. October 15, 1890.)

1. RAILROAD COMPANIES—NEGLIGENCE—INJURIES TO PERSONS ON TRACK.
Where a trespasser, walking along a railroad track, is struck and injured by a train, the liability of the railroad company depends upon the question whether those in charge of the train, after discovering that he was not going to leave the track, used all the means in their power to stop the train before it struck him.

2. SAME—CROSSINGS—SIGNALS.
Rev. St. Tex. art. 4232, which provides that locomotives shall whistle or ring before crossing a road, and that a railroad company, neglecting this precaution, shall "be liable for all damage which shall be sustained by any person by reason of such neglect," does not render a company violating such statute liable for injury to one who saw the approaching train in time to avoid it.

3. MEASURE OF DAMAGES FOR TORTS.
In an action for personal injuries the jury, in estimating the damages, may consider plaintiff's physical and mental suffering, the probable effect of the injury upon his health and the use of his limbs, his ability to labor and attend to his affairs, and generally any reduction of his power and capacity to earn money and to pursue the course of life which he might otherwise have done.

At Law.

C. H. McGinnis and *N. B. Bendy*, for plaintiff.

Davis, Beall & Kemp, for defendant.

MAXEY, J., (*charging jury.*) The plaintiff, Rafael Saldana, brings suit to recover of the defendant railway company damages for personal injuries alleged to have been inflicted upon him by one of the defendant's engines on the 6th day of September last, at the city of El Paso, Tex. It is in effect charged in the petition that the plaintiff's injuries resulted from the negligence of the defendant's servants and employes under substantially the following circumstances, to-wit: That plaintiff, in returning to El Paso, with two donkeys loaded with wood, desired to pass over a portion of defendant's road with his donkeys in order to cross a certain "hollow or gulch;" that before stepping upon the track he looked in both directions, east and west, to ascertain whether the track was clear, so that he could proceed along it without danger to himself and his animals, and after taking all necessary precautions, as he alleges, for his safety, he then got on defendant's said railway track with his said two donkeys to pass over said "hollow or gulch;" that immediately upon getting on the track he discovered, at a distance of about 360 feet, a switch engine of defendant approaching at a rapid rate, dashing around a curve of the track; that the engine gave no signal of its approach, by bell or whistle, but that, at said distance of about 360 feet, one of the defendant's employes on the engine "waved his hands to him, [plaintiff,] motioning to plaintiff to remove his donkeys from the track, which he was endeavoring to do, believing, after receiving said signal, that said switch engine would check up long enough for him to do so; but before he could remove the hindmost one from said track, the said switch engine * * * neither stopped nor slackened its speed, but negligently, willfully, recklessly, and wantonly, with great force and speed, ran against one of plaintiff's donkeys, which was in the lead, and threw him against the

hindmost one, thus knocking both off the track, * * * and thus struck plaintiff, as he was on the side of the track, in his attempt to escape, knocked him down, and run over him, and cut off one of his feet, and broke and crushed the other leg, and otherwise bruised and injured plaintiff." It is further alleged that defendant was also guilty of negligence, resulting in plaintiff's injuries, in failing to ring the locomotive bell or blow the whistle in approaching the public crossing, which is alleged to be about 120 yards west from the place of the accident. The court has thus given you a brief statement of the plaintiff's cause of action. In its answer the defendant denies, generally, all allegations in the petition contained, and further interposes, in bar of the action, the plea of contributive negligence on the part of plaintiff. The plaintiff attributing his injuries to the negligence of the defendant's servants as the direct cause of the same, it is incumbent upon him to establish by proof the truth of the charge he prefers, for if his injuries did not result directly from the negligence of the company's servants and employes, he would not be entitled to a recovery. What, then, is negligence? As defined by the supreme court, in *Railroad Co.* v. *Jones*, it "is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." 95 U. S. 441, 442.

But in reference to the question of negligence, we must, in this case, proceed further than simply to inquire into the failure of duty on the part of the employes of defendant. We must look to the testimony, and ascertain whether the plaintiff performed the duty which the law enjoined upon him. The defendant insists that he (the plaintiff) was the negligent party, and that he was the author of his misfortunes; and thus we have presented by the pleadings the concurrent negligence of both parties; negligence on the part of the defendant, and contributive negligence on the part of the plaintiff. In this connection it is further held by the supreme court, in the case cited, that "one who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff, in such cases, is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, (2) whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover, in the latter he is not." Id. 442. Now, gentlemen, look to the facts, and, applying to them the rules of law above announced, determine the question of negligence as between the parties. It has been clearly shown, not only by the testimony of the defendant, but also by that of plaintiff, that just prior to the accident, while the

plaintiff was on the railway track, driving his two donkeys up and along the track in the direction of the switch engine, he discovered the engine approaching at a distance, according to the testimony of the plaintiff himself, of 40 or 50 yards. Some of the witnesses, however, place it at a greater and some at a less distance. That the plaintiff was walking up the track, in view of the advancing engine, there is no doubt. It is further conceded that at the point where plaintiff got upon the track there was neither a street nor public crossing, the public crossing being something over 200 yards west. From the place of accident, looking east, the switch engine, on account of the curve in the road, could be seen only about 117 yards, and persons on the engine could see an equal distance looking west. As to the rate of speed of the engine prior to and at the time of the accident the testimony is conflicting, and you must satisfy yourselves upon that point from a consideration of all the facts and circumstances in evidence. The plaintiff further testified that an employe of the company on the engine waved his hand to him when the engine was 40 or 50 yards distant. The plaintiff insists that after he saw the approaching engine he did what he could to remove himself from the impending danger, but that he was unable to do so owing to the short interval which elapsed between the time he saw the engine and the collision which ensued. It is urged, however, by the defendant that the plaintiff could have easily protected himself by stepping on either side of the track, but that, instead of making his escape from a known danger, he was engaged in the effort to drive his donkeys from the track until it was too late to save himself. In view of the above facts, and others detailed by the witnesses, it becomes important in this immediate connection to consider the legal rights and duties of the plaintiff and defendant's employes, respectively. It is maintained by the defendant that the plaintiff was unlawfully on the track; that the employes on the engine had the right to a clear road-way, and that they further were authorized to presume that persons would remove themselves from the track before an advancing locomotive. Upon these points you are instructed that the employes operating the engine had the superior right to the use of the railway track for the purpose of enabling them to discharge the duties which the company owed to itself and the public. The plaintiff had no lawful right to use the track as a road-way for himself and animals, (*Railway Co.* v. *Garcia*, 75 Tex. 590, 13 S. W. Rep. 223,) and if he voluntarily chose to assume the risk of appropriating the track for such purpose, and his injuries resulted directly from his conduct in that respect, upon him must fall the consequences of his acts, and he cannot recover. *Railroad Co.* v. *Houston*, 95 U. S. 702.

Touching the duty of a railway company to persons on the track, it is said by the supreme court of this state, in *Railway Co.* v. *Richards*, that "a duty may be general, and owing to everybody, or it may be particular, and owing to a single person only, by reason of his peculiar position. * * * The general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of the neglect; the tramp who steals a

ride cannot insist that it is a duty to him; neither can he who makes a highway of a railroad track, and is injured by the train." 59 Tex. 377. The principle, however, asserted by the court in the *Richards Case* cannot be taken without qualification. It is properly said by the same court, in *Railway Co.* v. *Weisen*, that "a man does not forfeit his life, or his right to remain whole, by going where he has no right to go, or being where he has no business." 65 Tex. 447. Hence, although a man may be unlawfully on the track, may be a trespasser, the employes of the company would have no right to carelessly and negligently run over him after his presence and danger became known to them. The rule is thus stated by the supreme court of this state:

"A plaintiff may recover, even if his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the danger, failed to use ordinary care to avoid the injury. * * * When the danger becomes known, the failure to use such care as a prudent man would, under the circumstances, amounts to indifference, from the consequences of which no one ought to be excused." *Railroad Co.* v. *Cocke*, 64 Tex. 158.

Your attention is directed to another principle bearing upon the question of negligence in this case, and it is this: "The law," says the supreme court of this state, "presumes that a person walking upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge, or should have by the ordinary use of the senses of hearing and seeing, and the managers of the train may act upon this presumption." *Railway Co.* v. *Garcia*, 75 Tex. 591, 13 S. W. Rep. 223. It is not denied in this case that the plaintiff saw the approaching train. The employes on the engine, therefore, had the right to presume that he would leave the track in time to avoid injury. It was, however, the duty of the employes, at the instant they discovered he would not leave the track, to use a high degree of care, that is, use all the efforts in their power and within their means and ability to stop the train, and prevent the same from striking the plaintiff. But if, notwithstanding such efforts, they were unable to stop the train in time to prevent the injury, then the employes were not guilty of negligence. 75 Tex. 590, 13 S. W. Rep. 223.

It is further insisted by the plaintiff that it was the duty of the persons operating the engine to ring the locomotive bell, or blow the whistle on approaching the crossing, where the public road crosses the railway track, at a point about 200 yards west of the place of accident. He alleges in his petition that, had the company's employes on the engine blown the whistle or rung the bell, he would have received timely warning of the approach of the locomotive, and "would have removed his said donkeys and himself to a safe distance from said railway track before said switch engine could have reached the place where plaintiff was injured." The state statutes provide:

"A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and the bell shall be rung or the whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped." Rev. St. Tex. art. 4232.

And for every neglect the statute further provides that the corporation owning the road shall "be liable for all damage which shall be sustained by any person by reason of such neglect." Referring to this statute Mr. Chief Justice STAYTON says:

"The statute does not provide that a failure to ring a bell or blow a whistle, or both, when a train is approaching a crossing, will absolutely render a railway company liable for an injury received by a person in attempting to cross its track; but it does provide that if these things are not done, the company shall be liable for all damages which shall be sustained by any person by reason of such neglect." *Railway Co.* v. *Graves*, 59 Tex. 332.

To entitle a party to recover for failure to give the statutory signals, the injury must be the direct and proximate result of the failure to give them. The negligence, in such case, must cause the damage. Therefore negligence on the part of the complaining party, which is the proximate cause of the injury, will defeat his recovery, although the railway company may not have given the signals which the law requires to indicate the approach of the train, for, in that case, he contributes to his own injury, and it was not the result of the company's negligence in failing to give the signals. *Railway Co.* v. *Graves*, 59 Tex. 332; *Railroad Co.* v. *Houston*, 95 U. S. 702. The purpose of the signal is to give warning of the train's approach to persons at or near crossings and on the track, (*Railway Co.* v. *Gray*, 65 Tex. 35, 36;) but notice of that fact derived from any other source is equally effective, (*Railway Co.* v. *Graves*, *supra*.) Hence, if a person on the track already has timely notice of an approaching train, by observing it himself, (and of that fact, in this case, you must satisfy yourselves from the testimony,) he could not complain of the failure to give the statutory signals, for as to him the signals would be wholly unnecessary. After all, gentlemen, it is a question of the existence of negligence, and negligence causing or producing the plaintiff's injuries; and that question you must solve for yourselves from a consideration of all the facts and circumstances in evidence. Whether the signal was given by ringing the bell or blowing the whistle is another disputed question. If it was given, as defendant contends, the plaintiff has no cause of complaint on that score. If it was not given, then you will determine whether the plaintiff's injuries resulted directly and proximately from the failure of the company's employes to give the statutory signal. Review the entire case, look to and examine every fact and circumstance to which the witnesses have testified, and, applying the rules of law as embodied in the foregoing charge, determine for yourselves whether the plaintiff used that care and caution for his own safety and preservation which the law, as above explained, required him to exercise to entitle him to a recovery; and also determine whether the employes of defendant, at and just prior to the time plaintiff was hurt, discharged the duties which the law enjoined upon them touching plaintiff's safety and welfare. It is your province to determine, from a consideration of all the facts and circumstances in evidence, taken in connection with the charge of the court, whether there was negligence on the part of the defendant, and, if so, whether the injuries of plaintiff

were occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to them by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened. If you find that the defendant's employes were negligent, and that the plaintiff's injuries were occasioned entirely by their negligence or improper conduct, then your verdict should be for the plaintiff. But if, on the other hand, you are satisfied that the defendant's employes were not negligent on the occasion in question, or if they were negligent, and you find that plaintiff himself so far contributed to his injuries, by his own negligence or want of care and caution, that but for his negligence or want of care and caution he would not have been injured, then, in either of such events, your verdict should be for the defendant.

If, in view of the testimony and the foregoing instructions, your verdict be in favor of the plaintiff, you will award him such an amount of actual damages as will compensate him for the injuries he has sustained. In making your estimate of such damages you are authorized to take into consideration the physical and mental suffering of the plaintiff, the probable effect of the injury in future upon his health, and the use of his injured limbs, and his ability to labor and attend to his affairs, and, generally, any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done. *Railroad Co.* v. *Randall*, 50 Tex. 261; *Brown* v. *Sullivan*, 71 Tex. 476, 10 S. W. Rep. 288. The object of the law in cases like the present is simply to compensate the injured party for the injuries he has sustained; nothing more. You are the exclusive judges of the credibility of the witnesses and of the weight to which their testimony may be entitled, and you are authorized, in reaching a conclusion upon the issues in the case, to base your finding upon a preponderance of the evidence. As impartial jurors, you will fairly consider the issues between the parties, and reach such a conclusion as will commend itself to your own judgments, and such as will attain, as nearly as you may be able, the very right and justice of the cause.

WISCONSIN CENT. R. CO. *v.* FORSYTHE. SAME *v.* LENTY. SAME *v.* BEKKEN.

(Circuit Court, W. D. Wisconsin. September 15, 1890.)

PUBLIC LANDS—RESERVATIONS AND DONATIONS.

Congress, by an act approved June 3, 1856, (11 St. 20,) granted to Wisconsin, to aid in the construction of "a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior, and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads, respectively," with indemnity limits of 15 miles from each road; the lands unsold to revert to the United States, unless the roads were completed within 10 years. In anticipation of the passage of that act, the commissioner of the land-office, May 29, 1856,

directed the registers and receivers of the districts in which these lands were to suspend sales and locations until further orders. This grant was duly accepted by the state, and the benefit of it conferred upon a railroad company. The map of definite location of the Bayfield branch was filed July 17, 1858, and was approved. After the final location of that branch, the commissioner of the land-office made an order withdrawing and reserving from entry and location all the odd-numbered sections, outside the 6 and within the 15 mile indemnity limits of certain roads, described in the act of 1856, excluding the Bayfield branch. Prior to May 5, 1864, nothing had been done under the act of 1856, except to construct the road from Portage to Tomah, and to definitely locate the Bayfield branch. On that day congress passed another act, granting to the state, "for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin, for the same purpose," by the act of congress of June 3, 1856, "upon the same terms and conditions" as are contained in the latter act, with indemnity limits of 20 miles. The second and third sections granted to the state a like amount of place limits, with like indemnity limits, to aid in the construction of railroads, respectively, from Tomah to the St. Croix river or lake, and from designated places in the eastern part of the state, in a north-westerly direction to Bayfield, and thence to Superior, on Lake Superior. But its sixth section provided: "That any and all lands reserved to the United States by any act of congress for the purpose of aiding in any object of internal improvement, or in any manner, for any purpose whatsoever, and all mineral lands, be, and the same are hereby, reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States." 13 St. 66. The road described in the third section of the act of 1864 was constructed by the Wisconsin Central Railroad Company, and that company became entitled to the benefit of the grant made by that section. Its road was definitely located November 10, 1869. The road extending from a point north of St. Croix river or lake to Bayfield belongs to what is called the "Omaha Company." The lines of that road and of the Central road approach each other as they, respectively, approach Lake Superior, so that the place limits of the Central road overlapped the original 15-mile indemnity limits of the Bayfield branch of the Omaha Company. Those two companies entered into an agreement whereby the Central Company was to have patents for all the lands in the overlap lying east of the easterly 10-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly 10-mile limit of the Central road, while the Omaha Company was to have all the other lands within the overlap of the grants. The Central Company got patents from the state for all the lands situated on either side of, and coterminous with, said completed portions of its road. These patents covered the lands in dispute, which are outside and east of the enlarged place limits, (10 sections in width on each side of the Bayfield branch,) and within the 15-mile indemnity limits of that road. They are also within the 10-mile place limits of the Central road, as defined by the act of 1864. The Central Company received from the Omaha Company a deed of release covering those lands and others similarly situated. In 1887 the Omaha Company had a final adjustment of its land grant, when Secretary Lamar ruled (6 Dec. Dep. Int. 190) that the lands within the original indemnity limits of the Bayfield branch, as defined in the act of 1856, were, by orders of the secretary, "reserved to the United States" at the date of the passage of the act of 1864, and therefore were not included in the grant by that act. Upon a rehearing of that question before Secretary Noble (10 Dec. Dep. Int. 63) the same ruling was made. After these rulings, the lands here claimed by the Central Company were entered under the homestead and pre-emption laws of the United States, and patented to the defendant. *Held*: (1) The purpose of the act of 1864 was to break the continuity of the original line from Tomah, via St. Croix river or lake, to the west end of Lake Superior and to Bayfield, and to devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by, or which could have been made available under, the act of 1856. (2) The act of 1864 did not wholly displace the act of 1856, and make an entirely new, independent grant as of its date of the place lands to the extent of 10 full sections in width on each side of the particular roads therein mentioned, with indemnity limits of 20 miles, but, in legal effect, granted 4 additional sections in width of place lands, with indemnity limits enlarged from 15 to 20 miles, and confirmed the previous grant of 6 sections in width of place lands, with 15 miles indemnity limits; in other words, as to the Bayfield road, it converted 4 miles of the original indemnity limits, as defined in the act of 1856, into place limits, and added 5 miles on each side of the place limits, thus enlarged, to the indemnity limits, leaving untouched in all other respects the original grant of lands for that road.

(3) Except as to that part of the indemnity lands converted by the first section of the act of 1864 into place lands of the Bayfield road, the orders of the secretary of the interior, made prior to that year, withdrawing from sale and location for the benefit of that road its entire indemnity lands, was not abrogated or annulled by that act, congress not intending to deprive the Bayfield road of any part of the original indemnity lands. (4) The lands within the original indemnity limits of the Bayfield road, embraced in the withdrawals from sale and location by the secretary of the interior, prior to the passage of the act of 1864, were not *granted* by, but were excluded from the operation of, that act, because, within its meaning, and according to the decisions of the supreme court, they had been, and then were, by reason of such withdrawals, "reserved to the United States." (5) Although the object of such withdrawals, namely, to supply deficiencies in the place limits of the Bayfield road, was fully satisfied by the adjustment made with the Omaha Company of the grant for the benefit of that road, the lands so withdrawn, although falling within the outer lines of the place limits of the Central road, did not become the property of the Central Company, because, having been "reserved to the United States" prior to 1864, they were excluded altogether from the operation of that act, and could not be brought under it by reason of their not being finally needed for the Bayfield road. (6) The agreement between the Omaha and Central Companies, and the deed of release from the former to the latter company, was of no avail, as against the United States, because the Omaha Company acquired no legal interest in the lands in dispute which it could transfer to the other company, the lands never having been selected and set apart by the land department for the Bayfield road. Until indemnity lands are so specially selected and set apart, the title and right of property therein remains in the United States

At Law.

Pinny & Sanborn, *W. F. Vilas*, and *George A. Jenks*, for plaintiff.

Geo. G. Greene and *A. W. Weisbrod*, for defendant.

Before HARLAN, Justice, and BUNN, J.

HARLAN, Justice. This action of ejectment involves the title to the S. W. ¼ of section 11, township 47 N., of range 4 W., in Ashland county, Wisconsin, which the plaintiff, the Wisconsin Central Railroad Company, claims to own, and of which the defendant, William O. Forsythe, is in possession. The latter asserts title in himself, and denies that the company has any interest in the premises. The plaintiff's claim of ownership rests, primarily, upon the third section of an act of congress, approved May 5, 1864, granting lands to Wisconsin in aid of the construction of railroads in certain parts of that state. 13 St. 66. The defendant, denying that the lands in dispute were included in those so granted, avers that they constituted a part of other lands, which, at the time of the passage of the above act, were reserved to the United States for the purposes of a previous act, approved June 3, 1856, granting lands to aid in the construction of certain railroads in the same state. 11 St. 20. The defense is also based upon certain proceedings and decisions in the interior department, under or in consequence of which the defendant was permitted to enter, and did enter, the lands in dispute, in accordance with the laws of the United States relating to the public domain.

After the evidence was concluded, the jury were directed to return a verdict for the plaintiff, subject to the opinion of the court on a motion for judgment upon the verdict or on a motion for new trial. Such a verdict having been returned, the jury were discharged. The case is now before the court upon a motion by the plaintiff for judgment in its favor, as well as upon a motion by the defendant to set aside the verdict and award a new trial.

The principal question is whether the premises in dispute were part of the lands granted by the third section of the act of 1864 in aid of the construction of the road therein mentioned, which road is now owned and operated by the plaintiff. As the acts of 1856 and 1864 relate to the same general subject, we will be aided in our interpretation of the latter by ascertaining what was done, prior to its passage, in execution of the former.

The act of June 3, 1856, is entitled "An act granting public lands to the state of Wisconsin, to aid in the construction of railroads in said state," and is in these words:

"That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison, or Columbus, by the way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections above specified so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached, as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated, as aforesaid) shall be held by the state of Wisconsin for the use and purpose aforesaid: provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: provided, further, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: and provided, further, that any and all lands reserved to the United States by any act of congress, for the purpose of aiding in any object of internal improvement, or in any manner, for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act; except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the president of the United States.

"§ 2. That the sections and parts of sections of land which, by such grant, shall remain to the United States within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

"§ 3. That the said lands hereby granted to said state shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other, and the said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of property or troops of the United States.

"§ 4. That the lands hereby granted to said state shall be disposed of by

said state only in the manner following, that is to say: that a quantity of land, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and, when the governor of said state shall certify to the secretary of the interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold, and so from time to time until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

"§ 5. That the United States mail shall be transported over said roads, under the direction of the post-office department, at such price as congress may by law direct: provided, that until such price is fixed by law, the postmaster general shall have the power to determine the same." 11 St. 20.

In anticipation, as we suppose, of the passage of this act, the commissioner of the land-office, under date of May 29, 1856, directed the registers and receivers at La Crosse, Hudson, Mineral Point, Menasha, Stevens' Point, and Superior, Wisconsin, to suspend from sale and location all the lands in their respective districts until further orders; and on the 12th of June, 1856, he sent to the same officers a communication in these words:

"By my telegraphic dispatch of the 29th ult., you were requested to suspend from sale or location until further orders all the lands in your districts. The object of this withdrawal was to protect the lands from sale granted to the state for railroad purposes, by a bill which has passed both houses of congress, which having been approved by the president on the 3d instant, and thus become a law, I have to request that you will continue the reservation until otherwise directed. The governor has this day been advised and requested to furnish in advance sketch maps of the route of the roads, with a view of releasing as many of the lands as can be safely returned, without interfering with the public limits of selection, and also of the maps of actual final locations, on the receipt of which latter a further reduction may be made."

The grant contained in the above act was formally accepted by the state by an act approved October 8, 1856, (Gen. Laws Wis. 1856, c. 118;) and, by an act approved October 11, 1856, it conferred the benefit of the grant upon the La Crosse & Milwaukee Railroad Company, a corporation of Wisconsin, (Id. c. 122.)

On the 26th of October, 1856, the commissioner of the general land-office issued an order to the registers and receivers at Superior City, Hudson, and Eau Claire, Wisconsin, in which he said:

"Upon the filing in your office of duly-certified map of the line of route, as definitely fixed, of any of the roads referred to in the act entitled 'An act granting public lands to the state of Wisconsin, to aid in the construction of railroads in such state,' approved June 3, 1856, you will, without waiting for further instructions from this office, cease to permit locations, by entries or pre-emption, or for any purpose whatever, of the land within fifteen miles of said route."

By an act approved March 5, 1857, the St. Croix & Lake Superior Railroad Company, a Wisconsin corporation, was authorized to receive from the La Crosse & Milwaukee Railroad Company all the latter's right, title, and interest in the above lands, or any part thereof, lying north of

the point or place where the road of the La Crosse & Milwaukee Railroad Company "shall intersect the St. Croix river or lake, or other point which may be determined upon by the said last-named company, or such portion of said lands as said companies may agree." P. & L. Laws Wis. 1857, c. 230. Under this act, a deed of division was made March 10, 1857, between the La Crosse & Milwaukee Railroad Company and the St. Croix & Lake Superior Railroad Company. By that deed the former company conveyed to the latter all its interest—

"In and to every alternate section of land, designated by odd numbers, for six sections in width on each side of said road, from the point aforesaid on the St. Croix river or lake to the west end of Lake Superior, and from any point on said last aforesaid route to Bayfield, together with such lands, within fifteen miles of the line or route of said road or roads, as shall be selected, in pursuance of said act of congress, [June 3, 1856,] in lieu of any sections which shall have been sold by the United States, or to which the right of pre-emption has attached."

This deed was recorded in the office of the secretary of state of Wisconsin, November 19, 1857. The map of definite location of the main line of the St. Croix & Lake Superior Railroad Company north from St. Croix river or lake to the west end of Lake Superior was filed March 2, 1858; that of its Bayfield branch, July 17, 1858. These maps were filed under the act of June 3, 1856.

On the 1st of March, 1859, after the final location of the Bayfield branch, the commissioner of the general land-office made an order, addressed to the proper registers and receivers, in these words:

"For your information in the mattter, I inclose herewith a diagram of the district of lands subject to sale at your office, upon which has been designated the line of route and the lines of six and fifteen miles limits of the St. Croix and Lake Superior and the Bayfield line of railroads, to aid in the construction of which a grant of lands was made to the state of Wisconsin by act of June 3, 1856. As all the vacant lands in the odd-numbered sections outside the six and within the fifteen miles limits of the roads have been selected by the agent of the state in lieu of the lands sold and pre-empted in the alternate sections granted by the above-mentioned act, such grant you will of course continue to reserve, as heretofore, from sale or location for any purpose whatever."

Attention will now be given to the act of congress of May 5, 1864, (13 St. p. 66, c. 80.) At the time that act was passed, only 61 miles of the roads contemplated by the act of congress of June 3, 1856, had been constructed, namely, the road from Portage to Tomah. That part was constructed by the La Crosse & Milwaukee Railroad Company in the spring of 1858. Nothing had then been done in respect to other portions of the roads north of Tomah, and towards the west end of Lake Superior and to Bayfield, except to file maps of the definite location of routes; and even that much was not done in relation to the road, mentioned in the act of 1856, from Fond du Lac to Lake Winnebago northerly to the state line.

As the decision of this case turns principally upon the construction to be given to the act of May 5, 1864, its full text will be given. It is en-

titled "An act granting lands to aid in the construction of certain railroads in the state of Wisconsin," and is as follows:

"§ 1. That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose by the act of congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by said company to select, subject to the approval of the secretary of the interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached, as aforesaid, which lands, thus selected in lieu of those sold, and to which pre-emption or homestead right has attached, as aforesaid, together with sections and parts of sections designated by odd numbers, as aforesaid, and appropriated, as aforesaid, shall be held by said state for the use and purpose aforesaid: provided, that the lands to be so selected shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June 3, 1856; but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist.

"§ 2. That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from the town of Tomah, in the county of Monroe, in said state, to the St. Croix river or lake, between townships twenty-five and thirty-one, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose by the act of congress granting lands to said state to aid in the construction of certain railroads, approved June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the said act of June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections, or parts of sections, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by said state to select, subject to the approval of the secretary of the interior, from the public lands of the United States nearest to the tier of sections above specified, as much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached, as aforesaid, which lands, thus selected in lieu of those sold, and to which pre-emption or homestead right has attached, as aforesaid, together with sections and parts of sections designated by odd numbers, as aforesaid, and

appropriated, as aforesaid, shall be held by said state for the use and purpose aforesaid: provided, that the lands to be so located shall in no case be further than twenty miles from the line of said road, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six: but such selections and locations may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June three, eighteen hundred and fifty-six, should any such deficiency exist.

"§ 3. That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage city, Berlin, Doty's island, or Fond du Lac, as said state may determine, in a northwestern direction, to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said state, appointed by the governor thereof, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections above specified, as much public land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached, as aforesaid, which lands, thus selected in lieu of those sold, and to which the right of pre-emption or homestead has attached, as aforesaid, together with sections and parts of sections designated by odd numbers, as aforesaid, and appropriated, as aforesaid, shall be held by said state, or by the company to which she may transfer the same, for the use and purpose aforesaid: provided, that the lands to be so located shall in no case be further than twenty miles from the line of said road.

"§ 4. That the sections and parts of sections of land which shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of the said reserved lands become subject to private entry until the same have been first offered at public sale at the increased price.

"§ 5. That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six be, and the same is hereby, extended to a period of five years from and after the passage of this act.

"§ 6. That any and all lands reserved to the United States by any act of congress for the purpose of aiding in any object of internal improvement, or in any manner, for any purpose whatsoever, and all mineral lands, be, and the same are hereby, reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States.

"§ 7. That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road

is completed: provided, however, that no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end, which oath shall be taken before a judge of a court of record of the United States.

"§ 8. That the said lands hereby granted shall, when patented as provided in section seven of this act, be subject to the disposal of the companies respectively entitled thereto, for the purpose aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States.

"§ 9. That if said road, mentioned in the third section aforesaid, is not completed within ten years from the time of the passage of this act, as provided herein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States." 13 St. 66.

By an act of the Wisconsin legislature, approved March 20, 1865, the benefit of this act, so far as it related to the road from the St. Croix river or lake to the west end of Lake Superior and to Bayfield, was granted to the St. Croix and Lake Superior Railroad Company, subject to all the conditions and restrictions imposed upon the state by the said acts of May 5, 1864, and June 3, 1856. Gen. Laws Wis. 1865, c. 175, § 1. This was the same corporation, already referred to, that was allowed to receive from the La Crosse & Milwaukee Railroad Company the benefit of the act of June 3, 1856, relating to the same line of roads.

On the 22d of April, 1865, the St. Croix and Lake Superior Railroad Company, by its executive committee, accepted the grant of lands made by the act of congress of 1864, and by the above act of the Wisconsin legislature of March 20, 1865, so far as it related to the road from the St. Croix river or lake to the west end of Lake Superior and to Bayfield. That committee also passed a resolution declaring "that the line as now located by maps on file in the land-office at Washington be the line adopted for the selection of lands conferred on this company by grant."

The plaintiff, the Wisconsin Central Railroad Company, to be hereafter called the "Central Company," was formerly the Portage, Winnebago & Superior Railroad Company, the latter having been formed in 1869 by the consolidation of the Portage & Lake Superior Railroad Company and the Winnebago & Lake Superior Railroad Company; the two constituent companies having been incorporated in 1866 for the purpose, as recited in the titles of their respective acts of incorporation, of executing the trust created by the act of congress of May 5, 1864. P. & L. Laws Wis. 1866, cc. 314, 362; 1869, c. 257; 1871, c. 27. It is not controverted, in the present case, that the Central Company succeeded to all the rights conferred by the state upon the companies to which were transferred the benefit of the grant of lands contained in the third section of the act of May 5, 1864. Nor is it controverted that the road of the Central Company from Stevens' Point to Lake Superior, al-

though not on the precise lines originally specified, was constructed to Ashland, on Lake Superior, in accordance with the acts of congress and of the legislature of Wisconsin. It was definitely located November 10, 1869. Its map of definite location was filed in the proper office, and it appeared in evidence that the commissioner of the general land-office, on the 10th of December, 1869, sent to the register and receiver at Bayfield, Wis., "a diagram of the Portage, Winnebago, and Superior Railroad, under act of May 5, 1864, third section, and joint resolutions 21st June, 1866, (14 St. 360,) within the ten and twenty mile limits of the land grant designated thereon," and directed them to withdraw "from sale or location, pre-emption or homestead entry, all the odd-numbered sections of lands falling within those limits."

The road from the St. Croix river or lake to Superior, on Lake Superior, and the Bayfield branch, were constructed and are owned and operated by the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, to be hereafter, for the sake of brevity, called the "Omaha Company," the successor of the St. Croix & Superior Railroad Company, and the owner of the rights and privileges granted to the latter company in respect to the above road and branch. The road located under the act of 1856 from a point north of St. Croix river or lake to Bayfield approaches that of the Central Company, located under the act of 1864, as the latter proceeds in a north-westerly course to Ashland, and both the place and indemnity limits of the Central road conflict with or overlaps the original 15-mile indemnity limits of the Bayfield branch of the Omaha Company.

On the 12th of February, 1884, the Central Company and the Omaha Company entered into an agreement for the adjustment of the controversy between them as to the land in the overlap of the grants made by the acts of congress of June 3, 1856, and May 5, 1864. By that agreement the Omaha Company consented that the Central Company should "take patents for all the lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly ten-mile limit of the Central Company;" while the Omaha Company was to have all the other lands within the overlap of those grants.

The Central Company, having constructed roads from Portage city and from Menasha, or Doty's island, to Stevens' Point, thence to Ashland, on Lake Superior, in conformity with the acts of congress and of Wisconsin, received from the state, February 25, 1884, a patent "for so much of said lands granted aforesaid as are situated on either side of, and coterminous with, said completed portions of said road." The lands in dispute are covered by that patent.

On the 19th of February, 1887, the Omaha Company executed to the Central Company a deed of release as to certain lands, described by metes and bounds; the deed reciting that the former company intends to surrender to the latter company—

"All lands within the overlapping limits of said grants which lie easterly of the easterly ten-mile limit of the Bayfield branch of said Chicago, St. Paul,

Minneapolis and Omaha Railway, and northerly and easterly of the westerly ten-mile limit of the Wisconsin Central Railroad Company; and hereby consents that said lands be conveyed by the United States to the state of Wisconsin, for the use and benefit of the Wisconsin Central Railroad Company, or that the same be patented by the United States to said Wisconsin Central Railroad Company, as may be appropriated in accordance with the selection thereof heretofore made, or hereafter to be made, by or for said Wisconsin Central Railroad Company, as of lands within its land grant, under said acts of congress above mentioned."

In the year 1887, the Omaha Company applied to the general land-office for the final adjustment of its land grants under the acts of June 3, 1856, and May 5, 1864. Upon the hearing of that application, it was, among other things, determined, October, 1887, by the secretary of the interior, upon appeal from the commissioner of the land-office, that the lands within the 15-mile indemnity limits of the Bayfield road, as defined in the act of 1856, were, by virtue of the orders of the secretary, "reserved to the United States," and were not included in the grant in the act of 1864 for the road named in its third section, now the Central Railroad, and were so reserved before the passage of the act of 1864, for the purpose of indemnifying the Bayfied road for losses, if any should occur, in its place limits. To that proceeding the Central Company was not a party, and of its institution and pendency had no notice. 6 Dec. Dep. Int. 190, 194, 196, 209, 210, 217.

On the 2d of July, 1887, the Central Company listed in the land department a large quantity of lands, including the lands in dispute, as having inured to it under and by section 3 of the act of May 5, 1864.

After the decision of the secretary of the interior, above referred to, the Central Company appeared before the land department, and demanded a hearing on the above question determined at the time of the adjustment of the grant of the Omaha Company, claiming that such determination was not binding upon it; that it was not a party to, and had not been heard in, the proceeding in which it was made; that the lands listed by it were not excluded from the grant in section 3 of the act of 1864; that their withdrawal by the secretary was not a reservation to the United States, within the meaning of section 6 of that act; and that, if such withdrawal amounted to such a reservation, it was revoked and terminated by the act of May 5, 1864. Upon this application, the above question was reargued before the secretary of the interior, in the present year, upon an appeal to him by the Central Company. It was held by Secretary Noble, in harmony with the ruling of Secretary Lamar, that the lands within the limits of the indemnity withdrawal made for the benefit of the Bayfield road, were, by section 6 of the act of May 5, 1864, excluded from the grant contained in the third section of that act for the Central road; and that the title to all lands within such indemnity withdrawal for the Bayfield road, not ultimately required for the indemnity purposes for which it was made, remained in the United States. 10 Dec. Dep. Int. 63, 77.

Shortly after the decision last referred to, the defendant, being a citizen of the United States, and over 21 years of age, made a formal entry

of the lands in dispute, taking all the steps, and paying all the charges and fees, required by law for such entry.

The lands in dispute, part of those so listed by the plaintiff, are, we may repeat, outside and east of the enlarged place limits—10 sections in width on each side of the Bayfield branch of the Omaha road—as established by the first section of the act of 1864, but (and this is an important fact in the case) are within the 15-mile indemnity limits of that road, as those limits are defined by the act of 1856. It is also necessary to observe that they are within the place limits—10 sections in width on each side—of the Central road, as established by the third section of the act of 1864. The contention of the plaintiff is, that, as the grant in that section was one *in præsenti*, these lands, upon the filing and acceptance of its map of definite location, became its property, as of the date of the act of 1864, subject only to the condition, if its road was not completed within the time prescribed by congress, "no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States." 13 St. p. 68, c. 80, § 9.

It cannot be disputed that the grant of lands in the act of 1856 for the benefit of the Bayfield road was also one *in præsenti;* that prior to the passage of the act of 1864, the company constructing that road had, by the filing and acceptance of its map of definite location, earned its place lands, subject only to the condition, prescribed in the fourth section of the act of 1856, that if the road was not completed within the time designated, such lands as remained unsold should revert to the United States. Nor can it be disputed that, prior to 1864, all the lands within the 15-mile indemnity limits of that road, of which those here in dispute formed a part, had been lawfully withdrawn from sale or location, in order that the state, with the approval of the secretary of the interior, might select therefrom lands to supply deficiencies that may have resulted from previous sales or appropriations by the United States of lands within the place limits of that road, as defined by the act of 1856. And yet it is said that congress intended by the third section of the act of 1864 to grant to the state, for the benefit of another road, whose route had not then been located, such part of the indemnity lands of the Bayfield branch as fell within the designated place limits of that other road. It is argued that to this extent, at least, the act of 1856 was superseded and repealed by that of 1864.

At the threshold of the inquiry as to whether the act of 1856 was repealed or superseded, we are confronted with these facts: That the act of 1864 contains no words of repeal; that it does not, in terms, disturb any legal right which had accrued or become vested under the former act; that its first section recognizes the indemnity limits of the Bayfield road as embracing the lands in dispute quite as distinctly as the third section, construed alone, puts them in the place limits of the road mentioned in it; that in four out of nine sections of the act of 1864 the act of 1856, with its terms and conditions, is referred to, and its continuing existence, at least for some purposes, is recognized; that when the act of

1864 was passed, only eight of the ten years given in the act of 1856 for the completion of the roads therein mentioned had expired; and that the act of 1864, so far from superseding altogether the act of 1856, extends "the time fixed and limited for the completion of the said roads in the act aforesaid of June 3, 1856," to a period of five years from and after the passage of the act of 1864, while it gives ten years from its passage for the completion of the road mentioned in the third section; thus putting the Central road upon a different footing as to time from that prescribed as to the roads mentioned in the act of 1856.

These facts may not be conclusive against the suggestion of repeal, but they certainly tend to show that congress did not intend to wholly displace the act of 1856.

The act of 1864 undoubtedly took the place of that of 1856 for certain purposes. While, as was held by this court in *Madison & Portage R. Co.* v. *State of Wisconsin, etc.*, decided in 1879, the act of 1856 contemplated or rendered possible the construction by one company of a single continuous road from Madison or Columbus, via Portage City and St. Croix river or lake, to the west end of Lake Superior and to Bayfield, the continuity of such line was destroyed by the act of 1864, which both divided and enlarged the grant made by congress in 1856. In the case just cited it was said:

"This course was, perhaps, suggested by the fact, of which we may presume congress had knowledge, that nearly eight years had elapsed after the state's acceptance of the act of June 3, 1856, without anything whatever being done upon the line west and north of Tomah, beyond the mere location of the route from Tomah, via St. Croix river or lake, to Lake Superior. But, whatever considerations may have influenced congress, we are satisfied that the purpose of the act of May 5, 1864, was to break the continuity of the original line from Tomah, via St. Croix river or lake, to the west end of Lake Superior and to Bayfield, and to devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by, or which could have been made available under, the act of 1856."

In the same case, it was held that congress intended that all the lands granted by and earned under the act of May 5, 1864, by means of constructed road, should be disposed of according to the coterminous principle, under which each road would get the benefit of the lands granted by and earned under that act that were coterminous with each completed section of 20 miles,—a mode of disposing of them not absolutely required by the act of 1856. In these and perhaps in other respects, not material to be considered, the act of 1864 took the place of, or superseded, the act of 1856. But did it operate to displace the first act to the extent claimed by the plaintiff?

The first section of the act of 1864 certainly gives no support to the position taken by the plaintiff. It discloses, as we have said, no purpose upon the part of congress to disturb or displace any substantial right vested or acquired under the former act, or to cripple any railroad company that had proceeded under the act of 1856. It does not make an entirely new, independent grant, as of its date, of place lands to the extent of 10 full sections in width on each side of the particular roads

therein mentioned, with indemnity limits of 20 miles. It is, in legal effect, as was substantially decided in the *Madison-Portage Case*, a grant of 4 *additional* sections in width of place lands, with indemnity limits enlarged from 15 to 20 miles, and a confirmation of the previous grant of 6 sections in width of place lands, with 15 miles indemnity limits. It converted 4 miles of the indemnity limits, as defined in the act of 1856, into place limits of the road to Bayfield, and added 5 miles on each side of the place limits, thus enlarged, to the indemnity limits. But it left untouched the grant, made in 1856, for the same line of road, of 6 sections in width on each side, with indemnity limits of 15 miles. This view is fortified by the explicit recognition, in the first section of the act of 1864, of the fact that the additional lands therein granted are for the "same purpose" as were the lands originally granted by the act of 1856, which the act of 1864 required to be "deducted" from the aggregate of 10 sections in width on each side of the road, thereafter to constitute the place limits of the Bayfield branch. The first section of the act of 1864 should receive the same construction that would be given if it had, in words, *added* four sections in width to the place limits, and five miles to the indemnity limits, on each side of the road. The result, according to this view, is that, except as to that part of the indemnity lands converted by the first section of the act of 1864 into place lands of the Bayfield road, the order of the secretary, made prior to that year, withdrawing from sale and location for the benefit of that road its entire indemnity lands, was not abrogated or annulled by that act. So far from congress intending to deprive the Bayfield road of any part of its original indemnity lands, it put a part of them in its place limits, and increased its indemnity limits by five miles.

If this interpretation of the first section of the act of 1864 should be wrong, and if that section should be construed as making an entirely new, independent grant, as of the date of that act, of 10 sections in width, with indemnity limits of 20 miles on each side of the road, the result would be that congress, by the same act, embraced the lands in dispute within the indemnity limits of the Bayfield road, and within the place limits of the Central road. And such we understand to be, substantially, the position of the plaintiff; for it contends that the act of 1864 superseded and took the place of the act of 1856 in all material respects, "so that the grants of the Omaha Company and of the Central Company were in fact contemporaneous grants." A view somewhat similar was presented at the argument of the case of *Madison & P. R. Co. v. State.* The court then said:

"Although the Wisconsin Central Railroad Company has filed no cross-bill, and has only presented its claims by answer, it may not be improper for us to express an opinion upon the effect of the grant by the act of 1864, when there is a conflict or overlapping of lands granted to the different railroads as they approach Lake Superior; large quantities of lands being thus granted by the act to the different roads. These grants are made by the same law operating on the lands granted at the same time. The Wisconsin Central Railroad has completed its road to Ashland, on Lake Superior, a point not named in the act; but up to the present time no road has been finished to Bayfield,

or to the west end of Lake Superior, and, without foreclosing the parties upon this question, we should be inclined to think that the different companies, as to all lands overlapping in the respective grants, must be considered tenants in common, without regard to priority of construction."

The court concedes the force of the suggestion that what appears in the above extract from the opinion in the former case was not absolutely necessary to the determination of any specific issue therein made, in respect to which affirmative relief could have been given. It is now alluded to for the purpose of saying that, if the present case depended upon the first and third sections of the act of 1864, without reference to the sixth section, there would be ground for holding, in respect to the particular lands in dispute, and other lands similarly situated, that the Omaha Company and the Central Company became tenants in common, without regard to priority of construction; in which event the agreement between them, the deed of release from the Omaha Company, and the patent from the state, might perhaps be sufficient to sustain the title of the plaintiff as against the defendant. But no question was made in the former case as to the scope of section 6 of the act of 1864, nor was there any question in that case as to the effect of the withdrawal, prior to the act of 1864, from sale or location, and for the benefit of the Bayfield road, of lands that are within the outer boundaries of the place limits of the road, mentioned in the third section of that act. There was, consequently, no occasion to consider, and the court did not determine in the former case, the question whether the lands here in dispute, or any lands similarly situated, were excluded from the operation of the act of 1864 in virtue of its sixth section, and by reason of the secretary's previous orders withdrawing them from sale or location.

We proceed now to inquire whether the lands in dispute were in fact *granted* by the third section of the act of 1864. That section grants to the state, to aid in the construction of the road therein mentioned, "every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road;" and we have seen that the lands in dispute constitute part of some of those odd-numbered sections. But the sixth section expressly *reserves* and *excludes from the operation of the act*, not only mineral lands, but "any and all lands reserved to the United States by any act of congress, for the purpose of aiding in any object of internal improvement, or in any manner, for any purpose whatsoever." If, when the act of 1864 was passed, those lands were "reserved to the United States * * * in any manner, for any purpose whatsoever," then they were expressly excluded from the operation of the act, and therefore were not granted. Were they not so reserved by the order of the secretary of the interior, which had not been modified or rescinded by him when the act of 1864 was passed? The plaintiff insists that, while they may have been regarded as reserved for the benefit of a particular road, they were not, within the meaning of the act, reserved "to the United States." This position cannot be sustained, in view of the decisions of the supreme court of the United States.

The lands embraced in the withdrawals, although held as indemnity

lands, belonged to the United States. It had never parted with its interest in them, nor lost its right to control them absolutely. Its title to them was complete, because, as shown by adjudged cases, to be hereafter cited on another point, although withdrawn from sale or location in order that losses, when ascertained, in the place limits of the Bayfield road, might be supplied by selections from them, *the title, the right of property* of the United States, remained unaffected *until such selections were actually made and approved.* They were, it is true, selected in mass by the state's agent after the map of definite location of the Bayfield road was filed and approved; but such general selection did not change the right of property, for no particular lands were set apart by the land department to supply any ascertained losses in place limits. The reservation of them was solely to the end that the United States might, at the proper time, use them in meeting its obligations on account of the Bayfield road. In every sense, therefore, they were, by competent authority, "reserved to the United States;" that is, retained by the United States as lands not granted, and therefore as its property. The withdrawal of them from sale or location, under the general laws providing for the administration of the public domain, was a reservation of them by and to the United States; and that was their condition when the act of 1864 was passed.

Here we are met with the inquiry whether congress could have intended, in respect to the road mentioned in the third section of the act of 1864, to make to the state a grant that would cover these lands, and, by the sixth section of the same act, exclude them altogether from the grant. This is hardly an accurate or full statement of the case. The question, as propounded, assumes the very matter to be decided. It assumes that congress intended, at all events, by the third section of the act of 1864, to *grant* these lands, and other lands similarly situated, as place lands of the road mentioned, to become, as of the date of the grant, the property of the company constructing that road, when its route was finally located. Such assumption might be justified, if we looked alone to the third section. We cannot, however, in construing the act, ignore the first and sixth sections. The entire act must be taken together and in connection with the act of 1856, in order to ascertain the will of congress. Looking at the sixth section of the act of 1864, in connection with the third, it is clear that the words of the latter section are subject to the express condition, contained in the former, that the grant shall not include any lands "reserved to the United States * * * in any manner, for any purpose whatsoever." The sixth section should receive the same construction precisely that would be given if it had been simply a proviso of the third section. It is as if congress had declared in words: We give to the state, for the benefit of the road to be constructed from Portage City, Berlin, Doty's Island, or Fond du Lac, in a north-western direction, to Bayfield, thence to Superior, on Lake Superior, every alternate section of public land designated by odd numbers, for ten miles in width on each side of the road, except or excluding such lands within those limits as are reserved to the United States in any manner, for any purpose whatsoever.

This construction, it is contended, cannot be sound, as it would deprive even the road mentioned in the first section of the act of 1864 (the Bayfield branch) of the benefit of all the lands withdrawn from sale or location by the secretary's order; and this, for the reason that the broad language of the sixth section of the act of 1864 embraces every road in that act mentioned. Not at all; for, as heretofore shown, the lands in dispute constituted a part of the indemnity lands of the Bayfield road under the act of 1856, the general purposes, terms, and conditions of which are recognized by the act of 1864. Whatever rights that road had in respect to those particular lands arose under the act of 1856, and did not come from what may be regarded as the "new grant," in the act of 1864, giving *additional* place lands, with enlarged indemnity limits. Even if it were true that the grant in the act of 1856 for the Bayfield road was a new grant as to all of the lands within the place limits of that road as enlarged by the act of 1864, the result would be the same; for in the case supposed there would be ground to hold that the sixth section excluded the lands in dispute from the act of 1864; in which event, so far as the Omaha and Central Companies were concerned, they would have been regarded as "reserved to the United States," and therefore excluded altogether from the operation of the act.

We think that some confusion has come into this case by reason of the fact that the grant for the Central road is in the same act that enlarges the grant made for the Bayfield road in 1856. Let us suppose that the act of 1864 had made no reference whatever to the act of 1856, and had contained only a grant to the state, in the words of the third section of the former act, accompanied by a distinct clause or section, reserving and excluding from the operation of the act any and all lands "reserved to the United States" either by an act of congress or in any other manner, for any purpose whatsoever. Would it be pretended that such an act granted to the state the lands previously included in the indemnity limits of another road, whose route had then been definitely located, and whose indemnity lands had been withdrawn and reserved from sale or location by the secretary of the interior, in order to supply deficiencies, if any were found to exist, in the place limits of that other road? We think not. And yet there is really no difference in law between the case now before us and the case supposed.

That we have not given undue weight to the secretary's order of withdrawal, or misinterpreted it, is abundantly established by decisions of the supreme court in cases somewhat similar to the present one. These decisions, whatever might be the view of this court as to the meaning of the words "reserved to the United States," if the question were for the first time presented for determination, leave no room for doubt as to our duty in the present case. In 1846, congress, "for the purpose of aiding the territory of Iowa to improve the navigation of the Des Moines river from its mouth to the 'Raccoon Fork,' so called," made a grant to that territory of—

"One equal moiety, in alternate sections, of the public lands remaining unsold, and not otherwise disposed of, incumbered, or appropriated, in a strip

five miles in width on each side of said river, to be selected within said territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the secretary of the treasury of the United States." 9 St. c. 103, § 1.

The Des Moines river rises in the northern part of Iowa, and empties into the Mississippi at the south-east corner of that state. The Raccoon fork, coming from the north-west, enters the Des Moines river, near the center of the state, many miles above the mouth of that river. Subsequently, on the 15th of May, 1856, congress granted to the state of Iowa, for the purpose of aiding in the construction of certain railroads within its limits, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads, with a proviso substantially in the words of the sixth section of the act of May 5, 1864, now before us. That proviso (the italics are ours) was in these words:

"That any and all land heretofore *reserved to the United States* by any act of congress, or *in any other manner, by competent authority*, for the purpose of aiding in any objects of internal improvements, *or for any purpose whatsoever*, be, and the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroads through such reserved land, in which case the right of way shall be granted, subject to the approval of the president of the United States." 11 St. p. 9, c. 28, § 1.

In *Railroad Co.* v. *Litchfield*, 23 How. 66, it was decided that the grant of 1846 did not include lands *above* Raccoon fork,—that is, lands north and west of its junction with the Des Moines river; but only lands below such junction within the prescribed distance from the river. In *Wolcott* v. *Navigation Co.*, 5 Wall. 681, 687, which involved the title to certain lands covered by the above grant of 1846, it appeared that in August, 1859, the Des Moines Navigation Company, to which the state, succeeding to the rights of the territory, had in May, 1858, transferred the land granted to the territory, conveyed to Wolcott a half section within five miles of Des Moines river, but situated above the junction of Raccoon fork with that river, and warranted the title. At the date of the passage of the act of May 15, 1856, the odd-numbered sections within five miles of Des Moines river, above the point where the Raccoon fork empties into it, had been reserved, not in terms "to the United States," but from sale by the proper officer having charge of the public lands. That reservation was made in the belief, shared by many public officers, that the grant of 1846 included the odd-numbered sections above, as well as those below, that fork, within the prescribed distance from the river. The question presented was as to the scope and effect of the proviso in the act of 1856. It was admitted that the grant to Iowa by the act of May 15, 1856, for the benefit of the railroads named in it, embraced the lands there in dispute, unless they were excluded by the above proviso. This court said:

"We think it difficult to resist the conclusion that congress, in the passage of the proviso, had specially in their minds this previous grant, and the conflict of the opinion concerning it, and intended to reserve the lands for further dis-

position, if the title under the first grant should turn out to be defective. The decision of this court had not then taken place, though the litigation was probably pending in the court below, in the district of Iowa. The words of the proviso point almost directly to this grant, and to the dispute arising out of it among the public authorities: 'All lands heretofore reserved,' etc., 'by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements,' etc. These improvements of the Des Moines river were then in progress. Now, if it had turned out that the true construction of the act carried the grant above the Raccoon fork, then the lands would have been reserved by the act of congress, and no further legislation necessary. But, not satisfied with this, as if to provide for any result in respect to the title to them, if reserved in any other manner by competent authority, for the object of internal improvements, then the enacting clause should not operate to carry them under the new grant.

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river, first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the land-office to reserve from sale the lands embraced in the grant. Otherwise, its object might be utterly defeated. Hence, immediately upon a grant being made by congress for any of those public purposes to a state, notice is given by the commissioner of the land-office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land-officers to withhold the sales, and reserve them to the United States till it was ultimately disposed of."

These observations are pertinent to the case in hand. What was said in the *Wolcott Case* by the supreme court of the United States bears directly upon the inquiry whether the reservation by the secretary of the interior from sale or location of the lands within the indemnity limits of the Bayfield road was not a reservation "to the United States." In that case the withdrawal of lands from sale or location was distinctly characterized as a reservation of that class. The decision fully sustains the view that the lands embraced by the secretary's order of withdrawal in the present case were "reserved to the United States." It is peculiarly strong in its application here, by reason of the fact that the lands "reserved" in the Iowa case were not in fact embraced by congress in the grant of 1846, and consequently could not rightfully be used for the purposes for which they were withdrawn. The decision in *Wolcott* v. *Navigation Co.* was approved and followed in many subsequent cases: *Homestead Co.* v. *Valley R. Co.*, 17 Wall. 153; *Wolsey* v. *Chapman*, 101 U. S. 755; *Litchfield* v. *County of Webster*, Id. 773; *Dubuque, etc., R. Co.* v. *Des Moines Val. R. Co.*, 109 U. S. 329, 3 Sup. Ct. Rep.

188. See, also, *Williams* v. *Baker*, 17 Wall. 144, and *Bullard* v. *Railroad Co.*, 122 U. S. 167, 7 Sup. Ct. Rep. 1149. In our judgment, these cases control the decision of the present case so far as it depends upon the question whether the lands in dispute were "reserved to the United States" when the act of 1864 was passed. If the lands involved in the *Wolcott Case* were, within the meaning of the act of May 15, 1856, "reserved to the United States," for the purposes of the grant to Iowa in 1846, although they were not, in fact, embraced by that grant, and could not be used in executing it, much more would it be held that the lands within the original indemnity limits of the Bayfield road, reserved by the secretary's order of withdrawal, were, within the meaning of the sixth section of the act of 1864, "reserved to the United States."

Another contention upon the part of the plaintiff is that, even conceding that the lands in dispute were reserved by virtue of their being withdrawn, prior to 1864, for indemnity purposes, yet, as the object for which the withdrawal was made, namely, to supply deficiencies in the place limits of the Bayfield road, were fully satisfied, before the defendant made his entry, by the final adjustment of the land grant for the Omaha road, the lands so withdrawn would be affected by the granting clause in the third section of the act, and so become and be the property of the Central Company under that section. This view is in opposition to many adjudged cases. Whatever force it might have in the case of two contemporaneous grants to different companies, covering the same land, in neither of which an exception was made of lands "reserved to the United States," it can have no application where, as in the present case, the statute expressly reserves and excludes from its operation any and all lands so reserved. If these lands were reserved when the act of 1864 was passed, they certainly were not granted by the third section of that act to the Central road, and could not get into the grant to, and become the property of, the Central Company, by reason simply of their not being required for the adjustment of a different grant, made for another road. This view is illustrated by several cases. In *Railway Co.* v. *Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566, the question was whether lands to which a claim of homestead "attached" after the passage of an act granting lands to a railroad company, but before its line was definitely located, reverted to the company, and became a part of its grant, by reason of the failure of the "homesteader" to perfect his claim in the mode required by law. It was held that they did not, for the reason that the grant to the railroad company was of lands within certain prescribed limits as to quantity and location, "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely located." It was adjudged that the lands to which the homestead claim had attached could not be included in the grant to the railroad company. The court said:

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once

passed through military reservations for forts and other purposes which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that in any case where lands had been otherwise disposed, their reversion to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emption right has attached? Did congress intend to say that the right of the company also attached, and whichever proved to be the better right should obtain the land? * * * The reasonable purpose of the government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. * * * It necessarily means that, if such rights have attached, they [the lands] are not granted."

So in *Bullard* v. *Railroad Co.*, 122 U. S. 167, 176, 7 Sup. Ct. Rep. 1153:

"The object of the bill is to have a declaration of the court that the title of the plaintiff under these settlements and pre-emptions is superior to the title conferred by congress on the state of Iowa, and her grantees, under the act of July 12, 1862. If the lands at the time of these settlements and pre-emption declarations were effectually withdrawn from settlement, sale, or pre-emption, by orders of the department, which we have considered, there is an end to the plaintiff's title, for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the act of 1862, and no title could be established, because the land department had no right to grant it."

In *Railroad Co.* v. *Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112, the contest was between a railroad company, claiming under a grant of lands made in 1866 to the state of Minnesota, similar to the one involved in the *Dunmeyer Case*. Before the passage of the act, namely, in 1865, one Turner took certain preliminary steps, under the homestead laws of the United States, for the entry of the lands there in dispute. The entry made by him was, however, canceled in 1872; and in 1877 the same lands were entered by Mrs. Whitney as a homestead. The grant of 1866 excepted lands to which a right of homestead or pre-emption "had attached." The claim of the railroad depended upon the question whether the lands came into the grant of 1866, upon the cancellation in 1872 of the entry made by Turner in 1865. It was held that Turner's entry, not being void upon its face, operated to exclude the land from the railroad grant, and that, upon the cancellation of such entry, the tract in question did not inure to the benefit of the company, but reverted to the government, and became a part of the public domain, subject to appropriation by the first legal applicant.

These cases are, in the judgment of this court, conclusive against the contention that the lands here in dispute became part of the place lands of the Central road, after the grant for the benefit of the other road had been finally adjusted with the Omaha Company, and satisfied with other lands.

It remains to consider the claim of the plaintiff, based upon the agreement between it and the Omaha Company and the deed of release by

the latter to the former company. Although the lands in dispute were withdrawn from sale or location for the benefit of the Bayfield branch of the Omaha Company, and although the orders of withdrawal were in force at the date of the execution of the above agreement and deed of release, we cannot see that the Omaha Company had any legal interest in these lands which at the date of that agreement and deed could have been transferred by it to the Central Company. When the agreement and deed were made, the lands in dispute had not been specially selected and set apart for the purpose of supplying deficiences in the place limits of the Bayfield road. Until so selected and set apart with the approval of the land department, they remained, in the fullest legal sense, the property of the United States. In *Barney* v. *Railroad Co.*, 117 U. S. 228, 232, 6 Sup. Ct. Rep. 654, the court said:

"In the construction of land-grant acts in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches, when the lands are located, by an approved and accepted survey of the line of the road filed in the land department as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

So in *Sioux City, etc., R. Co.* v. *Chicago, etc., Ry. Co.*, 117 U. S. 406, 408, 6 Sup. Ct. Rep. 790:

"No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the secretary of the interior."

The same view was recently expressed in *Wisconsin Cent. R. Co.* v. *Price Co.*, 133 U. S. 496, 513, 10 Sup. Ct. Rep. 341, where one of the questions was as to the right of the state of Wisconsin to tax, as against a railroad company, certain lands within indemnity limits, that had been selected and reported to the secretary of the interior to be taken in lieu of lands lost in the company's place limits. But at the time the tax was assessed, that officer had not approved such selection. It was held that the approval of the secretary was essential to the efficiency of the selections, and to give to the company any title to the lands selected. After observing that his action was judicial, not ministerial, the court said:

"He [the secretary] was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits have been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. * * * Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification. The proposed selections remained the property of the United States. The government was, indeed, un-

der a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced by the courts."

It results from these cases that the agreement between the Omaha Company and the Central Company that the lands in dispute should, as between those companies, belong to the latter corporation, had no effect whatever upon the title or right of property of the United States. If at that time the lands had been actually set apart for the Bayfield road by approved selections, to supply ascertained deficiences in the place limits of that road, a different question would have been presented for determination.

It was stated at the bar that the decision of this case, and of two other cases in ejectment, tried at the same time, and depending upon the same facts, would indirectly affect the title to large tracts of land, in the same situation as the particular lands here in dispute, and which have been heretofore sold, in good faith, by the Central Company, to *bona fide* purchasers, in the belief that they were embraced in the grant contained in the third section of the act of May 5, 1864, and not excluded from the operation of that act by the sixth section relating to lands reserved to the United States; and that a decision in favor of the defendant in the present case would produce great confusion and trouble among such purchasers. In view of this statement, the court has felt it to be its duty to embody in this opinion all the material facts shown in evidence, and to state fully the grounds upon which its conclusion rests. That conclusion is:

That the lands in dispute were not granted by the United States for the benefit of the road mentioned in the third section of the act of May 5, 1864, and that the grant in the first section of the act of 1856 for the benefit of the railroad, beginning at a point on the line from the St. Croix river or lake to the west end of Lake Superior, and extending to Bayfield, having been fully adjusted by the United States with the only company that was entitled to the benefit of such last-named grant, the lands in dispute became a part of the public domain, in virtue of the orders subsequently made by the secretary of the interior, and were thereafter open to entry under the homestead and pre-emption laws of the United States.

It is ordered that the verdict heretofore returned by the jury in this case be set aside, and a new trial awarded.

Judge BUNN authorizes me to announce his concurrence in the views herein expressed.

Similar orders were made at the same time in *Wisconsin Central Railroad Company* v. *L. P. Lentz* and *Wisconsin Central Railroad Co.* v. *Edward Bekken*, which were cases in ejectment, and involved the same questions.

LANE *v.* SOVERIGN *et al.*

(Circuit Court, N. D. Illinois. April 21, 1890.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PLEADING.

Defendants' answer to a bill charging the infringement of complainant's patent for making oil-cans alleged that the cans were made in accordance with a patent issued 20 days before that of complainant, and admitted that the first claim of complainant's patent was similar to the first patent. The cause was heard on the bill, answer, and replication. *Held*, that the admission of infringement was complete, and must be taken as true, and the affirmative averments avoiding the effect of the admission are of no avail without proof.

In Equity.

L. L. Morrison, for complainant.

Banning, Banning & Payon, for defendants.

BLODGETT, J. This is a bill in equity charging defendants with the infringement of letters patent No. 387,426, granted August 7, 1888, to the complainant for an oil-can, and praying for an injunction and an accounting for profits and damages. Defendants answered, admitting the issue of the letters patent in question to complainant, as alleged in the bill, but insisted on proof as to whether complainant was the original and first inventor of the improvement described and claimed in the patent. Defendants also, by their answer, denied that they were, at the time of making such answer, engaged in manufacturing or selling any oil-cans which contained or embodied the invention described and claimed in the patent. Defendants further, by their answer, admitted that they had, before making such answer, manufactured and sold 837 cans, made substantially in accordance with letters patent No. 386,439, dated July 17, 1888, and as to such cans defendants admitted that they contained the features and combinations described in the first claim of complainant's patent. Complainant filed a replication to this answer, and the suit was brought to hearing upon the bill, answer, and replication, and a stipulation to the effect that complainant might, upon the hearing, introduce in evidence an ordinary printed patent-office copy of complainant's patent, drawings, and specifications, instead of the original, or a certified copy thereof, and on the hearing complainant exhibited an office copy of his patent, which was duly received and considered in evidence.

The production of a copy of the patent in evidence, under the stipulation, I think raises the presumption that complainant was the first inventor of the device thereby patented; and so much of the answer as denies the allegation of the bill that defendants are now engaged in manufacturing cans in violation of complainant's patent is, I think, responsive to the bill, and must therefore be considered as true.

I now come to the consideration of the effect of the admission in the answer of the manufacture of the 837 cans. This answer admits, in effect, that defendants have made 837 cans which contain the features of the first claim of the complainant's patent; but defendants insist that

said cans were made in accordance with the specifications of a patent 20 days prior in date to the complainant's patent. This is equivalent to saying to complainant, by the answer, "I infringed the first claim of your patent, but was justified in doing so, because your patent is anticipated by an older patent, and therefore void."

The admission of infringement is complete. The pleading or setting up of an older patent was new matter, which the defendants were bound to prove, if they are to be protected by it; and the mere statement of the defendants that such older patent exists, and that it describes the complainant's oil-can is not sufficient. The older patent should have been put in evidence, so that the court might determine whether it so far described complainant's device as to defeat his patent. Possibly it might appear from the dates of the applications for the two patents that the one last issued was in fact first applied for, or the complainant, on the introduction of the older patent, might have shown by the proof that he was the first to make the invention, and hence entitled to the device covered by the first claim as against one claiming protection from a patent older in date. The law in regard to the effect of admissions in the answer when a replication is filed is, I think, that so much of the answer as is directly responsive to the charges in the bill is to be taken as true; but any new matter pleaded by way of defense to the charges admitted to be true is affirmative matter, which the defendant is bound to prove where a replication is filed. In Daniells' Chancery Practice, (Perk. 4th Amer. Ed. vol. 1, p. 844, note 7,) it is said:

"Where, however, the answer of the defendant is not responsive to the bill, or sets up affirmative allegations of new matter, not stated or inquired of in the bill, in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is as much bound to establish the allegations so made by independent testimony as plaintiff is to sustain his bill. * * * But when the case is heard upon a bill and answer alone, the answer must be taken as true, whether responsive to the bill or not."

So also in *McDonald* v. *McDonald*, 16 Vt. 630, it is said:

"A fact alleged in the bill and admitted in the answer is established, but every fact alleged in the answer in avoidance of such fact must be proved like the bill, if the answer is traversed."

And in *Wakeman* v. *Grover*, 4 Paige, 23, it is said:

"Where a replication has been filed, allegations in the answer not responsive to anything in the bill cannot benefit the defendant at the hearing."

There will, then, be a decree for the complainant, and a reference to a master to ascertain and report as to the profits and damages complainant is entitled to from the manufacture of the 837 infringing cans which defendants admit they have made.

CREAMERY PACKAGE MANUF'G CO. *v.* ELGIN CO-OP. BUTTER TUB CO.

(*Circuit Court, N. D. Illinois.* July 31, 1890.)

1. PATENTS FOR INVENTIONS—NOVELTY.
Letters patent No. 294,764, granted March 11, 1884, to Matthew Corcoran, for a "machine for trussing tubs," are not void for want of patentable novelty, as the combination, consisting of recessed standards, with truss-hoops, removable bottom, and driving weight, is new, though its constituent elements had long been in use.

2. SAME—INFRINGEMENT—EQUIVALENTS.
Claim 2 of letters patent No. 294,764, granted March 11, 1884, to Matthew Corcoran, for a "machine for trussing tubs" covering a combination of recessed standards, with truss-hoops, removable bottom, and driving weight, is infringed by letters patent No. 356,217, granted January 18, 1887, to F. W. Ulrich, for the same kind of machine, wherein the device is a recessed iron pot, with removable bottom and truss-hoops placed in the recesses, as the latter device is simply an equivalent of the former.

In Equity.

Manahan & Ward, for complainant.

James Coleman and *John G. Elliott*, for defendant.

BLODGETT J. This is a bill in equity seeking an injunction and accounting by reason of the alleged infringement of patent No. 294,764, granted March 11, 1884, to Matthew Corcoran, for a "machine for trussing tubs." The patentee describes his invention in the specification as follows:

"My invention has reference to improvements in machinery for trussing or setting up tubs, having more special reference to the manufacture of butter-tubs, which latter are now in great demand as a means for packing, preserving, and transporting butter. Such improvements consist mainly in novel mechanism for supporting the truss-hoops horizontally, at proper distances above each other to receive the staves, and the employment of a drop-weight to force the staves into such truss-hoops while the latter are supported in certain relative positions."

The device covered by the patent consists of three standards placed at equal distances apart in the periphery of a circle, and in the inner faces of which recesses are formed for the truss-hoops to rest upon. These recesses recede from each other so that the upper ones hold the larger-sized truss-hoops, as the tub is trussed small ends downwards. These recesses are so arranged as to hold the truss-hoops in place, and below these recesses, marked "1" in the drawings, is another recess, marked "2" in the drawings, for holding a removable bottom to the machine. There is also a drop-bottom, that is, a bottom which is hung upon a lever, and so arranged as that by an action of the foot upon a treadle it may be pressed upward to hold the ends of the staves while they are being put in place. After the staves are properly arranged, a weight suspended over the machine is dropped upon the upper ends of the staves for the purpose of driving the staves to place. The patentee then describes the operation of his machine as follows:

"The operator places his foot on the outer end of the lever, bringing such end down upon the floor, and by the same motion forcing the movable bottom up against the under edge of the lower truss-hoop, the truss-hoops having

been placed in their several positions in the recesses, 1. The staves are then placed within the truss-hoops around the entire inner circumference of the latter. The upper edge of the lower truss-hoop is provided on its upper edge with an inward bevel to assist in guiding the lower ends of the staves into proper position. The operator's foot is then withdrawn from the lever, and the bottom thereby drops slightly away from the lower truss-hoop. The drop-weight is then permitted to fall upon the upper ends of the staves, forcing the latter tightly into such truss-hoops."

Infringement is insisted upon only as to the second claim of the patent, which is:

"(2) The combination of the standards, A, provided with recessess, 1 and 2, on the inner faces thereof, the truss-hoops, B, fitted to rest in such recesses, 1, the removable bottom, I, fitted to rest in such recesses, 2, the weight, G, arranged to be suspended over and dropped upon the upper ends of the staves, C, within such hoops, and the rope, H, substantially as shown, and for the purpose specified."

The defenses insisted upon are (1) want of patentable novelty; (2) that defendants do not infringe. It will be noticed that the claim in question is solely for a combination of elements. It is not insisted that any of these elements are new, but that the combination is new, and, although the defendants have introduced a large number of patents, covering the whole field of construction and trussings of barrels by machinery, I do not find in this mass of testimony any such combination as is shown in the complainant's patent. There is proof in the record of vertical standards to hold the truss-hoops and of bottoms to receive the ends of the staves, but the proof fails to show a combination of recessed standards with the truss-hoops and the removable bottom and the driving weight, as claimed in this patent. It is also urged by the defendants' counsel that the bottom, I, provided for in the patent, is not removable, and that it cannot be taken out or placed into the recesses, 2, and that hence the claim is inoperative. This is manifestly a mistake of fact, as the drawings clearly show that the bottom, I, may be removed, and the specifications state that after the tub has been fired "the bottom, D, is removed and the bottom, I, is placed in the lower recesses, 2." No reason is perceived, either from the specifications or the drawings, why this bottom, I, may not be placed in these recesses, 2, and removed therefrom, as it is not necessary that it shall fit snugly into these recesses, but play enough may be given it to allow of sufficient tipping to put the plate into and take it out of the recesses, and, inasmuch as the directions for use of the device require the bottom, I, to be placed in those recesses for the final process of tightening the truss-hoops, any person constructing the machine would provide room for taking out and putting in the bottom, I, from these recesses. Not finding in the proofs any anticipation of the combination covered by this second claim, and the utility of the machine being abundantly shown, from the fact that it has gone widely into use, and that the defendants in fact use it in substantially the form of the patent, I must find that the defense of want of patentable novelty is not sustained.

As to the question of infringement it is conceded that the defendants

are manufacturing butter-tubs with a machine constructed substantially after the directions and specifications in patent No. 356,217, granted January 18, 1887, to F. W. Ulrich, and there can be no doubt from an inspection of Ulrich's drawings and specifications that the principle of the complainant's machine has been adopted in the drawings of that machine. It is true that the Ulrich machine, instead of having three recessed standards to support the truss-hoops in a horizontal position has an iron pot, with recesses or rests, within which the truss-hoops are placed; but this iron pot in no way differs in its operation from the complainant's frame or standards. The drawings of the Ulrich patent would seem to indicate that the bottom of the tub is solid or integral with its sides, but the proof shows that the machines used by the defendant and which are claimed to be Ulrich machines, have no bottom, and that a removable bottom is used the same as is provided for in the complainant's machine, so that I see no escape for the defendant upon the issue of non-infringement. The pot with the bottom removed is certainly nothing but the equivalent of the complainant's recessed standards for supporting the truss-hoops, and, as undoubtedly the defendant has found in practical working that a removable bottom is necessary to the successful use of the device, they have removed the bottom, and thereby more fully conformed to the construction of an operative machine under the complainant's patent. For these reasons I find that the defendants have infringed, as charged in the bill of complaint, and a decree may be entered accordingly, with a reference to a master to inquire as to the damages.

WESTINGHOUSE *v.* CARPENTER.

(*Circuit Court, S. D. Iowa.* June 29, 1888.)

PATENTS FOR INVENTION—EXPIRATION OF TERM.

After a patent, the infringement of which has been enjoined, expires, the injunction will be dissolved without reference to such articles as were manfactured while the patent was alive. The patentee may recover damages for such acts of infringement.

In Equity. On motion to dissolve injunction.

Bill by George Westinghouse against J. Fairchild Carpenter for the infringement of complainant's patent.

J. Snowden Bell, *Nathaniel French*, *George H. Christy*, and *William Bakewell*, for complainant.

Banning & Banning, for defendant.

Before MILLER, Justice, and LOVE, J.

MILLER, Justice. We are of the opinion that the motion ought to be granted. The attorney for the plaintiff practically concedes from the decisions of the courts on that subject that the motion to dissolve the injunction should be granted on account of the expiration of the patent which expired a few days ago with the expiration of a prior English patent. He, however, insists that the injunction should be continued as

to the use and sale of those articles which were manufactured and sold while the patent was alive, the manufacture of which was an infringement of this patent; that he should have the benefit of having forbidden them while the patent was in existence; and that the injunction should be continued as to the selling or using of those manufactures, notwithstanding the expiration of the patent. We are of the opinion that with the expiration of his patent the plaintiff's right to forbid anybody to make, sell, or use the articles to which this invention refers expires. His monopoly is continued for 17 years by law, or whatever period the law allows his patent to run. That monopoly is against the making, selling, or using of such articles. He has the benefit of that monopoly, and has had that benefit with regard to those articles in which he now asks to be further protected. He may recover the damages he has sustained, in this suit, which is still pending in this court. He may recover for the damages which were inflicted before the injunction was brought. And he still asks that the court shall enjoin the sale and use of those articles for which he expects to get damages. Speaking for myself,—and also for Judge LOVE,—I do not believe that is the true doctrine on this subject. There are some particular circumstances showing that the use of this patented article was an experiment to see whether it could be used successfully in this country; and, under all the circumstances, we are disinclined to make any modification of the motion to dissolve the injunction, but dissolve it absolutely.

THE GULF STREAM.[1]

THE KNIGHT.

INLAND & SEABOARD COASTING CO. *v.* THE GULF STREAM.

(*District Court, S. D. New York.* October 24, 1890.)

COLLISION—STEAM-VESSELS CROSSING—CHANGE OF COURSE—DUTY TO STOP AND BACK. The steam-ship K., on a course of N. E. by N., ½ N., made the green light of the steam-ship G. S. about half a point off her own port bow, and thereupon ported her helm. The G. S., on a course of S. by W., ¾ W., made both colored lights of the K. half a point on her starboard bow. She thereupon starboarded, and ran until she shut out the red light, but soon after it reappeared, when the G. S. hard a-starboarded, but collision occurred soon after. Neither vessel at any time slackened speed. *Held*, that the vessels were on crossing courses, and, under article 15 of the collision rules, it was the duty of the G. S. to keep out of the way, and of the K. to hold her course. The latter's swing to starboard was therefore a fault contributing to the collision; and, as the reappearance of the red lights of the K. should have shown to the G. S. that there was danger of collision by the starboard swing of the K., it was the duty of the G. S. thereupon, under article 18, to stop and back; and for her failure so to do she also was in fault. The damages were therefore divided.

In Admiralty. Suit for damages occasioned by collision between the steam-ships Gulf Stream and Knight.

Owen & Gray, for libelants.

Biddle & Ward, for claimants.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. In this case the two steamers were going in nearly opposite directions, differing therefrom by not more than three-fourths of a point, the Knight going N. E. by N., ½ N.; the Gulf Stream S. by W., ¼ W. The vessels made each other's lights when several miles distant. The Knight made the green light of the Gulf Stream about half a point off her own port bow, and ported her helm, and she did not see the red light of the Gulf Stream at all. The Gulf Stream first saw, about half a point on her starboard bow, both colored lights of the Knight. She then changed her course one point to port, and ran some distance until she shut out the red light for a short time; but soon after the red light again appeared, along with the green, when she hard a-starboarded, and the collision occurred shortly after. The Knight was all the time porting her wheel, until at the collision she headed about E. by N. When she ported, she gave a signal of one whistle, which was not heard by the Gulf Stream. Neither vessel stopped, nor even slowed her engine. Under article 15 of the new rules of navigation, these vessels were on crossing courses; as respects the Knight, because she saw only the other's green light; and as respects the Gulf Stream, because the two colored lights were not seen ahead, but from half a point to a point and a half on her own starboard bow, for a considerable time before any risk of collision commenced, so that she showed to the Knight only her own green light. By articles 16 and 22, therefore, it was the duty of the Gulf Stream to keep out of the way, and of the Knight to keep her course. The Knight disobeyed this rule by porting. This manifestly contributed to bring about the collision, and she is, on that ground, in fault. It seems to me equally clear that the Gulf Stream was also in fault in not observing the eighteenth article, which, under the above circumstances, required her to slacken her speed or to stop and reverse when they approached near each other. The Gulf Stream, when at a considerable distance, had changed her course one point to port, so as to bring the Knight about a point and a half on her starboard bow. As the vessels approached each other, and the Knight had broadened off considerably upon the starboard bow, she again showed to the Gulf Stream her red light, as well as her green light as before. This was the clearest possible evidence that a collision was threatened through the failure of the Knight to keep her course, and that she was endeavoring to cross the bow of the Gulf Stream. The officer in charge so understood it. It was his duty, under such circumstances, by article 18, to stop and back. There was ample opportunity to avoid collision by doing this after the course of the Knight was evident, as is shown both by the direct testimony, and by the further swing of three to four points by the Gulf Stream before collision. Instead of observing this duty, the Gulf Stream put her helm hard a-starboard, and continued on with unabated speed until the vessels struck. Both must therefore be held in fault, (*The Frisia*, 28 Fed. Rep. 249; *The Khedive*, L. R. 5 App. Cas. 876; *The Beryl*, 9 Prob. Div. 137, 142; *The Aurania*, 29 Fed. Rep. 124,) and the damages and costs divided.

BOSTWICK v. AMERICAN FINANCE CO.

(*Circuit Court, S. D. New York.* November 12, 1890.)

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—RESIDENCE.

Act Cong. March 3, 1887, as amended by Act Aug. 13, 1888, provides that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant; "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." *Held* that, when the jurisdiction depends solely on the citizenship, plaintiff may bring the action in the district wherein he resides, without reference to the residence of defendant, if he resides in a different state.

In Equity.

John V. Bouvier, Jr., for the complainant.

James Parker, for the defendant.

COXE, J. The complaint alleges that the complainant is a citizen of this state and a resident of the city of New York; that the defendant is a Pennsylvania corporation; and "that its principal and only place of business is at the city of New York, where it transacts all its business aforesaid, and not elsewhere." The action is in the nature of a creditor's bill, in aid of a judgment heretofore recovered in an action in this court, which action was commenced by complainant in the supreme court of New York in November, 1888, and was removed to this court by the defendant upon the ground that defendant was a foreign corporation. The defendant appears and interposes a special plea, insisting that the court has no jurisdiction for the reason that the defendant is not a citizen or inhabitant of this state or found within this district. There is no proof as to the manner in which the defendant was brought into court, and no question arises as to the regularity of the service of the writ. If a question of this kind exists it should have been raised by motion to set aside the service. *Robinson* v. *Stock-Yard Co.*, 12 Fed. Rep. 361; *Golden* v. *The Morning News*, 42 Fed. Rep. 112. Nothing is now before the court but the bill and plea. The issue thus raised is plain and simple. Has this court jurisdiction of an action in which the complainant is a citizen of New York and a resident of this district, and the defendant a citizen of Pennsylvania? It is thought that it has. The act of March 3, 1887, amended August 13, 1888,) provides that the circuit court shall have jurisdiction of suits at law or in equity where there is a controversy between citizens of different states; that no civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant; "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." The parties here are citizens of different states, and the complainant is a resident of the district where the suit is brought.

Nothing more is needed. In the case of *Filli* v. *Railroad Co.*, 37 Fed. Rep. 65, it was said:

"If the plaintiff in the case at bar were a citizen of this state, and a resident of this district, he could no doubt effect service on the defendant here, where its principal office is located, although it is a citizen of Pennsylvania, and so much of its railroad as is located in this state lies within the northern district."

This language exactly covers the present case. See, also, *Fales* v. *Railway Co.*, 32 Fed. Rep. 673; *Short* v. *Railway Co.*, 33 Fed. Rep. 114; *St. Louis R. Co.* v. *Terre Haute R. Co.*, Id. 385; *Rawley* v. *Railway Co.*, Id. 305; *Loomis* v. *Coal Co.*, Id. 353; *Bank* v. *Avery*, 34 Fed. Rep. 81; *Wilson* v. *Telegraph Co.*, Id. 561; *Hills* v. *Railway Co.*, 37 Fed. Rep. 660.

The plea is overruled. The defendant may answer within 20 days.

UNITED STATES *v.* JELLICO MOUNTAIN COKE & COAL CO. *et al.*

(Circuit Court, M. D. Tennessee. October 13, 1890.)

PRELIMINARY INJUNCTIONS—ILLEGAL COMBINATIONS.

Where the material allegations of a bill filed by the United States against various coal companies, under Act Cong. July 2, 1890, to enjoin their combination in restraint of trade, are denied by defendants' affidavits, a preliminary injunction will not be granted, as plaintiff gives no indemnifying bond in case the injunction should be dissolved.

In Equity.

This case arose on a bill filed by the United States under the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." All the coal companies doing business in the city of Nashville, as members of the coal exchange, were made parties defendant. On the preliminary hearing a temporary injunction was refused.

W. H. H. Miller, Atty. Gen., *Wm. H. Taft*, Acting Atty. Gen., and *John Ruhm*, U. S. Atty.

G. N. Tillman and *W. L. Granbery*, for defendants.

HAMMOND, J. This is an application for a preliminary injunction only, and it appears to the court better to await the hearing, and determine upon plenary proof of the exact facts those grave questions which have been suggested, than to decide them now upon the bare statements of the bill which are so general in their character, and quite too barren of any averments of specific facts to enable the court to determine whether the general conclusions of fact averred are true, particularly in view of the affidavits of defendants denying some of the most important of them; and in this view it is unnecessary to hear any counter-affidavits. The court is the more inclined to this course since the bill is not that of a private citizen, complaining of an injury to him, but only by the United States

on behalf of the public, and in pursuance of a public policy of enforcing a recent act of congress to prevent combinations in restraint of trade and commerce. It is manifest that the act is new, and this a most important application of it. It would more injure the defendants to grant this preliminary injunction if, on the hearing, it should turn out that the case does not fall within the act, than it would injure the public to withhold the injunction until the final hearing; and the more since the United States gives no bond to protect the defendants against that injury, as a private suitor would be compelled to do. When this is the situation of the parties the rule is to refuse the preliminary injunction, and abide the hearing. The court reserves all expression of opinion on the subject-matter of the bill until that time, as the best for all concerned.

BRUSH ELECTRIC CO. *v.* BALL ELECTRIC LIGHT CO.

(Circuit Court, S. D. New York. November 8, 1890.)

BILL FOR INFRINGEMENT—DEMURRER FOR LACHES.

In a bill for infringement of letters patent, alleged to have been issued in 1879, and assigned to the complainant in 1880, an averment of an infringement of the latter's rights "since the date of said patent" will be construed as meaning after or subsequent to the date of the patent, and not *ever since* that time, and the bill is not subject to demurrer for laches of complainant in asserting his rights.

On Demurrer.

Henry A. Seymour, for complainant.

Philip J. O'Reilly, for defendant.

COXE, J. This is an equity action for infringement of letters patent granted to Charles F. Brush, September 2, 1879, and now owned by the complainant. The action was commenced February 25, 1890. The usual relief is demanded. The bill alleges that the defendant has "since the date of said patent, since September 2, 1879, at New York, within said district," infringed upon the complainant's rights. The demurrer is aimed at the language quoted, the contention being that the defendant is there charged with a continuous infringement since the date of the patent, and that equity will not aid a complainant guilty of such laches in asserting his rights. That the language quoted is open to the construction contended for by the defendant is not denied, but it is equally true that it can be so construed as to sustain the bill, and that such a construction is the more natural one. "Since September 2, 1879," does not necessarily mean *ever since* September 2, 1879. It may mean after, or subsequently to, September 2, 1879. *Engraving Co.* v. *Hoke*, 30 Fed. Rep. 444; *Kittle* v. *De Graaf*, Id. 689. That the word "since" was used in the latter sense is evident from the fact that it is alleged elsewhere in the bill that the patent was not assigned to the complainant until September, 1880. It cannot be said, therefore, that the pleader intended

to aver that the defendant had infringed upon the complainant's rights continuously since September, 1879. The complainant had no rights under the patent until September, 1880. The demurrer is overruled. The defendant has 20 days in which to answer.

GLASPELL *v.* NORTHERN PAC. R. Co.

(Circuit Court, D. North Dakota. November 8, 1890.)

1. DECEIT—MEASURE OF DAMAGES.
   In an action for deceit in misrepresenting the value of land sold, the measure of damages under Code Dak. § 1967, (providing that the measure of damages for the breach of an obligation not arising from contract, except where otherwise provided, is the amount which will compensate for all the detriment proximately caused thereby,) is the loss sustained by reason of the fraud. Following *Smith* v. *Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39; *Atwater* v. *Whiteman*, 41 Fed. Rep. 427.
2. SAME—INSTRUCTIONS.
   In such an action an instruction to the effect that the measure of damages is the difference between the actual value of the land and its value as represented by the vendor is reversible error when it cannot be seen by an inspection of the record that the jury did not follow such instruction.
3. NEW TRIAL—AFFIDAVITS OF JURYMEN.
   Affidavits of jurors showing that they did not follow the erroneous directions of the court in arriving at their verdict are inadmissible on motion for new trial, though offered in support of the verdict.

At Law. On motion for a new trial.

This is an action brought to recover damages for deceit in the sale by the defendant to the plaintiff of 2,240 acres of land situate in the county of Wells in this district. The action was tried in the territorial district court in and for Stutsman county, in the sixth judicial district, and a verdict and judgment were rendered for the plaintiff on the 26th day of November, 1888, for the sum of $12,609.58. A motion for a new trial was thereupon made by the defendant in said territorial court, which motion was pending on the 2d day of November, 1889, when the state of North Dakota was admitted into the Union. A bill of exceptions was settled by the judge of the court who tried the cause on the 30th day of August, 1889. The property in controversy is situate within the said sixth judicial district as it existed under the territorial system, and all of the said district is included within the boundaries of the state of North Dakota. Upon the admission of the state into the Union this action was transferred from the territorial court into this court upon the request of the defendant, pursuant to section 23, c. 180, (25 St. at Large, 676,) and on the 8th day of October, 1890, the said motion for a new trial was brought on to be heard before this court. The plaintiff alleges in his complaint, among other things, in substance, that on or about the 1st day of February, 1883, at Jamestown, in the county of Stutsman, and territory of Dakota, the defendant, the Northern Pacific Railroad Company, sold to this plaintiff for a valuable consideration, to-wit, the sum of $8,960, the lands in question, described as follows, to-wit: The

north one-half (N. ½) of section one, (1,) the south one-half (½) of section thirty-five, (35,) the south one-half (S. ½) of section fifteen (15,) the north one-half (N. ½) of section thirty-one, (31,) and the north one-half of the south-west quarter, (N. ½ S. W. ¼,) and the north one-half of the south-east quarter, (N. ½ S. E. ¼,) of section thirty-one, the south-west quarter (S. W. ¼) of section three, (3,)—all of said lands being in township one hundred and forty-five (145) north, range sixty-nine (69) west, of the fifth principal meridian. Also all of section twenty-three, (23,) in township one hundred and forty-five (145) north, range seventy (70) west, of the fifth principal meridian. That said sale was made to plaintiff at Jamestown aforesaid, he then and there acting and being represented by S. L. Glaspell, a resident of the city of Jamestown, the plaintiff being a resident at that time of the city of Chicago. That at the time of the sale neither this plaintiff nor the said S. L. Glaspell had been within the limits of said county of Wells, nor had seen nor had any knowledge of the situation, character, or quality of the lands except such as was imparted to them by the defendant and its agents. That at the time the sale took place the lands were covered with snow to such an extent that no examination thereof could be made which would have disclosed their quality, and that the prairie in the vicinity of the lands was then impassable by reason of the deep snow, and that no railroad was then running trains within a distance of 40 miles therefrom. That for the purpose of inducing plaintiff to make the purchase of said lands, and prior to said purchase, defendant, through its agents, made certain representations to plaintiff as to the character, quality, and situation of said lands, the number of settlers in this vicinity, and as to its adaptability to general farming purposes, as follows: That all of said lands were adapted to general farming purposes; that the soil thereof consisted of black loam soil, from 15 inches to 2 feet in depth, with clay subsoil; that it was all free from stones, sand, and gravel, except a few scattering surface stones; that it was of gentle rolling surface, and free from sloughs or water-holes; that part of it contained some good meadow land; that township 145, range 69, and township 145, range 70, in which said lands were situated, had been surveyed by the United States government; and that the even-numbered sections thereon, known as "Government Lands," were thickly settled by actual settlers residing upon and cultivating their lands. That, relying wholly upon said representations of defendant and its agents, and without having other knowlege of the character, quality, or situation of said lands, plaintiff purchased said lands of defendant in full faith and confidence in the truth of said representations so made to him. That the agents of the company who made said representations had authority to sell said lands and make said representations from the defendant. That said lands were not as represented to him. That they failed to correspond with the representations made to him as hereinbefore set forth. That none of said lands were, at the date of the purchase and sale, or at any time, adapted to general farming purposes or any purpose of farming. That the soil thereon did not then, nor at any time, consist of black loam surface soil from 15 inches

to 2 feet deep, with a clay subsoil, but, on the contrary, the black loam surface soil on said land nowhere exceeds a depth of 6 inches, and that but a small part of said land was or is covered with any black loam whatsoever. That said lands were not free from stones, sand, or gravel, but, on the contrary, are and were almost entirely composed of stones, sand, and gravel, both upon and under the surface, to such an extent as to make it unfit for any purpose of farming or agriculture, and the greater part of said lands were and are entirely unproductive of vegetation. That it was not and is not of gentle rolling surface, and free from water-holes and sloughs, but broken and hilly, and containing many sloughs and water-holes. That townships 145, range 69, and 145, range 70, had not been then surveyed by the United States government, and are not yet so surveyed. That the even-numbered sections in said townships, known as "Government Lands," were not then, and are not now, thickly settled by actual settlers residing upon and cultivating their lands, but, on the contrary, the same are entirely uninhabited and uncultivated. That said lands, at the time of the sale, had they been of the quality, character, and situation as represented aforesaid by the defendant, would have been of the actual cash value of $14,000; but the same were not then, nor at any time, of any value whatever, but were and are entirely worthless, and the plaintiff has sustained damage by reason of such false representations aforesaid in the sum of $14,000, and demands judgment for that amount, with costs. The defendant interposes a general denial.

Evidence was adduced on the parts of the plaintiff and defendant tending to prove the allegations in the complaint and answer. The evidence on the part of the plaintiff tends to show that the lands were of no actual value at the time of the sale, and that if they had been as represented they would have been worth from $5 to $7 per acre. On the part of the defendant one witness, John J. Nichols, claims to have examined the land described; says that it was probably worth about $3 per acre at the time of the sale. Another witness, Atkinson, on the part of the defendant, testified that he had examined the land in the spring of 1882, and had made memoranda, showing the character and quality of these lands, in company with John J. Nichols. He testified, among other things, substantially as follows:

"*Question.* When did you inspect or examine these lands? *Answer.* In the spring of 1882. *Q.* In company with any other person than yourself? *A.* Mr. Nichols,—John J. Nichols. *Q.* And had you made any memoranda showing the character and quality of these lands as the result of that examination? *A.* We did; yes, sir. *Q.* You spoke of having made some selections in these townships for yourself. How many sections had you selected for yourself from these townships? *A.* I selected 16 sections for the company. There was Mr. Thompson, Mr. Burdick, Mr. Smith, Mr. Decker, Mr. De Saint, and Mr. Hench, all of Davenport, were interested with me in these. I had selected section 11, township 145, range 69, and half of section 1, township 145, range 69. *Q.* Did you advise Mr. Glaspell during the course of any of these conversations that you had selected these lands from these townships? *A.* I did; yes, sir. We were talking about them. *Q.* Have you

examined at any time the north half of section 1 in township 145, range 69? *A.* Yes, sir; we did. *Q.* State to the jury the character and quality of the soil upon that section, and its general contour and configuration. *A.* It is bluffy, and it is cut up; that is, the Pipestone. I can't say whether a branch of the Pipestone touches a corner of the section; but it lays on a bluff something like this bluff here, north of the town, the south part of the section I purchased. But the north part was too bluffy to suit me. *Q.* In any of the conversations which you had with Mr. Glaspell, about which you have testified, do you remember whether you said anything to him in regard to this coulée running through the north half of the section? *A.* It wasn't a coulée. The north half of the section lies almost directly on the bluff, and the south half on the flat. *Q.* Did you advise Mr. Glaspell of that? *A.* I did. *Q.* What reply did he make, if any, to the information you gave him of that? *A.* I don't remember anything. I mentioned once that I thought that if the boom continued I might want to buy that if it wasn't bought, as I had the other half, and as it was lying near Sykeston, if it wasn't taken up. *Q.* Describe the south half of section 35 in the same township and range. *A.* My remembrance is of that section that the surface is a good deal broken. The land, I think, is not hilly, but is broken, as we found it over the prairie some places, especially near the coteaux, or where we found the soil blown off. I think there was a good deal of such land as that, and there was parts that had the appearance of tough soil. Our examination was in April, and we couldn't judge of the depth of the soil, but I judged that from the grass. *Q.* South half of section 15? *A.* I think that is better. But it is—I think there was a coulée running through that that I objected to. *Q.* About the character and quality of the soil on this land? *A.* The most of it I would judge from the growth of the grass to be very good. I would take the soil to be very good upon most of section 15. I remember particularly in the neighborhood there are—

"*Mr. Nickeus.* No, don't give us anything around in the neighborhood.

"*A.* The north half of section 31, and the north half of the north-east quarter, and north half of the south-east quarter of section 31 of the same township and range. There was a part of that section, if I remember rightly, was very stony. I can't remember just what part it was. I think there was part of it, but I am not positive. *Q.* Can you describe the character and quality of the north-west quarter of section 3 of the same township and range? I believe there is a coulée running up in that from the Pipestone; that is, in 145-69? *Q.* Yes, sir. *A.* I think there is a coulée running up. Quite a ravine running up in that section that breaks it badly. *Q.* Describe the character and quality of section 23. 145-70. That was a tolerably level section; but if I remember right, from the gravel and grass I thought that the soil was thin on that, and I think there were a good many stones on it also. *Q.* State a little more fully what experience you had in dealing in lands in this and adjoining counties, and what acquaintance you had with their value in the early part of the year 1883. *A.* Well, I had been buying and selling some lands, and had been farming to some extent, and looking at lands considerable. *Q.* What was the value of the lands per acre concerning the character and quality of which you have just testified in the month of February, 1883? *A.* Well, I cannot put a valuation on them. Our lands in that neighborhood we were holding—

"*Mr. Nickeus.* Objected to as irrelevant, incompetent, and immaterial.

"*A.* Well, I couldn't say just what such lands were worth. *Q.* Supposing that all of said lands were adapted to general farming purposes; that the soil thereof consisted of black loam surface soil; that it was all free from stones, sand, and gravel, except a few scattering surface stones; and that it was gently rolling surface, and free from sloughs or water-holes, and that part of

it contained some good meadow land; supposing all of these things to have been true,—what would have been its value per acre in the month of February, 1883? *A.* I would call that pretty good land. Such land as that would suit me. I would say that it was worth from six to seven dollars an acre located there."

The land was principally paid for in preferred stock of the Northern Pacific Railroad Company.

S. L. Glaspell and *E. W. Camp*, for plaintiff.

John C. Bullitt, *Ball & Smith*, and *John. S. Watson*, for defendant.

THOMAS, J., (*after stating the facts as above.*) The bill of exceptions states that the court charged the jury as to the measure of damages that if they found for the plaintiff it must be in a sum equal to the difference between the actual value of the lands and the value of the said lands as they would have been had they been as represented at the time of the sale. The defendant excepted to this instruction, and now contends that it is erroneous, and was prejudicial to the defendant. Did the court give to the jury the correct rule for the measurement of damages as applicable to the facts of this case? The action is for the recovery of damages resulting to plaintiff from alleged false and fraudulent representations. The lands were wild and uncultivated, and at the time of the sale there were only a few settlers, if any, in the vicinity where this land was situated. In an action to recover damages which the plaintiff had suffered by reason of the purchase of stock in a corporation which he was induced to purchase on the faith of false and fraudulent representations made to him by the defendant, the supreme court of the United States, in *Smith* v. *Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, held that the measure of damages is the loss which the plaintiff sustained by reason of such representations, such as the amount which he paid out, and interest, and all outlays legitimately attributable to the defendant's fraudulent conduct, but it does not include the expected fruits of an unrealized speculation. The rule thus enunciated by the supreme court is binding on this court if applicable to the facts of this case. Counsel for the plaintiff contends that the rule laid down in *Smith* v. *Bolles*, *supra*, applies only to the purchase of personal property of a speculative character, and that it does not apply to the purchase of land induced by fraud, and refers to *Horne* v. *Walton*, 117 Ill. 130, 141, 7 N. E. Rep. 100, 103, which is one of the cases cited by Chief Justice FULLER in *Smith* v. *Bolles*, on page 130 of the opinion. In that case the supreme court of Illinois states that "where the sale of land is made by false and fraudulent representations as to its value, quality, or condition, the measure of damages in any action by the purchaser is the difference between the actual value of the land and its value as represented to be at the time of the sale." But that question was not involved in the case, and it was unnecessary to give the rule of damages on the sale of land induced by fraud. It appears in that case that the party procured a loan of $2,000 through fraud and deceit upon representations that the security was good, the security being land, when as a matter of fact it

was worthless. The court held that the actual loss to the party was the amount he had borrowed, with interest thereon while he was kept out of the possession of it. The court say, on page 135 of the opinion. "We think the true measure of damages in this case was the amount of such loss, to-wit, $2,000, and interest." In the opinion in *Smith* v. *Bolles* is cited also the case of *Crater* v. *Binninger*, 33 N. J. Law, 513, and it will be found in that case that the New Jersey court laid down an entirely different rule as to the measure of damages on the sale of lands induced by fraud. Courts have sometimes made a distinction as to the rule of damages in the sale of personal property and real property when effected or induced by fraud and false representations, but the supreme court of the United States, in *Smith* v. *Bolles*, seem to have laid down a rule applicable to the measure of damages in the sale of both classes of property coming within the line of facts applicable to that case. Judge SHIRAS has applied this rule in the case of the sale of pine lands, induced by false and fraudulent representations. *Atwater* v. *Whiteman*, 41 Fed. Rep. 427. The statute of this state, (section 1967,) which was in force also in the territory of Dakota at the time of the trial of this action, and for a long time prior thereto, is declaratory of the common-law rule as to the measure of damages as enunciated, explained, and applied in *Smith* v. *Bolles*. It reads as follows:

"For a breach of an obligation, not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The latter part of the section "whether it could have been anticipated or not" is new, but as there is no question of remote damages in this case it is not necessary to attempt to define the meaning of these words. The balance of the section, as I have stated, is declaratory of the common law. *Fairbanks* v. *Williams*, 58 Cal. 241, 242; 2 Greenl. Ev. § 256; *Walrath* v. *Redfield*, 11 Barb. 368–371. Upon this statute and the cases of *Smith* v. *Bolles* and *Atwater* v. *Whiteman*, *supra*, I am of the opinion that the court, upon the trial of this action, should have instructed the jury that if they found for the plaintiff upon the other issues that as to the measure of damages they should find the cash value of the land in the condition it actually was at the time of the sale, and deduct such value from the sum of money invested by the plaintiff in the land, and that difference, with interest added, in the discretion of the jury, would be the proper amount which the plaintiff was entitled to recover. It follows that the instruction given by the court as to the measure of damages was erroneous, for which error a new trial must be granted, unless it appears that the error was harmless, and worked no injury to the defendant.

It is apparent that the case was tried by both parties upon the theory that the rule for the measure of damages as given by the court was the correct rule, and it must be presumed that the jury followed the instructions of the court, and applied the rule given in making up and return-

ing their verdict. The jury were the judges of the credibility of the witnesses and of the weight of the evidence. They were instructed in fact that if they found for the plaintiff they should find the actual value of the property at the time of the sale, and also that they should find what the value would have been if it had been as represented, and the difference would be the correct measure of damages. The evidence tended to show on the part of the plaintiff that the lands were of no value whatever, but that they would have been worth from $5 to $7 per acre if they had been as represented. The evidence on the part of the defendant, given by the witness Atkinson, was to the effect that they were of some value, or, in other words, the jury were at liberty to find from his evidence that the lands were of some value. The witness Nichols testified that they were worth about $3 per acre. Can this court determine from the evidence or from the record whether the jury adopted the evidence of the defendant's witnesses as to the actual value at the time of the sale, or whether they adopted the theory of the plaintiff's witnesses that they were of no value whatever? Can the court legitimately find from the evidence, or from the record sent to this court, whether the jury adopted the theory of defendant's witnesses, and placed the actual value of these lands at $3 per acre at the time of the sale, and adopted the theory of plaintiff's witnesses that they would have been worth $7 per acre if they had been as represented, that being the highest sum placed by plaintiff's witnesses upon said lands if they had been as represented, and allowed the plaintiff the difference of $4 per acre, and interest thereon, or whether the jury adopted the theory that the lands were of no value at the time of the sale, and found that they would have been worth $4 per acre if they had been as represented, a sum lower than any of plaintiff's witnesses had placed on the land, and added interest to this sum of $4 per acre? The result or the amount of the verdict would have been the same in either case. I think it clear that this court cannot determine that question from the evidence or the record now before it. It must go outside of the record, if at all, to determine on what basis the jury figured, or what rule of calculation they resorted to in determining their verdict. It would seem that the jury would reasonably infer from the comparison of all the evidence that the lands at the time of the sale were of some value. It is notorious that the lands of the Northern Pacific Railroad Company were sought after and were readily sold in the market at and prior to that time at reasonable prices. It is possible also that if the case had been tried upon the correct theory as to the measure of damages, the value of the preferred stock with which the lands in question were principally paid for might have been a subject of inquiry on the trial, or may upon a new trial be inquired into for the purpose of ascertaining the loss sustained by the plaintiff. It is impossible for this court to say, from all the evidence, that a verdict upon a new trial will be the same, or substantially the same. In *Atwater* v. *Whiteman*, *supra*, the court sustained the verdict, and refused to grant a new trial, notwithstanding the jury had been erroneously instructed as to the measure of damages, for the reason that

a special verdict, in addition to the general verdict, had been found by the jury. On page 428 of the opinion Judge SHIRAS says:

"The general verdict was as follows: 'We, the jury, find a verdict for the plaintiff for $4,924.62, with interest at the rate of 7 per cent. from November 15, 1882, to January 7, 1890, amounting to $2,417.90, which, added to the last-named amount, makes a total of $7,342.50.' In answer to specific questions submitted the jury found that the fair cash value of the land at the time of the sale was $1.25 per acre, and that if the land had, at the time of the sale, been equal in quality and value to what defendant represented it to be, the value thereof would have been $11,598.13. The undisputed evidence shows that there was invested in the land the sum of $6,964, belonging to the plaintiff. Deduct from this amount the value of the land at the rate of $1.25 per acre, as found by the jury, and we get the exact sum found by the jury in the general verdict in the amount of damages, to-wit, $4,924.62. It is therefore clear, beyond question, that the jury, in estimating the damages, in fact carried out the rule laid down in *Smith* v. *Bolles*."

There are no facts on the face of the record presented to this court in the case at bar that would enable it to say that the jury in estimating the damages in effect carried out the rule laid down in *Smith* v. *Bolles*, or reached substantially the same result they might have reached if that rule had been given to them by the court. The plaintiff claims that there was no prejudicial error in the giving of the instruction, for the reason that the jury in fact only allowed the purchase money, and interest, and that affidavits of jurors are admissible to show this fact to sustain the verdict, and in support of his contention therein produced and read upon the hearing of the motion for a new trial in this court the following affidavits signed by eight of the jurors:

"*State of North Dakota, County of Stutsman—ss.*

"M. W. Wright, P. V. Fellows, J. H. Sears, and Joseph Stine, being each duly sworn, deposes and says, each for himself, that he was one of the jurors in the trial of the above-entitled action, in which a verdict was rendered in the district court of the then territory of Dakota, in the county of Stutsman, on the 24th day of November, A. D. 1888, and in arriving at said verdict the jury estimated the land sold by defendant to plaintiff to be of no value, and that plaintiff paid therefor the sum of $8,960, or $4 per acre, for 2,240 acres. The sale was made on or about March 6th, 1883. They considered that the land would have been worth, if it had been as represented, the sum of $4 per acre, and that plaintiff had lost by the transaction the price he paid, with interest. It was the intention or aim of the jury to render a verdict for the plaintiff equal to the amount of money which he had paid to defendant, with interest at 7% per annum."

"*State of North Dakota, County of Stutsman—ss.*

"William Harselew, R. M. Clayton, A. M. Davis, and Charles Riemenschneider, being first duly sworn, each for himself deposes and says that he was one of the jurors in the trial of the above-entitled action in the district court of the then territory of Dakota, county of Stutsman, in which a verdict was rendered on the 24th day of November, 1888. In reaching such verdict the jury estimated the land sold plaintiff by defendant to be worthless and of no value, and that plaintiff paid therefor the sum of $8,960 on or about March 6th, 1888. We considered that if the land had been as represented that it would have been of the value of $8,960, and that plaintiff had lost, by reason of the transaction, the sum paid, with interest at seven per cent. per annum."

And in support of these affidavits of the jurors they also read the following affidavits:

"*State of North Dakota, County of Stutsman—ss.*

"Theodore F. Branch, being first duly sworn, deposes and says that he is the clerk of the district court for Stutsman county, North Dakota; that at the November, 1888, term he was a bailiff in said court, and was present in said court during the trial of the case of *Albert H. Glaspell* vs. *Northern Pacific Railroad Company*, and was one of the witnesses in said action, and testified in regard to a survey and examination of the lands (2,240 acres) involved in said action made by himself; that he was the bailiff in charge of the jury in said action during their deliberations over their verdict; that said jury returned a sealed verdict into court about eleven (11) o'clock P. M.; that immediately after said jury left the jury-room this affiant found therein a paper upon which a calculation of interest had been made upon a principal sum of $8,960, amounting in all to $12,545.43, being the amount of the verdict in said action; that at the same time this affiant returned with said paper into the court-room, and made the statement to S. L. Glaspell and E. W. Camp that he could tell what the verdict would be. Affiant found said paper on the table used by said jury in arriving at their verdict, and there was no other paper in said room with figures thereon or calculations of any kind."

"*State of North Dakota, County of Stutsman—ss.*

"Edgar W. Camp, being first duly sworn, says he was one of the attorneys for plaintiff in the action mentioned in foregoing affidavit of Theodore F. Branch. Affiant, with others, waited in the court-room till after the jury agreed and returned a sealed verdict. After the verdict had been agreed upon, and the jury had left the jury-room, said Branch went into the jury-room and soon after returned to the court-room, holding in his hand a piece of paper, which he seemed to be examining. Branch said that he would like to make a bet that he could guess within five dollars of the amount of the verdict. To the best of affiant's recollection affiant soon after saw the said paper and examined it, and that it contained a calculation of interest. Affiant does not recollect the sums and amounts, but recollects that the verdict read the next day tallied with the calculations on the paper."

"*State of North Dakota, County of Stutsman—ss.*

"S. L. Glaspell, being first duly sworn, says that he was one of the attorneys for the plaintiff in the trial of the above-entitled action; that he saw the paper referred to in the above affidavit within five minutes of the time the said jury left the jury-room, and returned their verdict, sealed, to the clerk; that he immediately telegraphed the plaintiff, who had previously left the city, the verdict, and based the sum upon the figures in said paper, and he had no other knowledge or information of the verdict than was disclosed by said paper. The same contained a calculation of interest in the sum of $8,960, at 7% interest, to the date of the verdict. The figures telegraphed by affiant as the verdict in said case was the exact amount as afterwards shown by the verdict when opened in court. Affiant had no conversation with any juror prior to the opening of said verdict in court as to the amount thereof, and had no knowledge or information of the amount thereof save as was disclosed by said paper."

These affidavits were read subject to the objection of the defendant. Are these affidavits admissible for the purpose claimed? The material part of the affidavit of Branch is that "said jury returned the verdict into court about 11 o'clock P. M.; that immediately after said jury left

the jury-room this affiant found therein a paper upon which a calculation of interest had been made, upon a principal sum of $8,960, amounting in all to $12,545.43, being the amount of the verdict in said action;" and that he communicated these facts to Camp and Glaspell; "that affiant found said paper on the table used by said jury in arriving at their verdict, and there was no other paper in said room with figures thereon or calculations of any kind." The effect of the affidavits of Camp and Glaspell is that they saw the paper immediately after as shown to them by Branch. Giving full effect to these affidavits, the most they show is that the jury figured from a principal sum of $8,960, at 7 per cent. interest, and reached the sum of $12,545.43, being the amount of the verdict. If the jury had found the actual value of the land to be $3 per acre, and the value as represented at $7 per acre, the same result would follow as above suggested. We must therefore go to these affidavits of the jurors to sustain this verdict, if at all. Are these affidavits of jurors admissible to show on what grounds, or by what process of reasoning, the jury found and rendered their verdict? Can the plaintiff show by these affidavits that the jury disregarded the instructions of the court, and the theory on which the case was tried, in respect to the measure of damages, and that they adopted the correct rule, and gave the verdict for the loss the plaintiff had sustained by reason of the fraud? This is the proposition presented, and I have been unable to find any well-considered authority to sustain it. Upon the grounds of public policy, the courts have almost universally agreed upon a rule that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict or to explain it, or show on what grounds it was rendered. Thomp. & M. Juries, § 440, and cases there cited; Id. § 451; *Hudson* v. *State*, 9 Yerg. 408; *Larkins* v. *Tarter*, 3 Sneed, 681. 2 Thomp. Trials, § 2627, and cases cited. It has been held in Massachusetts that when a jury have returned into court with their verdict, before they are discharged, and while they are yet a jury, it is competent for the court to interrogate them as to the grounds of their finding if there is more than one distinct ground on which the verdict may be given. *Parrott* v. *Thacher*, 9 Pick. 426; *Biggs* v. *Barry*, 2 Curt. 259. I apprehend that these courts would not extend the rule so as to admit the affidavits of jurors as to the grounds on which the verdict was rendered, even if all the jurors had made and joined in the affidavits, especially after they had separated and ceased to become a jury in the case. In *Roberts* v. *Hughes*, 7 Mees. & W. 399, the English court of exchequer held that the rule does not exclude jurymen from swearing to what took place in open court, but only to what took place in their private room, or as to the grounds on which they found their verdict. While the testimony of the jurors will not be received to impeach their verdict, it will be received to sustain the verdict when assailed. This rule is invoked generally and almost universally when the verdict is assailed on account of alleged misconduct of jurors, and it is not only adopted in the furtherance of justice, but to vindicate the jurors themselves. Thomp. & M. Juries, § 446; *Wright* v. *Telegraph Co.*, 20 Iowa, 195; *Hall* v. *Robison*, 25 Iowa, 91; Proff.

Jury, § 408, and cases cited; *People* v. *Hunt*, 59 Cal. 430–432; *People* v. *Goldenson*, 19 Pac. Rep. 172.

The case of *Dalrymple* v. *Williams*, 63 N. Y. 361, and *Hodgkins* v. *Mead*, (N. Y.) 23 N. E. Rep. 559, are relied on by plaintiff to support his contention that the affidavits of the jurors are admissible to sustain the verdict; but in both of these cases the facts are materially different from the case at bar. In *Dalrymple* v. *Williams* the foreman announced as the verdict of the jury a general verdict against both defendants. It was claimed that the real verdict as agreed upon was in favor of Williams and against the other defendant; and the affidavits of the jurors stating these facts, and the fact that the foreman had made a mistake in announcing the verdict in court, were admitted. The affidavits were admitted simply to correct a mistake made in open court, and not to explain or give the grounds on which the verdict was based. On page 365 of the opinion Mr. Justice ALLEN, speaking for the court, refers to *Jackson* v. *Dickenson*, 15 Johns. 309, and to *Roberts* v. *Hughes*, *supra*, with approval. He says:

"In *Jackson* v. *Dickenson* the affidavits of the jurors were held admissible to show that a mistake had been made in taking their verdict, and that it was entirely different from what was intended. The court draws a distinction between what transpires while the jury are deliberating on their verdict and what takes place in open court in returning their verdict, holding the statements of jurors admissible as to the latter, but not as to the former. *Roberts* v. *Hughes*, 7 Mees. & W. 399, is like the last case quoted. The affidavits of the jurors were received as to what took place in open court on the delivery of the verdict, to correct it."

In *Hodgkins* v. *Mead*, *supra*, which was an action brought by a real-estate broker for commissions, the defendant contended that the payment of commissions was conditional on the completion of the contract by the purchasers, but no question was made as to the amount. On page 559 of the opinion Justice PECKHAM, speaking for the court, says:

"The answer set up a special contract between the parties by which the plaintiff was to claim and be entitled to no commissions except upon the performance by the proposed purchasers of the property of the special contract of sale entered into between them and the defendant, and the answer alleged a failure by the proposed purchasers, and that on account thereof the plaintiff had not earned his commissions. This was the sole question at issue between the parties, and it was assumed and conceded that, if the plaintiff was entitled to a verdict at all, it was for the 1 per cent. upon $80,000, with interest from the time it was due. The charge of the judge to the jury was explicit upon that point, and he stated in so many words that, if the plaintiff was entitled to a verdict, he must recover his commissions upon the purchase price with interest, amounting in all to the sum of $848. The judge further said: 'Now, you have a single question of fact to decide, whether you believe the testimony of the plaintiff, or the testimony of Mead, Sergeant, and Meldrum, as to this arrangement made on the 21st day of February. If you find that there was an arrangement made that the commission of plaintiff was conditional, then your verdict will be for the defendant, because the condition was never complied with. If, on the other hand, there was no condition, it is admitted here that the plaintiff was employed, and that he found a purchaser, and that the plaintiff would be entitled to a verdict.'"

The precise amount of such verdict had already been stated by the court, and there was no dispute about it. It was conceded that the amount of the verdict, if for the plaintiff, must be 1 per cent. upon the $80,000, with interest. It was clear beyond dispute that the amount must be the same upon another trial. The amount was really agreed upon, but the foreman neglected to hand the amount to the court in the sealed verdict. The case was decided on the principle enunciated in the case of *Dalrymple* v. *Williams*, *supra*. The affidavits were admissible to correct a mistake made in open court in not announcing the actual verdict agreed upon by the jury, on the principle laid down in *Jackson* v. *Dickenson* and *Roberts* v. *Hughes*, *supra*. It was upon this principle that the court allowed the verdict to be amended in *Burlingame* v. *Railroad*, 23 Fed. Rep. 706. In my opinion the affidavits of all the jurors would not have been admissible to sustain this verdict, much less the affidavits of eight of the jurors, who attempted to speak for the entire jury. The objection of the defendant to the admissibility of the affidavits is therefore sustained. It is claimed by the attorney for the plaintiff that it was admitted upon the argument in this court that the land was worthless, and, that being so, it necessarily follows that the jury must have adopted that theory. I do not understand that defendant's attorney made so broad an admission, but if he did it does not follow that the jury adopted that theory as the basis of their calculations in view of the evidence. It follows that for the reasons hereinbefore stated a new trial must be granted, and it is accordingly ordered. It is unnecessary to notice the other assignments of error.

In re DEPRIEST *et al.*

(Circuit Court, E. D. Virginia. October 31, 1890.)

1. ELECTIONS AND VOTERS—SUPERVISORS—ACCESS TO REGISTRATION BOOKS.
Rev. St. U. S. § 2026, provides that the chief supervisor of elections "shall require of the supervisors of elections, when necessary, lists of the persons who may register and vote in their respective voting precincts." Section 2016 provides that the supervisors of elections, when thus required by the chief supervisor, shall make the lists above mentioned, and verify the same. *Held* that, in the case of an approaching election for members of congress, the supervisors were entitled to access to the registration books of their voting precincts, and had a right not merely to the names that had just been registered, but to inspection of the entire registration books.

2. SAME—OBSTRUCTION BY REGISTRAR.
A registrar who denies the supervisors access to the registration books, or obstructs them in making a copy, commits an offense within section 5522, providing that every person who obstructs or hinders the supervisors of election in the performance of any duty required of them shall be liable to instant arrest and imprisonment and fine.

At Law.

In the matter of Clinton Depriest, supervisor of elections, and Robert Taylor, registrar of elections, in one of the voting precincts of the city

of Richmond, the court sitting specially under the requirements of Rev. St. U. S. § 2012.

T. R. Borland, U. S. Atty., and *L. C. Bristow*, Asst. U. S. Atty., for supervisor.

R. G. Pegram, *J. C. Lamb*, and *C. V. Meredith*, for registrar.

HUGHES, J. In the matter before me I am called upon to say whether, with reference to the election of members of congress to be held next week, a local supervisor of elections appointed by this court may, when required to do so, take a copy of lists of the persons qualified to vote at the approaching election as they are entered in the books of a registrar of election for a voting precinct. These lists are commonly called "registration books," but they are spoken of by congress as "lists of persons who may register and vote." The United States Revised Statutes provide, in section 2026, that the chief supervisor "shall require of the supervisors of election, when necessary, lists of the persons who may register and vote in their respective voting precincts." And section 2016 provides that the supervisors of election, when thus required by the chief supervisor, shall make the lists above mentioned, and verify the same. Authority is thus given the supervisor of elections to demand access to the registration book of the voting precinct, for the purpose of copying its lists of the voters of the precinct, and complying with the requisition upon him of the chief supervisor. In respect to the election about to be held for members of congress the registering officer appointed by state authority is an election officer of the United States, bound by the laws of the United States, and amenable to the penalties prescribed by those laws. The registration books kept by each registrar are public records, open to inspection by officers of election, and may be copied by any such officer in the fulfillment of official duty. For the purpose of the approaching election these registration books are not only public records in the general sense as distinguished from secret documents in close and special custody, but they are federal records, showing who may register and vote in a federal election. In this latter respect they are liable to inspection, and to being copied by the supervisors of election when they are required to do so as provided by law.

In the case under consideration the supervisor of election has been required by the chief supervisor to furnish copies of the lists of persons who may register and vote in one of the voting precincts of the city of Richmond. To obey that order he must have access to the registration book of the precinct. That book is a public record in the custody of the registrar for the precinct. It is the duty of that registrar to give the supervisor access to the book for the purpose of making the copy called for, and if the registrar denies or obstructs him in making the copy that officer commits an offense denounced by section 5522 of the United States Revised Statutes, which makes him liable to instant arrest without process, and imprisonment for not more than two years, and fine not exceeding $3,000. It is contended by counsel who appear for the registrar that the two sections of the United States Revised Statutes first above cited

do not refer to the entire registration book of the precinct, but only to the names that may have been newly put upon it at the registration held a few days ago, and only to such of those names as the supervisor himself had made a list of. This is altogether too narrow and technical a view to take of the matter. The contention cannot be true as a general proposition. Suppose a law had been passed redividing the city of Richmond into voting precincts. Suppose, after this redivision, the state registration and election of 1889 had been held, at which no supervisor of the United States could have attended, it being an election held only for state officers. That registration would have embraced all the voters in the precinct, being the first that was taken after the redivision. Can it be contended that a supervisor for 1890, appointed as an officer of the election for a member of congress to be held next week, is without authority to make a list of any names save those offered for registration in 1890? Such a construction would render the provisions of sections 2016 and 2026 mere empty words. The contention is inadmissible. When the law speaks of the lists of persons who may register and vote it refers to all registered persons,—to the entire lists; that is to say, to the registration books. And when the chief supervisor calls for them, and the local supervisor applies for access to the books in order to copy them, he should be facilitated in making the copy.

In re WHITE.

(*Circuit Court, W. D. Pennsylvania.* November 11, 1890.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—LICENSING SOLICITING AGENTS.
The borough ordinance of Union City, Pa., requiring all persons canvassing from house to house for the purpose of selling, *inter alia*, books, or soliciting orders therefor from the general public, to take out a license, and pay to the borough a fee for doing such business, in so far as it touches a citizen of another state, who, as the agent of a person engaged in the book trade in such other state, simply so canvassed and took orders for the sale of a book, the orders to be sent to and filled by his principal, is a regulation of commerce among the states, and is void.
2. SAME.
Such agent, having been arrested and convicted for so doing before a justice of the peace and imprisoned, is entitled to be discharged on *habeas corpus*.

Sur Habeas Corpus.

F. M. McClintock, for petitioner.

J. W. Sproul, for respondent.

ACHESON, J. The petitioner, Albert H. White, a citizen of the state of Ohio, as the agent, and not otherwise, of W. J. Squire, whose residence and place of business is the city of Toledo, Ohio, and who is also a citizen of that state, was engaged within the limits of the borough of Union City, in the state of Pennsylvania, in canvassing from house to house for orders for the sale of a book entitled "The New People's Cyclopedia," and

as such agent took orders in said borough for the sale of the book from the general public,—that is, from persons other than dealers in books,—without having taken out a license and paid the fee for doing business, required by the ordinance of the borough, which in terms embraces every person canvassing from house to house in the borough, for the purpose of selling books or soliciting orders therefor from the general public. While so engaged, the petitioner was prosecuted and convicted before a justice of the peace of the borough for a violation of the said ordinance, in not taking out a license and paying the prescribed license fee, and he was sentenced to pay a fine of $10 and the costs; and, in default of payment, he was arrested under a writ directing his commitment to the jail of the county of Erie, and he is held in custody by the respondent, a constable of said borough, by virtue of such writ.

It appears that "The New People's Cyclopedia" is a work for which a copyright has been obtained under the laws of the United States; that the same is published outside the state of Pennsylvania, namely, in the states of New York and Ohio, and is kept for sale at the city of Toledo, Ohio, by the said Squire, the petitioner's employer, to whom all orders taken by the petitioner are sent to be filled, and no deliveries are made by the petitioner, nor is any money for the book received by him. His exclusive business is the soliciting of orders for the book on behalf of his principal, Squire, and this is all the petitioner did in the borough of Union City. The petitioner seeks his discharge on the ground that, in so far as the ordinance in question touches him, it is in conflict with the constitution of the United States, and void. In *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, it was held by the supreme court of the United States that the statute of the state of Tennessee, enacting that all drummers, and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale, or selling, goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee a certain weekly or monthly sum for such privilege, in so far as it applied to persons from other states soliciting the sale of goods on behalf of individuals or firms doing business in other states, is a regulation of commerce among the states, and violates the provision of the constitution of the United States, which grants to congress the power to make such regulations. That decision, in my judgment, is conclusive of the present controversy. The fact that the petitioner "canvassed from house to house," soliciting and taking orders from "the general public," is an immaterial circumstance, and does not take this case out of the ruling of the supreme court. The ordinance in question, as respects the petitioner, being void, and his conviction and imprisonment being in violation of the constitution of the United States, it is clearly within the jurisdiction of this court, on *habeas corpus*, to discharge him from custody. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734; *Minnesota* v. *Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862; *Ex parte Kieffer*, 40 Fed. Rep. 399. And it is ordered that the petitioner be, and he is, discharged; the respondent to pay the costs.

Ex parte PRITCHARD.

(Circuit Court, S. D. Ohio, W. D. August 22, 1890.)

CRIMINAL LAW—VENUE—CONSTITUTIONAL REQUIREMENT.

Const. U. S. art. 3, § 2, declaring that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but, when not committed within any state, the trial shall be at such place or places as the congress may by law have directed," —relates exclusively to trials in the federal courts.

At Law. On petition for *habeas corpus.*

C. H. Blackburn, for petitioner.

Wm. Littlefort, for Hamilton county, Ohio.

SAGE, J., (*orally.*) The petitioner is in the custody of the sheriff of Hamilton county, Ohio, upon an indictment for homicide, found by the grand jury of said county, and pending in the court of common pleas. It appears from the petition, and from the agreed statement of facts filed by the parties herein, that the offenses charged were not committed within the county of Hamilton, nor within the state of Ohio, but on board the steam-boat Telegraph, while she was under way and navigating the waters of the Ohio river, between the cities of Cincinnati and Pomeroy, Ohio, "and when said steam-boat was below, inside, and south and southeast of low-water mark of said Ohio river;" low-water mark upon the north side of the river being the southern boundary of the state. Upon these facts it is beyond question that the court of common pleas of Hamilton county has no jurisdiction of the case against the petitioner. But section 753 of the Revised Statutes of the United States provides that the writ of *habeas corpus*—

"Shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or being a subject or citizen of a foreign state," etc., (here follow provisions not pertinent to any question involved in this application,) "or unless it is necessary to bring the prisoner into court to testify."

Now it is conceded that, unless the petitioner is "in custody in violation of the constitution or of a law or treaty of the United States," he is not entitled to the writ; but it is claimed by his counsel that the imprisonment of the petitioner is in violation of the paragraph of section 2, art. 3, of the constitution, which declares that—

"The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but, when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

This provision relates exclusively to trials in the federal courts, and has no application here. The writ will be refused.

Ex parte FRIDAY.

(*District Court, N. D. New York.* October 17, 1890.)

1. CRIMINAL LAW—SENTENCE—ENTRY AT SUBSEQUENT TERM.
The terms of the supreme court of the District of Columbia are appointed by the court in general term, pursuant to 25 U. S. St. at Large, 749, to begin on the first Tuesdays of January, April, and October. The rules of court provide for the prolongation of a term only for the purpose of signing and settling bills of exceptions. *Held*, that one term could not be continued after the commencement of the next succeeding term, and a judgment entered in July, under the heading "January Term, 1890, cont'd," by which a sentence pronounced at the January term, 1890, is set aside as invalid, and a new sentence pronounced, is void.

2. SAME—IMPRISONMENT IN STATE PENITENTIARY.
Rev. St. U. S. § 5541, provides that when a person convicted of an offense against the United States is sentenced to imprisonment "for a period longer than one year," the sentence may be executed in a state penitentiary. *Held*, that a sentence in such case of imprisonment "for one year" in a state penitentiary is not void, but, if objectionable at all, is merely irregular, in that imprisonment in a state penitentiary for a period not "longer than one year" is imposed.

3. SAME—LENGTH OF TERM—HARD LABOR.
Rev. St. U. S. § 5541, provides that when "any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year" the sentence may be executed in a state penitentiary. Section 5542 provides that "in every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement at hard labor," the sentence may be executed in a state penitentiary. *Held*, that section 5541 applies to cases where the punishment is imprisonment only, while section 5542 applies to cases where the punishment is imprisonment at hard labor, and where a person is convicted of an offense against the United States, punishable by imprisonment at hard labor, the sentence may be executed in a state penitentiary, though it is not "for a period longer than one year." Explaining *In re Mills*, 10 Sup. Ct. Rep. 762, 135 U. S. 263.

4. SAME—PENITENTIARY OFFENSES.
Rev. St. D. C. § 1144, provides that a person convicted, among other offenses, of larceny, shall be imprisoned "in the penitentiary" for a certain period. Section 1158 provides that a person convicted of grand larceny "shall be sentenced to suffer imprisonment and labor" for a period not less than one year. *Held* that, where a person is convicted of grand larceny, sentence can be executed only in a penitentiary.

At Law.

Application by Kate Friday for a discharge on a writ of *habeas corpus*. Sections 5541 and 5542 of the Revised Statutes of the United States are as follows:

"Sec. 5541. In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose.

"Sec. 5542. In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

Charles A. Talcott, for the petitioner.

D. S. Alexander, U. S. Dist. Atty., and *John E. Smith*, Asst. U. S. Dist. Atty., opposed.

COXE, J. The petitioner was, in 1889, indicted for larceny, at the October term of the supreme court of the District of Columbia, holding a criminal term. The indictment contained three counts. At the January term, 1890, the petitioner was tried and convicted upon all the counts. A motion for a new trial was made and denied, and on the 15th of March, 1890, still of the January term, she was sentenced on the first count to be imprisoned at labor in the Albany county penitentiary for one year, on the the third count to be imprisoned at labor in the same penitentiary for one year additional, and on the second count to be imprisoned in the jail of the District of Columbia for 30 days. Notice of appeal to the court in general term was thereupon given. The duly-certified records of the court, presented upon the argument, show that on the 9th of July, 1890, under the heading "January Term, 1890, cont'd," the defendant was brought into court, and the sentence previously pronounced on the 15th of March was set aside as invalid, and one that could not be carried into effect in view of the decision of the supreme court in *Re Mills*, 135 U. S. 263, 10 Sup. Ct. Rep. 762. A new sentence was thereupon pronounced, like the first in every particular, except that the terms in the penitentiary were increased, being for a year and a day in each instance. The terms of the criminal court for the District of Columbia for the year 1890 began on the first Tuesdays of January, April, and October. The superintendent of the Albany penitentiary attaches to his return what purports to be a certified copy of the record of the supreme court of the District of Columbia, and he states that this is his sole authority for holding the petitioner. This record is dated July 9th, and recites that the petitioner was indicted, tried, convicted, and sentenced to imprisonment for one year and one day upon the first and third counts, respectively. The petitioner asks to be released, for the following reasons: *First.* The sentence being cumulative is erroneous. *Second.* The sentence was partly executed by imprisonment from March 15th to July 9th in the district jail, and could not thereafter be changed, even at the same term. *Third.* The January term, 1890, expired upon the commencement of the April term, and a sentence imposing additional penalties could not be pronounced after the term at which the petitioner was convicted and first sentenced.

The proposition that the court, on the 9th of July, had no jurisdiction to expunge the sentence of March 15th, and pronounced one imposing a longer imprisonment, states, in my judgment, the petitioner's strongest ground of relief. In opposition to this position two conflicting theories are advanced. The district attorney maintained at the outset that the first sentence was absolutely void, and the case should be treated as if it had been continued upon the verdict until July 9th, the sentence then pronounced being the only valid sentence. Subsequently the conflicting theory was advanced that the first sentence was in no way affected by the *Mills Case*, that it was valid and is now being executed, and the proceedings of July 9th, being at a subsequent term, were beyond the jurisdiction of the court, and should be treated as null. In answer to the latter view it is deemed sufficient to say that the return of

the superintendent of the penitentiary only authorizes him to hold the petitioner under the second sentence. No reference is made in the return to any proceedings prior to July 9th. The prison authorities cannot hold her upon a sentence delivered four months before, of which they have never heard, even though the sentence were valid. If the sentence of July 9th is void the petitioner must be released. So the question is, had the court jurisdiction to pronounce the sentence of that date? In a paper submitted by the United States district attorney for the District of Columbia it is apparently conceded that the second sentence was not pronounced at the same term as the first, for he says:

"On the 9th of July (in the April term) the sentence of the previous term was set aside in consequence of the decision of the U. S. supreme court in the *Mills Case.*"

It is thought that this view is the correct one. The January term could not have been kept alive after the commencement of the April term for the purpose of revoking sentences theretofore given and pronouncing new ones. The rules of the court provide for the prolongation of the term for the purpose of settling and signing bills of exceptions, and for this purpose only. The terms of the supreme court of the District of Columbia are appointed by the court in general term, but this is done pursuant to statute, (25 St. at Large, 749,) and the terms when thus fixed have the same stability as if designated by an act of congress. Section 845 of the Revised Statutes, relating to the District of Columbia, provides, not for a suspension of the sentence, but for a postponement of the execution of the sentence, to enable the convicted party to apply for a writ of error, and the postponement shall in no case exceed 30 days after the end of the term. Clearly, this section in no way aids the validity of the second sentence. The proposition that when a term of court begins the prior term ends is firmly established, and I see nothing in the statutes relating to the supreme court of the District of Columbia to take it out of the general rule. As was said by Mr. Justice CLIFFORD in the dissenting opinion in *Ex parte Lange*, 18 Wall. 192:

"Every term continues until the call of the next succeeding term, unless previously adjourned *sine die;* and until that time the judgment may be modified or stricken out. *Noonan* v. *Bradley*, 12 Wall. 129; *King* v. *Justices*, 1 Maule & S. 442."

As the January term could not be continued till July 9th, it follows that the sentence of that date, under which the petitioner is held, was pronounced at the April term, three months after its commencement. I do not understand that it is now contended that a valid sentence made at one term can be set aside and a different and more severe sentence pronounced at a subsequent term. The rule that this cannot be done is unquestioned. 1 Bish. Crim. Proc. § 1298; *Com.* v. *Weymouth*, 2 Allen, 144; 1 Starkie, Crim. Pl. 262; *Miller* v. *Finkle*, 1 Park. Crim. R. 374; 2 Hawk. P. C. p. 634, c. 48, § 20; *Rex* v. *Price*, 6 East, 327; *Com.* v. *Mayloy*, 57 Pa. St. 291.

It is suggested, however, that the proceedings of May 15th were absolutely void under the decision in the *Mills Case*, so that the court was

justified in treating the case as one standing on the verdict where the sentence had, in the mean time, been suspended. As a matter of fact the case was not continued upon the verdict under a suspended sentence. This would seem sufficient, but various other answers suggest themselves. Three only will be considered.

1. Assuming, for a moment, that the doctrine of the *Mills Case* is applicable, it is thought that the first judgment was not absolutely void. It was irregular, but it was not a nullity. A wrong place of imprisonment was designated. But this was not necessarily a part of the sentence, and the judgment would have been perfectly regular if at any time during the January term the place of imprisonment had been changed from the penitentiary to the jail. *Ex parte Waterman*, 33 Fed. Rep. 29. So, too, an amendment increasing the term of imprisonment, if made at the same term, would, probably, have cured the defect. The language of Mr. Justice MILLER in the *Lange Case*, *supra*, is applicable. He says, (page 174:)

"And so it is said that the judgment first rendered in the present case, being erroneous, must be treated as no judgment, and, therefore, presenting no bar to the rendition of a valid judgment. The argument is plausible but unsound. The power of the court over that judgment was just the same, whether it was void or valid. If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term, and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first. Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held,—so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force,—whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us. The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict."

It seems very clear that in no aspect of the case can the judgment of March 15th be treated as so absolutely invalid that it could be wholly ignored.

2. Was the first judgment even irregular, was it in any manner affected by the decision in the *Mills Case?* I think not, and for the following reasons: Mills was imprisoned for one year under section 3242 of the Revised Statutes, as amended February 8, 1875, (18 St. at Large, 307,) which provides for imprisonment (not at hard labor) for not less than 30 days or more than two years. The court decides that "a sentence simply of 'imprisonment,' in the case of a person convicted of an offense against the United States,—where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary,—cannot be executed by confinement in a penitentiary, except in cases in which the sentence is 'for a period longer than one year.'" It is thought that the supreme court did not intend this decision to apply

to a sentence under a section of the statutes making it the imperative duty of the court to impose hard labor. To hold that it does apply makes the enforcement of some of the most important sections of the Revised Statutes simply impossible. Very many of these sections require imprisonment at hard labor, leaving the term entirely in the discretion of the court. "At hard labor for not more than three years," or "not more than five years," or "not more than ten years," is the language of the law. Cases constantly arise under these sections where the court is of the opinion that the ends of justice are fully met by an imprisonment at hard labor for less than a year, and often for less than six months. Other sections fix the term absolutely at less than a year. Take section 5471, for instance:

"And any person who shall take or steal any mail or package of newspapers from any post-office, or from any person having custody thereof, shall be imprisoned at hard labor for not more than three months."

If the view which induced a change of the March judgment in this case is correct, how can a sentence under these sections be executed? Certainly not in a penitentiary, for the judge is precluded, in the one case by his conscience and in the other by the express language of the law, from making the term of imprisonment longer than a year. And not in a county jail, surely, for the statutory condition of hard labor cannot be executed in a jail. But an additional, and to my mind unanswerable, argument is found in section 5542 of the Revised Statutes, which is the section immediately following the one considered in the *Mills Case*. It provides:

"In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

This has been the law since March 3, 1825. 4 St. at Large, 118. Section 5541, passed 40 years later, applies to cases of imprisonment only, and such imprisonment can be in a penitentiary only when the sentence is for a period longer than one year. Section 5542 relates to crimes requiring imprisonment at hard labor, and provides for the execution of the sentence in a penitentiary, without any reference to the length of the imprisonment. It is difficult to see how language could be selected more clearly emphasizing the evident distinction in the minds of the law-makers between imprisonment only and imprisonment at hard labor. In the one case the imprisonment may be in a penitentiary if longer than one year; in the other the imprisonment, whether for six years or six months, may be in a penitentiary or state prison.

Turning now to the record in the case at bar there can be little doubt that it was one requiring imprisonment in a penitentiary. The petitioner was convicted of grand larceny, an infamous offense and a felony at common law. Section 1144, Rev. St. D. C., provides that any person convicted in any court in the District of any of a number of offenses,

larceny being one, shall be sentenced to suffer punishment by imprisonment "in the penitentiary" for the periods respectively prescribed in the chapter relating to crimes and offenses. Section 1158, Id., provides that every person convicted of grand larceny "shall be sentenced to suffer imprisonment and labor" for a period not less than one year or more than three years. From these sections it would seem clear that the court was entirely correct, if he thought the punishment sufficient, in fixing the term at one year, and that under the language, "at labor" and "in the penitentiary," just quoted, he was compelled by law to order the sentence executed in a penitentiary. The case would seem to be directly within the exception pointed out in the *Mills Case*, where the statute prescribing the punishment does require that the accused shall be confined in a penitentiary.

3. In view of the foregoing I have not deemed it necessary to inquire whether the imprisonment prescribed by the first sentence was not for a period longer than one year. The term of imprisonment was *de facto* for two years—one year on each count. There was but one indictment, one trial, and one judgment. Did the fact that the judgment required two terms of one year instead of one term of two years preclude the court from considering it as one case? *Carlton* v. *Com.*, 5 Metc. (Mass.) 532. Was it not "a case" where the person convicted was "sentenced to imprisonment for a period longer than one year" within section 5541? An affirmative answer would seem to be a common-sense answer. An interpretation of the law should be sought which will permit the courts charged with the practical execution of the criminal law to administer it not only with a due regard for the interests of the public, but for the benefit of the criminal as well. Every reasonable construction should be adopted which enables the courts to send convicted criminals to the penitentiaries, where they are taught habits of industry and are surrounded by salutary influences, rather than to those hot-beds of idleness and crime, the county jails.

To recapitulate. It is thought that the following propositions are established: *First.* The court had no power to continue the January session until the 9th of July—long after the April term had commenced—for the purpose of vacating the March sentence and pronouncing a new one. *Second.* The first sentence was vacated, and the second sentence passed not at the January but at the next term, the April term, of the court. *Third.* The first sentence was valid, and the court had no power at the April term to pronounce a new sentence increasing the term of petitioner's imprisonment. *Fourth.* The second sentence being invalid and the superintendent of the penitentiary holding the petitioner upon no other judgment, it follows that she is entitled to a release. Discharge granted.

PEORIA TARGET CO. *v.* CLEVELAND TARGET CO. *et al.*

(Circuit Court, N. D. Ohio. May 27, 1890.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—ANTICIPATION.
Reissued letters patent No. 10,867 issued September 13, 1887, to N. Grier Moore, administrator of Charles F. Stock, for a trap having a throwing arm, with a pivoted extension provided with means for automatically releasing a target, describes a useful and novel invention which had not been anticipated.

2. SAME—REISSUE—MISTAKE IN ORIGINAL APPLICATION.
The drawings, specifications, and invention clearly set forth in the application for letters patent No. 295,302, issued March 18, 1884, to Charles F. Stock, clearly covered the pivoted carrier claimed in reissued letters patent No. 10,867. The mechanism described in the original application is the same as in the reissued application. The features of the construction and the illustrations are the same in both applications. When Stock's application for the original patent was prepared he was sick, and the application contained no claim for the pivoted carrier, but as soon as the patent was issued he noticed the defect, and said he proposed to have the error corrected. He died, however, soon afterwards, without having it done. *Held*, that there was such a mistake as was properly corrected, by reissue to his administrator covering the pivoted carrier.

3. SAME—ASSIGNMENT.
The patentee assigned a half interest in the original patent to the I. W. H. Co. After the patentee's death his administrator, M., assigned the patent to W., after joining with the I. W. H. Co. in surrendering the patent and in filing application for the reissued patent, which was granted to M., as administrator. After the reissue of the patent the I. W. H. Co. and W. conveyed all their title to complainant. *Held*, that complainant's title was good.

In Equity.

Taylor E. Brown and *C. C. Pool*, for complainant.

Webster & Angell and *Watson & Thurston*, for defendants.

RICKS, J. This suit is brought upon reissued letters patent No. 10,867, dated September 13, 1887, issued to N. Grier Moore, administrator of Charles F. Stock. The original patent was dated March 18, 1884, and numbered 295,302, and was issued to Charles F. Stock during his life-time. In January, 1885, Stock surrendered his original letters patent, and filed an application for a reissue upon a corrected and amended specification. This application resulted in an interference proceeding involving four other parties. The conclusion of the proceedings was favorable to Stock, and a reissued patent was awarded of date and number above stated.

The first question presented by the record is as to complainant's title to the letters patent. The original patent was issued March 18, 1884, and on June 11th of the same year Stock sold and assigned an undivided one-half interest in it to the Isaac Walker Hardware Company. On October 28, 1884, Mr. Stock died, and on December 17, 1884, N. Grier Moore was appointed administrator of the estate, pursuant to authority conveyed by the county court of Peoria county, Ill. Moore, as administrator, conveyed and assigned to Edwin H. Walker this and other patents, in which transfer Mrs. Stock joined, but prior to this assignment, and on the 26th day of January, 1885, Moore, as administrator, and the Isaac Walker Hardware Company, joined in surrendering the original patent, and in filing application for the reissued patent, which was

granted as before stated. On October 10, 1887, Edwin H. Walker and the Isaac Walker Hardware Company, by separate conveyances, transferred all their title to the complainant. This title, on demurrer, was held good by this court, and no proof having been taken since, the title stands as approved in that decision.

The next question is whether the reissued letters patent is valid. This device has been accepted and generally adopted, and is one of novelty and utility. It seems to me very evident from the testimony in this record that Stock was the first one to conceive and disclose to the public the idea of a trap having a throwing arm, with a pivoted extension which, when the throwing arm was released, would swing on its own pivot and release the target, and give to it a motion and rapidity similar to that of a bird in its flight. He conceived this device in the latter part of 1882, and communicated it to several persons, whose testimony is in the record. He prepared several devices, and early in 1883 he tested a pivoted carrier offered in evidence. This device was intended for throwing the form of targets then in use which had a tongue, and the carrier had holding and releasing devices for such tongue. About the latter part of July, 1883, Stock claimed to have conceived another device, with the same kind of a carrier, designed to throw targets without tongues. Such a device he constructed about that time, and it has been identified and offered in evidence. This was publicly tested about the time of its construction. The attorneys whom he employed to prepare his application for a patent, either through mistake on their own part, or from want of clear description on Stock's part, failed to state the claims in this application as broadly as the device and the invention justified. In December, 1883, the application was made and two claims were incorporated, both relating to the holding and releasing features of the invention. The pivoted carrier was not claimed as part of the invention. It appears from the evidence that Stock was in bad health in New York when his application was prepared, and the circumstances surrounding him were such as explains his claim that his application was not carefully examined before being forwarded. There is evidence showing that when the patent was issued he recognized its defective features, made complaints concerning it, and stated that he proposed to have the error corrected. He did not proceed in this matter as diligently and enthusiastically as might have been expected, because he was in poor health and other causes intervened, but there is no such laches shown as should deprive him of his invention. There was such mistake as the statute contemplates, and he took the proper means to correct it. The proceedings in the patent-office are fully set forth. The authorities were convinced that the original drawings and specifications described and covered, and the inventor conceived, the device of the pivoted carrier, but that through inadvertence and mistake his claims had not included it. The authorities in the patent-office must have found that the inadvertence and mistakes set forth in the application for a reissue had been made, and that the application was made in due time, and with proper diligence. There was evidence upon the face of the original application to show it, and

that finding this court has no disposition, if it had the authority, to review.

Is the reissued patent valid? It appears, as before stated, that the drawings, specifications, and invention clearly set forth in the application of Stock for his original letters patent fairly covered the pivoted carrier. The mechanism described in the original application is the same as in the reissued application. The features of the construction are the same in both. The illustrations are the same in both. The mechanism and the illustration in the original covered the additional claims made in the reissue. But it is said Stock did not consider that he had covered the pivoted carrier in his original patent, because before he filed his application for a reissue he filed an application for a new patent, covering this very claim, and alleged it was not disclosed by him to the public before. It does appear that he did make an application in October, 1884, but it is denied that the claims therein made were the same as those in the original or reissue. But the October application was withdrawn, and an application made for the reissue. If Stock, in the October application, did apply for the pivoted carrier claim, it does not follow that it was then disclosed for the first time. In fact it was disclosed and fairly covered in the invention described in the application for the original patent. Being the first to describe a pivoted carrier, and the first to illustrate such a device, I think the reissue was properly allowed, and that it only gave to the inventor what he had fairly disclosed in his original application. This was a useful and novel invention. It gave to the target the velocity, force, and peculiar rotary motion desired, and has brought it into general use. This invention was prior to Marqua's, and is valid, and should be sustained.

Claim 1 in the reissued patent is the same as claim 1 in the original. It combines a throwing arm and a clip for holding the target, arranged to automatically release the target as described. The main contention of defendant as to this claim is that the slot in the end of the throwing arm is a necessary element to the operation of the device, and without it the claim recites an inoperative combination. But a reference to the drawings show that Stock illustrated two forms of releasing devices, in which the slot is not necessary, but where a hinged joint made it operative. The complainant is entitled to a broad construction of this claim, and I am of the opinion that defendant's trap, exhibited by complainant, is an infringement of this claim. No infringement is alleged of claim 2. The complainant's claim 3 is for a throwing arm, with a pivoted extension or target carrier, which, by the motion and arrest of the arm, independently rotates on its pivot. It seems very plain that the defendant's trap is constructed with such a pivoted carrier. It is not used as an equivalent in any element, but is substantially the same device, and, having held this valid, I think defendant's infringement of this claim is established. Claim 4 covers a sending or throwing arm having a pivoted clip carrying the target, said arm being provided with means for automatically releasing the target at the extreme extension of the arm. This device permits the target to be re-

leased whenever the centrifugal force caused by the rapid swinging of the arm is sufficient to carry the pivoted carrier to the point at which the discharge of the target is produced. The release may take place before the carrier reaches its extreme limit. The defendant's trap contains a self-acting target-releasing device, constructed upon the same general principles set forth in the Stock patent, and is an infringement of it. A decree will be allowed sustaining the validity of the reissued patent sued upon, and finding that the defendant infringes the first, third, and fourth claims thereof, and a reference to a master for an accounting of the profits and damages resulting from such infringement.

At the October term, 1890, a petition for rehearing was allowed on account of newly-discovered evidence of prior use at Knoxville, Tenn. The case will be heard with this new evidence at February term, 1891.

PARKER *v.* THE LITTLE ACME.

(District Court, W. D. Pennsylvania. October 11, 1890.)

1. MARITIME LIENS—SEIZURE OF VESSEL—RIGHTS OF MASTER.
   Where the sheriff, by virtue of a writ of execution, seized a steam-boat, and, after taking actual possession, ran the boat a few days without the consent or knowledge of the owner, one who acted as master and pilot during that time must look to the sheriff for his compensation, and has no lien against the boat.
2. SAME—LIENS BY STATE LAWS.
   The Pennsylvania act which gives liens against domestic vessels navigating the rivers Allegheny, Monongahela, and Ohio does not apply to a boat running exclusively on the Beaver river, a tributary of the Ohio.

In Admiralty.
Barton & Barton, for libelant.
James R. Macfarlane, for respondent.

ACHESON, J. It appears by the libelant's own admission, and otherwise, that he was hired by the day; and it is also shown that he was paid by his employer, Mr. Mardorf, the owner of the boat, in full for his services up to the time (November 7, 1889) when the sheriff, acting under judicial process, took the boat in execution. Presumably it was a lawful seizure, but, however this may be, the sheriff took actual possession of the Little Acme under the writ in his hands. Then, without the consent or knowledge of the owner, but on his own responsibility, he ran the boat two days, and then tied her up. Now the libelant knew of the seizure, and for payment for his services during the short time the sheriff undertook to run the boat he must look to that officer, whose bailiff or servant he was. *Trovillo* v. *Tilford*, 6 Watts, 468, 471. Most certainly, after November 9, 1889, the libelant did not serve as master or pilot, for the boat did not run at all, and she remained under execution. Upon the proofs, it is not apparent to me that after the last-mentioned

date the libelant rendered any service whatever for which the owner of the boat is answerable; but, if he did, those services were not of a maritime nature, and are not the subject of a lien.

The balance of the libelant's claim is of doubtful merit at the best, but as a lien it has no standing. This was a domestic vessel, and at home. Therefore, no maritime lien for the matters here involved could arise. And then the Pennsylvania act of 20th April, 1858, (1 Purd. Dig. 126,) applies exclusively to vessels navigating the Allegheny, Monongahela, and Ohio rivers, whereas the Little Acme navigated the Beaver river only. Moreover, this statute does not embrace such items as are here in question. *Dalzell* v. *The Daniel Kaine*, 31 Fed. Rep. 746.

Let a decree be drawn dismissing the libel, with costs.

WISHART *v.* THE JOS. NIXON.

(District Court, W. D. Pennsylvania. October 28, 1890.)

MARITIME CONTRACTS—CARE OF VESSEL AT PIER—LIENS BY STATE LAWS.

The libelant, late master of a tow-boat, at the end of a trip was hired to take exclusive custody and care of the boat while she remained moored at Pittsburgh, her home port, and to put and keep her in good order, and fit to proceed on an anticipated voyage, which he did. He necessarily remained on board the boat day and night. It was necessary to move the boat into shore and out therefrom as the river rose and fell, and the chief perils to which the boat was exposed, and from which she was to be protected by the libelant, were perils of the river. *Held*, that the contract and the services actually rendered by the libelant were maritime, and that the lien for his wages against the boat, given by the state statute, was enforceable *in rem* in admiralty.

In Admiralty.

Geo. W. Acklin, for libelant.

Geo. C. Wilson and *David S. McCann*, for respondent.

ACHESON, J. Although the libelant's services on the Nixon were rendered at her home port, yet it is very clear that he has a lien against the boat for his wages by virtue of the Pennsylvania act of April 20, 1858, relating to vessels navigating the rivers Allegheny, Monongahela, and Ohio. 1 Purd. Dig. 126. The debatable question is whether the libelant's services were performed under a maritime contract, or were of a maritime character, so as to give him a right to sue *in rem* in admiralty, agreeably to the practice sanctioned by the cases of *Peyroux* v. *Howard*, 7 Pet. 324, and *The Lottawanna*, 21 Wall. 558. The libelant was called a "watchman," but he was much more; and indeed his services went far beyond those of an ordinary ship-keeper.

I find the material facts of the case to be these: The Nixon is a steam tow-boat. In November, 1889, upon the termination of a trip, the boat was moored in the Monongahela river, at the public wharf in the port of Pittsburgh, awaiting anticipated employment. The libelant, who is

a river man of many years' experience, and had just made a trip on the Nixon as master, was employed by her owner to take exclusive custody and care of the boat while she remained in port, and to exercise general supervision over her, putting and keeping her in good order, and in readiness to proceed on an expected trip, when the libelant was again to act as her master. A boat lying where the Nixon was must be moved in against the shore and out therefrom as the river rises and falls; otherwise, in times of freshets she is liable, on the one hand, to be struck and damaged by floating objects, or, on the other, to get aground as the water recedes; and she is also to be protected from the movements of other vessels coming in and going out. It is therefore necessary to have a proper person on board a boat so situated to guard her against these dangers, and to that end the libelant was kept on the Nixon, and he served the boat in the manner just indicated. In the performance of his duties it was incumbent on the libelant to remain aboard the boat day and night, and this he did during the time covered by his claim. There was a great deal of high water during the period of the libelant's service, and much of the time he kept up steam in the nigger boiler to meet emergencies, and he used steam in sparring the boat. Moreover, the libelant overhauled and repaired all the lines and rigging, mended broken chains, lowered and painted the chimneys, oiled the machinery, kept the pipes connected with the boilers drained, to prevent their bursting in freezing weather, had some other needed repairs about the boat made, and assisted in making them, and generally did whatever was necessary to get and keep the boat in good order, and in a fit condition to proceed upon a voyage when called on; and all this was within the scope of the contract of hiring. While the boat was in the custody of the libelant, her license expired, and, by direction of the owner, the libelant had her boilers officially inspected; he preparing the boat for the inspection, and personally giving the required aid when the tests were made by the local inspector, and in the new papers the libelant was named as master.

Now, in view of the facts shown, it seems to me that the contract here was essentially maritime, and that the services actually rendered by the libelant were nautical. The contract related to a vessel afloat and about to proceed on a voyage, and it concerned not only her preservation from marine dangers, but her reparation, and the fitting of her for navigation. The libelant's services directly promoted all those objects. The principal dangers to which the boat was exposed, and from which she was to be protected, were perils of the river. The services in that regard here rendered were not those of a landsman. They could be performed properly by a mariner only. It is settled that a claim for wharfage is cognizable in admiralty. *Ex parte Easton*, 95 U. S. 68. But if the contract of a wharfinger is maritime, why not such a contract as the one involved here? Again, we find it decided in *Leathers* v. *Blessing*, 105 U. S. 626, 629, that the fact that a vessel had completed her voyage, and was securely moored to the wharf where her cargo was about to be discharged, and had communication with the shore by a gang-plank, did not deprive her of the character of a water-borne vessel, or oust the jurisdiction in

admiralty over a tort there committed on her. Upon the question of jurisdiction, then, my judgment is with the libelant.

This conclusion by no means conflicts with the ruling of this court in *McGinnis* v. *The Grand Turk*, 2 Pitts. R. 326, or the decision of the district court of the eastern district of Pennsylvania in the case of *The E. A. Barnard*, 2 Fed. Rep. 712. The ruling in the latter case was that a watchman and ship-keeper had no lien, under the general maritime law, for services rendered at the home port of the vessel; and this really was the point decided in the case of *The Grand Turk*. Moreover, there the boat was laid up for repairs at the marine railway, and the service of the watchman was but the work of a landsman. But here there is a statutory lien, and the special facts of the case distinguish it from the cases upon which the respondent relies.

Touching the merits of the controversy, I deem it unnecessary to recite or discuss the proofs. It is sufficient to say that, upon a careful consideration of all the evidence, I am of the opinion that the defenses based on the alleged negligence and misconduct of the libelant are not made out, and I think the libelant is justly entitled to recover the full amount of his claim. Let a decree be drawn in favor of the libelant for the amount of his claim, with interest from date of suit, and costs.

McCREERY *v.* THE JESSIE RUSSELL.

(Circuit Court, D. New Jersey. September 25, 1890.)

COLLISION—STEAM AND SAILING VESSEL.

The lighter Barbara was coming down the North river, her sails filled from the starboard side, intending to go as near the Battery as was safe, and into the East river. A tug and sloop were discovered pointing up the river, and towards the New York shore. Just before the collision the sloop starboarded her helm to go about, and struck the tug, which, to avoid damage, went ahead at full speed and struck the lighter in her starboard bow, sinking her. The lighter would have cleared the sloop. *Held* that, as all the lighter had to do was to hold her course, the tug was liable for the collision. Affirming 38 Fed. Rep. 624.

In Admiralty. On appeal from district court. See 38 Fed. Rep. 624.

John Griffin, for claimant and appellant.

Hyland & Zabriskie, for libelant and appellee.

BRADLEY, Justice. I am entirely satisfied with the decree made by the district court in this case, and adopt the findings of fact proposed by the libelant, appellee, and also the first, third, and fourth conclusions of law proposed by him. Let a decree be entered against the steam tug Jessie Russell, in favor of the libelant, for the sum of $663.84 with interest from the 24th day of December, 1889.

END OF VOLUME 43.